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(1897—1900)

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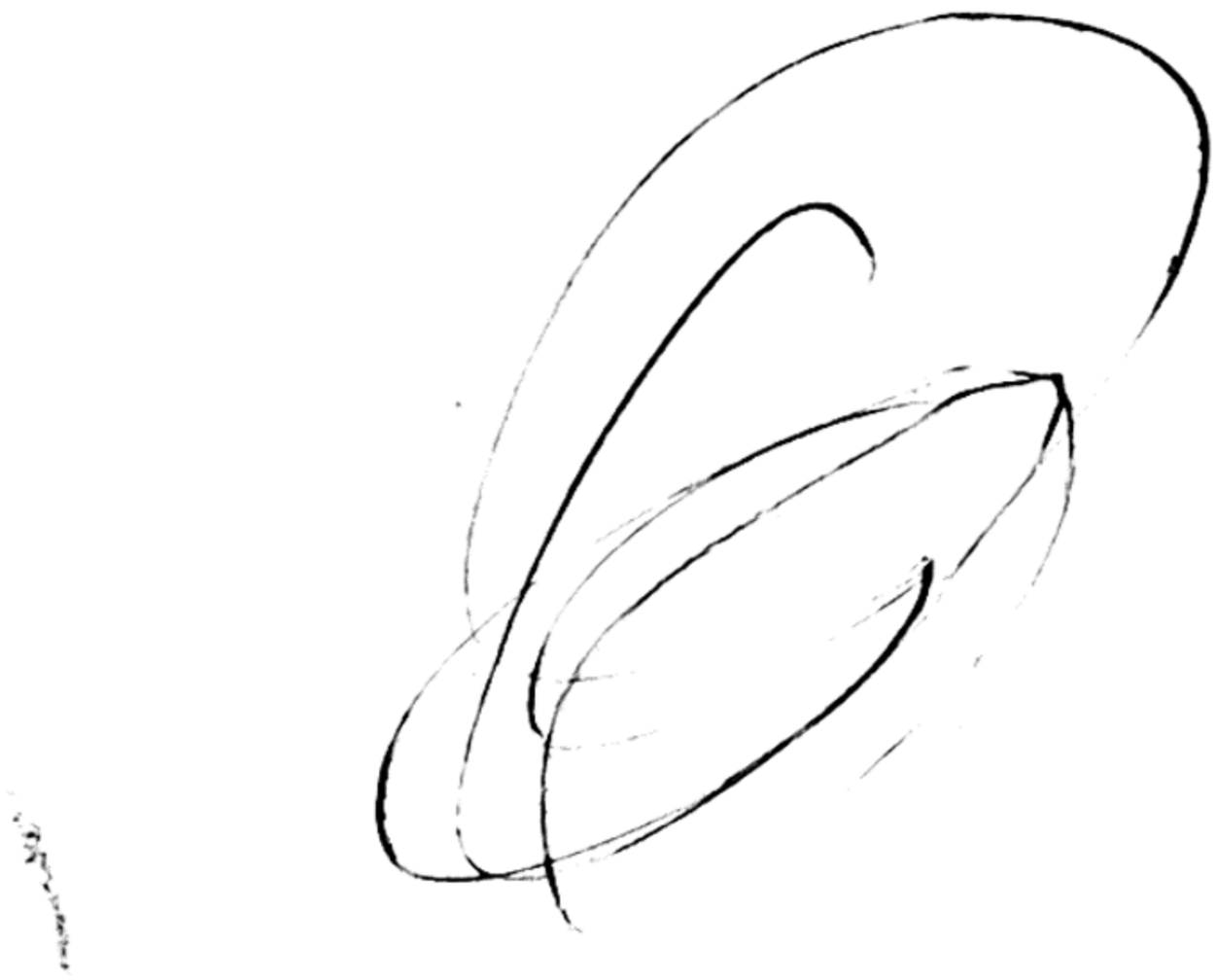

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DURING 1897—1900.

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" SIR ARTHUR STRACHEY, KT.

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NEW SERIES.
ALLAHABAD—VOL. IX.

I.L.R., 19 ALLAHABAD.

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1896
JUNE 27.

PRIVY COUNCIL.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Morris and James of Hereford, and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

19 A. 1 (P.C.)= 23 I.A. 147= 7 Sar. P.C.J. 49.

NITR PAL SINGH (*Defendant-Appellant*) *v.* JAI PAL SINGH (*Plaintiff-Respondent*) [6th and 7th May and 27th June 1896.]

Hindu law—Family custom—Rajputs—Impartible estate—Primogeniture—Evidence of converging probabilities.

In a Rajput family, of a clan named Jadon Thakur, long settled near Agra, holding an ancestral taluq of zamindari villages, and having their principal dwelling place in one of such villages, the question arose whether, by a family custom, their ancestral property descended as an impartible estate, to be possessed by the eldest son of the last inheritor, or, descended as an ordinary estate, under the Hindu law, to be held jointly by the sons, each having the right to claim partition.

The second of a joint family of three sons now sued the elder, the youngest being a co-defendant, but not taking either side.

The evidence established a family custom that the ancestral property should descend as an impartible estate, and should be possessed by a single heir at a time, who should be the eldest son.

All the lines of evidence, of differing degrees of value, converged towards the same result, the existence of this custom of impartibility, and of primogeniture.

Perhaps no one of these lines, taken alone, would have been conclusive in favour of this right being established in the eldest son. But, when the whole evidence was considered, the converging probabilities were conclusive to maintain the right claimed by the eldest son to exclusive possession.

[R., 8 Ind. Cas. 897 (902)=4 S.L.R. 88 (102); D., 8 O.C. 94 (104).]

1896
JUNE 27.

PRIVY COUNCIL.

19 A. 1 (P.C.) = 23 I.A. 147 = 1 Sar. P.C.J. 49.

APPEAL from a decree (15th April 1889) of the High Court, reversing a decree (24th December 1886) of the Subordinate Judge of Agra.

The plaintiff, now respondent, was the second of three brothers, who were a joint Hindu family, in which for many generations past had been held a taluq of zamindari villages in what became, in days comparatively recent, the districts of Agra and Etah. The [2] family was Rajput of a clan called Jadon Thakur, and from their village, Umargarh, in the Etah district, which was the family dwelling place, the whole riasat belonging to them was called, on this record.

The plaintiff was a minor, represented by his mother and guardian, Musammat Bijai Kuar, and sued without payment of fees under Chapter XXVI of the Code of Civil Procedure. The third brother, a minor, represented by his mother as his guardian, was a co-defendant, but took no part in the proceedings.

The plaint alleged that Thakur Budh Singh, who died on the 1st July 1881, had by different wives, these three sons: that they were his heirs, no custom differing from the Hindu law prevailing in this family: that Thakur Nitr Pal Singh, having influenced his father, caused his, Nitr Pal's, name to be recorded as proprietor of village Umargarh, with the naglas, or hamlets attached, and that the entry was made in his father's lifetime: and that the plaintiff was entitled to a one-third share, valued at Rs. 47,125 of the estate, on partition, which should be decreed.

The defendant, Nitr Pal Singh, by his written answer asserted that, by a family custom, the whole riasat, taking its name from Umargarh, of the family, was *tikait* (meaning thereby was exceptional, as being the property of an individual marked with the *tika*), and was impartible (1); that the estate descended by a rule of primogeniture; that his father, Thakur Budh Pal Singh, had placed him on the masnad, and that the entry in the administration paper of Umargarh and other villages, as to his right, was correct.

The main questions on this appeal were whether the evidence had established that a family custom existed, whereby the estate was impartible, and descended to the eldest son.

The facts, and the evidence under its different heads, are stated in their Lordships' judgment.

The Subordinate Judge of Agra found that the estate was impartible, and that it was rightly in the possession of the defend-[3]ant, in virtue of the family custom alleged by him. The suit was dismissed with costs in the Court of first instance.

A Division Bench of the High Court (EDGE, C. J., and TYRRELL, J.) allowed the plaintiff's appeal, and decreed his claim. Their judgment dealt with the following salient points in the evidence, among others:—

1. The evidence of the genealogist or jaga, the books kept by him, and the pedigree of the brothers, which he produced. To this the appellate Court below attached little, if any, value; and, in their opinion, it was plain that the pedigree afforded no evidence on the question of the impartibility of the estate.

2. Former claim by a member of the family for partition. On the death in 1825 of Moti Singh, who was an only son, his eldest son, Pirthi

(1) Shakespear gives the meaning of "tikait" as—"invested with the tika, or badge of sovereignty."

Raj Singh took the management of the estate. Upon the death of the latter, when a few years had elapsed, a claim to a share in the estate was made by one of the widows of the deceased Moti Singh, on behalf of her son, whom she had borne to Moti Singh, named Sheobaran Singh. This claim was perferred after Pirthi Raj's death against his elder son Tikam Singh.

3. Award of an arbitrator in 1842. The claim on behalf of Sheobaran having been referred to the arbitration of a neighbour, and lessee of an indigo factory, Mr. Hamilton Bell, his award thereon was made in 1843, and was upheld by the Sadr Dewani Adalat at Agra in 1845. This award declared the inheritance to be impartible, but it was not acted upon. The High Court as to it said, "Apparently the award left two-thirds of the property to Tikam Singh and transferred the proprietary right in the remaining one-third to Sheobaran Singh. Practically the transaction was one of partition, dividing the family property and giving the allottees exclusive control over their shares." The documentary evidence led the High Court to the inference "that this award was treated as a dead letter."

4. The ceremonial of gaddinashini. The High Court believes that some ceremonials of placing Budh Singh, and afterwards Nitr Pal Singh, on the gaddi or masnad, did take place. But the Court [4] observed that no witness professed to have seen similar ceremonials in the case of Tikam Singh, Pirthi Singh, or any other member of the family. Nor was it in their opinion proved that the customs of gaddinashini, and of impartibility, necessarily co-existed, and they believed the contrary to be the fact in Thakur families. They thought that the tikait Gaddinashini ceremonials were first practised in the family after the dispute between Tikam Singh and Sheobaran Singh; and in order to make evidence of a tikait Gaddinashini family, if they took place at all.

5. The entries in the wajib-ul-araiz of villages composing the riasat, comprising also the entries relating to the hereditary holding by the head of the family of the office of lambardar. The High Court found that the wajib-ul-arz of Umargarh of the year 1854 contained nothing from which the existence of the custom of primogeniture in this family could be inferred. They found on coming to the wajib-ul-arz of 1876 that here the custom was set forth. This, however, the Court at the same time found to be an entry dictated by Budh Singh, the father of the present litigants; and the Court therefore attached little, if any, value to it as evidence of the alleged custom.

6. In addition to the above there was the oral evidence of witnesses. This the Court examined.

The judgment expressed that the documentary evidence on the record was decidedly adverse to the existence of the alleged custom. The Judges found no document on the file of a date prior to the dispute between the guardian of Sheobaran and Tikam Singh.

The case, in their opinion, was not like those in which a custom has been established by the production of documents of old dates. In this the documents of date anterior to 1876, far from supporting the alleged custom, showed that when the custom was alleged it was at once denied, and that the person on whose behalf it was disputed got a substantial portion of the family property. The Judges could not rely upon the hearsay evidence put forward on behalf of the defendant as to what was the state of the family prior to 1843. They pointed out that, in regard to the title "Rao," Budh

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Singh [5] was the first who appeared to have that title. And that in regard to the statements made on the 12th December 1881 by the ladies of the household, those who made the statements were *pardanashin* ladies residing in the house of the defendant. And that neither in the award of 1843, nor in the judgment of the Sadar Court of 1845, was there allusion to this family being a tikait family.

The judgment ended, on the main question, thus :—

"We have come to the conclusion that no custom of impartibility "existed in the family, and that the ordinary Hindu law applies. We "have also come to the conclusion that this was not a family in which "the eldest male was entitled to the title of, or was known as, Raja or "Rao, and in which the practice of tikait and of the gaddi came first into "existence after the disputes between Tikam Singh and Sheobaran "Singh. At any rate, we are satisfied that the contrary is not "proved."

On the appeal of Thakur Nitr Pal Singh, Mr. *J. D. Mayne* and Mr. *A. J. Wallach*, for the appellant, argued that the conclusions of the High Court that the family custom had not been proved were against the weight of the evidence. That there should be customs to the effect alleged accorded well with the known and proved circumstances of this family, and these customs were affirmed by oral testimony, while a large body of documentary evidence, in varied ways, supported the same result. The evidence was reviewed in their argument, and reference was made to the occurrence in the history of some impartible estates of their having been divided off from more ancient and larger impartible zamindaris; for instance, in *The Collector of Madura* v. *Moottoo Ramalinga* (1) and *Katama Natchiar* v. *The Rajah of Shivagunga* (2). The repondents did not appear. Afterwards, on June 27th, their Lordships' judgment was delivered by LORD HOBHOUSE :—

JUDGMENT.

[6] The question in this appeal is whether the ancestral property of a Rajput family long settled in the Agra district devolves according to ordinary Mitakshara law, or is subject to the custom of primogeniture. The Courts below have differed in opinion upon the evidence, the Subordinate Judge thinking that the custom is established, and the High Court that it is not, so that it becomes the duty of this Board to say whether the evidence is such as to make it right to restore the original decision.

The family is one of Rajputs belonging to a clan, apparently numerous, called Jadon Thakurs. Their estate and place of residence is the taluq or riasat of Umargarh. One of the witnesses named Bhairon states that he is the Jaga (something apparently corresponding to a bard or herald or genealogist) of this family and of all other Jadon Thakurs; and that he kept books compiled by himself, his father and his elders, containing pedigrees of those families. He produced the book relating to Umargarh which professes to show the heads of the family and some of the younger sons for 27 generations. Some parts of the evidence will be better understood if so much of it as relates to the last six generations is set out here.

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(1) 12 M.I.A. 397 (437) = 1 B.L.R. P.C. 1. (2) 9 M.I.A. 539 (543) = 2 W.R. P.C. 31.

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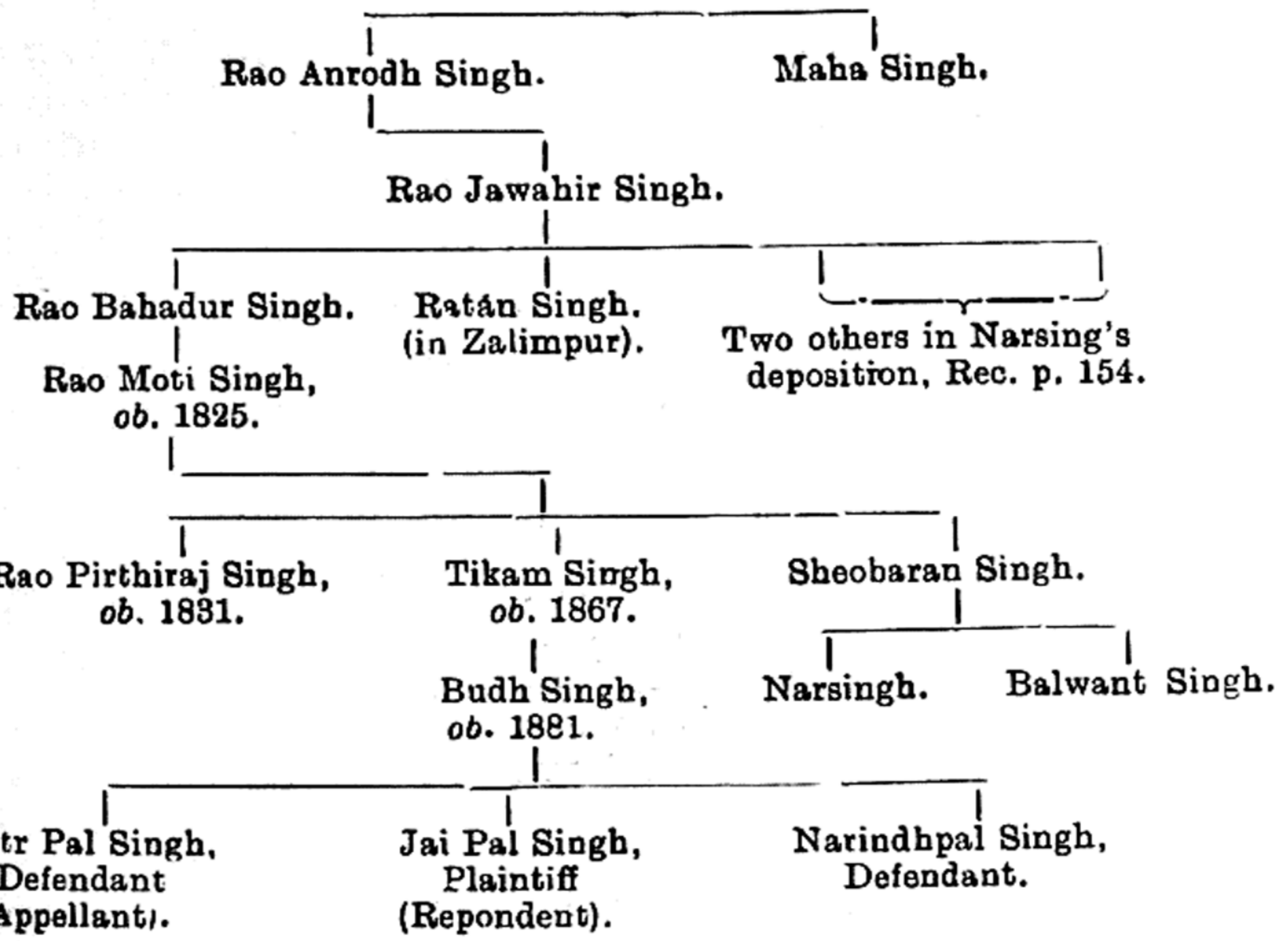

[7] The plaintiff is a younger son of Budh, claiming to have the estate divided. The eldest son, who resists that claim, is the principal defendant. Another son who did not join in the plaintiff's claim was made a defendant, and now takes no active part in the proceedings. Both the younger sons are minors.

The Subordinate Judge of Agra decided in favour of the custom, and dismissed the suit. Omitting some minor points, the main grounds of his decision may be stated under the following heads:—(*a*) The pedigree made out by Bhairon, coinciding as it does with a large amount of tradition among the Umargarh family and their kinsfolk, the Jadon Thakurs, shows that the family is ancient and noble, and has been in possession of the taluq of Umargarh and of various villages appertaining thereto for many generations. (*b*) The family property has never been the subject of partition. (*c*) The heads of it ascertained by primogeniture have been installed on the gaddi with public ceremonies. (*d*) The first claim for partition by a younger son, made in 1831, was resisted and finally defeated in 1845. (*e*) The property in suit has since been enjoyed by the head of the family as sole owner. (*f*) The members of the family, with the exception of the actual claimants for partition, have declared their belief in the custom of primogeniture. (*g*) There is substantial evidence to the same effect among their kinsfolks the Jadon Thakurs. (*h*) The evidence adduced by the defendant stands unrefuted by any substantial evidence for the plaintiff. Their Lordships will proceed to show the objections taken by the High Court to these positions, and to examine the evidence bearing on them.

Head (*a*).—The High Court point out the inconclusive nature of Bhairon's pedigree. No doubt a document of this kind compiled from papers handed down from Jaga to Jaga and probably supplemented by tradition, must be taken with much reserve; and its obscurity is increased in this case by the fact that it is written in a peculiar dialect or character known only to the Jaga, and by the further circumstance that it is difficult to understand from the record what is represented as the precise language of the book, and what **[8]** is the language of Bhairon himself. Their Lordships hesitate to attach importance to such expression as "succeeded to the Gaddi," or to

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the appearance of the dignified title "Rao" which is prefixed to the head of each generation. Still there is no suggestion that Bhairon is untruthful; and the contradictions between his pedigree and other parts of the evidence which are dwelt on by the High Court are quite insignificant. They cannot doubt that the Jaga books represent with fidelity the traditions and belief in the Umargarh family, or that the family is a noble one of very long standing in the country. Indeed, as the Subordinate Judge points out, the plaintiff has made no suggestion to the contrary. The Jadon Thakurs who give evidence for him all believe in a common ancestor many generations ago; and the High Court, though unable to attach any value to the pedigree, are satisfied that the Umargarh family is an old one, and socially of considerable importance.

Head (*b*).—But then they say that the pedigree affords no evidence of impartibility. Certainly it affords no explicit evidence, nor does it profess to do so. The High Court, however, think that the absence of partition for many generations is as consistent with partibility as with primogeniture, unless it is shown that partition was claimed and refused. Of course if that was shown it would be very cogent evidence in favour of primogeniture. And it is possible that a divisible estate may remain undivided for a long time. But their Lordships do not think it probable that any great number of generations would pass without any operation of the motives under which Sheobaran acted fifty years ago and the plaintiff is acting now. Anrodh had a younger brother, and nothing is known of partition. Bahadur had a younger brother (three, if Narsingh is correct) and we hear nothing of partition. The High Court, indeed, finding that Ratan is stated to be "in Zalimpur," suggest that he may have been there by partition. But we find from the talug papers that in 1855 Zalimpur was vested in Tikam. The probability is rather that it was given to Ratan for maintenance. and on his death fell into the taluq. Prior to Sheobaran there is no tradition or rumour of a partition suggested on the plaintiff's [9] part. To put it at the lowest, that lays a ground for the favourable reception of evidence in favour of primogeniture; or, to put it higher, makes it probable that primogeniture is the real custom of the family.

Head (*c*).—The High Court are prepared to believe that some ceremonial of gaddinashini did take place in the cases of the defendant and his father Budh. In fact, such ceremonies are proved by numerous eye-witnesses, invited for the occasion, wholly unshaken in cross-examination, and not contradicted except by other neighbours who were not invited and did not see what took place. And as to the defendant the evidence is corroborated by Budh's petition in the Collector's office, which prays for a mutation of names, and which was allowed by an order of the 15th of February 1877, in suite of an objection made by somebody, by whom is not clear.

The High Court attenuate the significance of installation by two remarks. First they say that no witness professes to have seen any similar ceremonials in respect of Tikam, Pirthi, or any other member of the family. Now Pirthi acceded in the year 1825, 61 years before the evidence was taken, and Tikam six years later. None of the witnesses examined is old enough to have seen them installed. But as to Tikam there is evidence that Narsingh saw him occupying the gaddi, and that Balmakund, a Jadon Thakur, heard from his father that Tikam was placed on the gaddi and remained in its possession. His widow Bijai speaks to the same effect. Aman Singh, another Jadon Thakur, heard about the

installation of Pirthi and his father Moti from the Jagas. Of course as the time becomes more remote the evidence becomes fainter; but there is evidence of family tradition as far back as Anrodh, in accordance with Bhairon's pedigree. Their Lordships cannot concur with the opinion of the High Court that the gaddi ceremonies were invented to make evidence after the dispute with Sheobaran, nor is it easy to see the motive for making evidence at that time.

[10] The other remark is a suggestion that there is no necessary connection between gaddinashini and primogeniture. That may be so, but it is impossible to read the evidence without seeing that the witnesses on both sides treat the two as identical, or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied gaddinashini for the purpose of disconnecting it from primogeniture. Not only so, but the plaintiff's uncle Sukh Ram, being expressly questioned on the point, says that if the gaddi custom is proved the plaintiff will not get a share. And Raja Shankar Singh, who gives much information about family customs in the Agra district, speaks of gaddinashini and primogeniture as generally coincident. It is clear that the Subordinate Judge had no suspicion that the evidence applying to gaddinashini could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny gaddinashini they mean to affirm or deny primogeniture; and their constant identification of the two shows how closely they are connected in the minds of the families of that part of the country. The custom of gaddinashini has clearly an important bearing upon that of primogeniture, though the connection between them may not be a necessary one.

Head (*d*).—This brings us to the stage of the family history in which actual controversies on this question have sprung up, and they require some careful attention. On the death of Moti in the year 1825, the eldest of his three sons, Pirthi, became head of the family. Whether he was formally placed on the gaddi has been discussed above; he certainly represented the estate on the Collector's books and during his life no question as to the ownership was raised. He died in 1831, when his brother Tikam became head. It seems that immediately afterwards the widow of Moti raised a claim on behalf of the youngest son, then a minor, to have the estate divided. An agreement was made deferring the question till Sheobaran's attainment of full age, and then another agreement was made appointing Mr. Bell to be arbitrator. Mr. Bell was a **[11]** proprietor of indigo works in Umargarh, and he held a mortgage created by Moti on the estate.

The precise tenor of the questions referred is one of the many things which are left in obscurity on this Record. In his award, which is dated 16th January 1843, Mr. Bell states them as being the difference existing between the brothers connected with the pretentions of Sheobaran to a joint interest in the estate. After referring to two agreements, and a decree of Court, none of which are produced, and to the testimony of neighbouring zamindars and younger branches of the family, he states that custom has determined the descent of the estate in one individual. Then he refers to "the avowed inclination of Thakur Tikam Singh that his younger brother should receive such allowance as may enable him to support himself in a manner consistent with the respectability of his descent;" and proceeds to award that Sheobaran should have six villages and a plot of land in full proprietorship, and should have no further claim upon the taluq.

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Sheobaran was not content with this award, but immediately afterwards sued for his full share in the estate. Tikam insisted on his right as eldest brother, and also pleaded the award. Nawab Kuar the widow of Pirthi, who was a defendant, supported Tikam. She alleged that she was entitled to one-third of the estate, only "by reason of the family usage, and of Tikam Singh being seated on the gaddi, she has refrained from making any claim." The Sudder Amin gave Sheobaran a decree on the ground that primogeniture could not prevail except in the families of Rajas and Ravats; whereas the Umargarh family did not bear either of those titles. As for the award, he held it to be invalid on grounds which have nothing to do with the present question. They were overruled by the Sudder Court, who, on the ground that Mr. Bell had decided the case in favour of Tikam, reversed the decree below, and dismissed the suit. Their decree is dated the 1st of December 1845.

From this litigation in the Civil Court we get no additional light thrown upon the family custom, unless it be the declaration [12] of Pirthi's widow. The Sudder Amin did not discuss it, but thought that the question of primogeniture turned on the use or non-use of certain appellations. The Sudder Court had not to express any opinion about it, and did not:—

As to the bearing of the award, the High Court take a view which their Lordships cannot understand. They say:—

> "Practically, the transaction was one of partition, dividing the family property and giving the allottees exclusive control over their shares.
>
> "Mr. Bell, in making the award, may have considered that the practice, which is not unusual in some places, of giving one portion to the eldest brother—a larger share—was one which he might follow.
>
> "However this may be, we are satisfied that the award operated to transfer to Sheobaran Singh the absolute right in the awarded villages in a manner absolutely inconsistent with there being the custom alleged."

This is in direct contravention of the language of Mr. Bell, who states that his award is not by way of partition, which is prohibited by the family custom, but by way of voluntary allowance for Sheobaran's support in a manner consistent with his position. Mr. Bell may have made his award on insufficient grounds, or without due inquiry, but his opinion is clear. And the opinion of a resident in Umargarh, who had dealings with the estate, was a friend of the family, and was so trusted by them that they called him in to settle the question of primogeniture between them, must have weight in a controversy on that subject. The suggestion that Mr. Bell did not act in good faith, but lent himself to the manufacture of evidence, has no basis of fact that their Lordships can find.

Head (*e*).—After all, the award was not acted on. On 18th May 1848 Tikam, declaring that he was full proprietor of mauza Bechupura, one of the Umargarh villages not awarded to Sheobaran, made it over absolutely to Sheobaran by way of provision and maintenance. On the 3rd of July 1854 a wajib-ul-arz for taluqa Umargarh was framed on the declarations of the mukhtars of Tikam and Sheobaran. By it Sheobaran is shown to be owner in possession of Bechupura and pattidar of the taluq of Umargarh, and Tikam appears as the owner of several villages, among which [13] are five of the six awarded to Sheobaran. It is calculated that the awarded villages were about one-third in value of the whole taluq, and that the property ultimately taken by Sheobaran was much less, possibly only one-third of the amount awarded. The subsequent enjoyment has been in accordance with the recorded titles.

This change of arrangement remains totally unexplained, and the High Court appear on that account to throw blame on the defendant and suspicion on his case. If the defendant could have produced the proceedings which led up to the award they might have been material. But we are not discussing the validity or legal effect of the award, but the amount of light which it throws on the alleged custom; and it is difficult to suppose that arrangements superseding the award to the disadvantage of the younger brother would disclose circumstances to weaken the title of the elder. Of course the plaintiff might have compelled an investigation of those matters in the first Court; but it does not seem to have occurred to anybody that it was useful to do so, and probably it was not.

The wajib-ul-arz of 1854 does not contain any statement of the family custom of inheritance. In wajib-ul-araiz of separate mauzas made in 1876 there are statements importing that primogeniture is the custom; but as some of them are shown to have been dictated by Budh, and perhaps all were, they do not add to the weight of his opinion shown in other ways. The point for which the wajib-ul-arz of 1854 was used is that it contains a statement relating to lambardars. It says that on the death of a lambardar his eldest son becomes lambardar according to the custom of the family.

The High Court treat this as totally immaterial, because they say the choice of lambardar has nothing to do with the succession to the estate, and that partible estates may have the custom of hereditary lambardars. This they prove by referring to Kasba Jalesar. It is difficult to see how Jalesar is an instance. As with so many other matters in this record, the evidence is obscure. **[14]** There are two extracts from a wajib-ul-arz. No date is affixed to them. By their contents they would seem to have been framed in the lifetime of Pirthi. Seoti Ram, to whom the High Court refer as showing Budh's dictation of the wajib-ul-araiz of 1876, knows nothing about Jalesar. Supposing these extracts to be Budh's work, their only effect is that the lambardarship is hereditary and will go to the eldest son of the masnadnashin; and the estate also will go to his eldest son. But there are three castes in the Kasba which have different customs, and one of those castes (*viz.*, the Syed caste, which their Lordships presume to be Muhammadan) conforms to the Muhammadan law. That is quite consistent with the descent by primogeniture of the property of the riasat whose chiefs are hereditary lambardars, and does not detract from the bearing, whatever it may be, of the devolution of lambardarship upon the devolution of property in the same family.

A lambardar represents the estates in all transactions with the Government. It is of importance that he should be of capacity for business, and it is usual in a joint family to appoint one of the elder members of the family. When it is found that the office devolves by primogeniture in a family (and there is no suggestion that the wajib-ul-arz speaks falsely), it seems to their Lordships a material circumstance to aid the conclusion that the estate devolves in the same way in the same family.

Heads (*f*), (*g*) and (*h*) may be taken together. Bijai Kuar is the widow of Tikam, and learned about the family customs from Moti's widow and presumably from her husband. Besides speaking of primogeniture in general terms, she says that after Moti's death Pirthi obtained the gaddi, and that Tikam and Sheobaran got maintenance. The statement of Pirthi's widow against the interest she claimed as hers in the suit of 1843 has been before mentioned. On the death of Budh some inquiry was

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held, apparently with reference to the entry of the estate in the Collector's books. One of his widows, Rathorji also called Bijai, deposed to the mutation of names in Budh's time, and to his intention that the defendant should succeed according to the family custom. Another [15] of his widows, Solankhi the mother of Narindhpal, also deposes to the custom on the same occasion. Neither of those two widows have been examined in the present suit, but their depositions have been put in and treated as evidence. Narsingh, the son of Sheobaran, speaks to the succession from Anrodh's time, according with Bhairon's pedigree, except that he ascribes to Jawahir three younger sons instead of one. He says that he heard from his father. He is open to the observation that he gives an impossible date to one communication from his father, that his father died when he was about 11 years old, and that he is indebted to the defendant, to what amount does not appear. Unless it be for the debt, he does not seem to have any interest to support traditions in which he does not believe.

Seven Jadon Thakurs, and another neighbouring Thakur of a different caste, affirm the custom in general terms, and also establish the installation of the defendant and his father by direct evidence, and affirm other installations by tradition and hearsay. Their evidence varies in detail and is not given by rote. It is quite unshaken by cross-examination.

All this evidence is subject to the observation that it is given after the dispute with Sheobaran, that the ladies are pardanashin, that the witnesses speak to what they have heard when very young, and so forth. These observations would have much greater weight if there had been any dispute before Sheobaran's time, or if there were evidence conflicting with that given for the defendant. But within the family itself there is no conflict of opinion. The plaintiff has produced no evidence but that of several Thakurs, Jadon and others, who deny the custom in general terms and in identical language. But the value of their denial, small in itself, is reduced to nothing by the fact that they also deny the installation of Budh and the defendant, which are proved by conclusive evidence. One of them indeed, Hari Ram, says that 20 or 22 years ago the riasat was partitioned in his presence. But he only adduces as proof some remarks which Tikam made to him quite at variance with the [16] known facts. And he does not even know that Sheobaran ever sued for a partition.

The High Court say that the plaintiff's witnesses must have known of the custom if it had existed, and ought to be believed. But people who knew nothing of the gaddi custom or of actual installations are not likely to have known or cared anything about the custom of inheritance. There need be no imputation on their veracity, for, with the exception of Hari Ram, they only speak to negatives, and are guilty of nothing worse than the common error of assuming the non-existence of that which is not known to them.

Their Lordships conclude that there is no contradiction of the defendant's case ; and that the propositions of the Subordinate Judge are established by sufficient proof. All the lines of evidence here examined converge upon the same point. Perhaps no one of them would, if standing alone, be conclusive in favour of the defendant's case ; but taken as a whole they are conclusive. The High Court should have dismissed the plaintiff's appeal, and it is now right to discharge their order and to restore that of the Subordinate Judge, and to direct that the respondent shall pay

the costs of his appeal to the High Court. Their Lordships will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. White* and *DeBuriaette.*

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MATHURA DAS AND OTHERS (*Defendants*) *v.* BHIKHAN MAL AND OTHERS (*Plaintiffs*).* [13th July, 1896.]

Interpretation of document—Devise by a Hindu in favour of a female—Presumption as to intention of testator concerning the estate to be taken by the devisee.

One M. R., a separated Hindu, died in 1862, leaving him surviving two daughters and a daughter-in-law, Musammat Sohni, the widow of a pre-deceased son.

[17] During his lifetime M. R. had caused to be recorded in the *wajib-ul-arzes* of two villages, D. and A., owned by him—"Musammat Sohni, wife of my son Salig Ram, shall be regarded as owner after my death." In the *wajib-ul-arz* of a third village the following entry was recorded—"After my death Ganga Sahai the adopted son, and Musammat Sohni, the wife of Salig Ram, shall have a right to the property."

Subsequently to the death of M.R. the nature of the estate taken by Musammat Sohni in the villages D. and A. came before a Court of law and Musammat Sohni did not challenge the decree which was then passed declaring her interest to be only a life estate.

Held that under the above circumstances and having regard to the sentiments prevalent amongst Hindus on the subject of the devolution of immoveable property upon females, the devise of the villages D. and A. must be taken to convey an estate for life only and not the absolute ownership in the villages. *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) and *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2) referred to. *Hira Bai* v. *Lakshmi Bai* (3) and *Koonj Behari Dhur* v. *Prem Chand Dutt* (4) considered.

[R., 28 A. 488 = 3 A.L.J. 415 = 8 Bom. L.R. 402 = 3 C.L.J. 594 = 10 C.W.N. 730 = 33 I.A. 97 = 1 M.L.T. 171; 2 O.C. 226 (232); 9 O.C. 119 (122); 1 S.L.R. 211 (216).]

THE facts of this case sufficienty appear from the judgment of the Court.

Pandit *Sundar Lal* and Munshi *Ram Prasad*, for the appellants.

Mr. *D. N. Banerji*, Babu *Durga Charan Banerji* and Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

BANERJI AND AIKMAN, JJ.—The suit in which this appeal has arisen relates to the estate of one Moti Ram, a separated Hindu, who died in 1862, leaving him surviving two daughters and a daughter-in-law, Musammat Sohni, the widow of a predeceased son. On Moti Ram's death Musammat Sohni took possession of the estate, and remained in possession till her death on the 16th of September 1881. The daughters of

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* First Appeal, No. 167 of 1894, from a decree of Pandit Bansi Dhar, Subordinate Judge of Meerut, dated the 18th May 1894.

(1) 6 M.I.A. 526. (2) 2 I.A. 7. (3) 11 B. 573. (4) 5 C. 684.

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A. 16 = 16 A.W.N. (1896) 171.

Moti Ram died during the lifetime of Sohni. Upon her death, the defendants obtained mutation of names in their favour and took possession of the property, which is still in their possession.

The present suit was instituted on the 25th of August, 1893, by three out of the five sons of Moti Ram's daughters. They claim a three-fifths share of the property, together with mesne profits, on [18] the allegation that they are entitled to that share and have been wrongfully kept out of possession. The first two defendants are the remaining grandsons of Moti Ram. The other defendants are the descendants of his brother Hulas Rai.

The main defence to the suit was limitation, the defendants urging that the possession of Musammat Sohni was adverse to the plaintiffs. Ganga Sahai, the second defendant, raised a further plea to the effect that he had been adopted by Moti Ram.

The Court below found on both points in favour of the plaintiffs and made a decree in their favour. The defendants have appealed, and they have repeated in their memorandum of appeal the grounds on which they contested the claim in the Court below.

There can be no question, and it is indeed conceded, that as the inheritance to Moti Ram's estate opened out in 1862, the plaintiffs' claim would be barred by the law of limitation, unless they could pray in aid the estate held by Musammat Sohni after Moti Ram's death. The whole question therefore hinges on the nature of that estate. As the husband of Musammat Sohni predeceased Moti Ram, she was not entitled to succeed to Moti Ram's property by right of inheritance. The plaintiffs state in their plaint that she obtained possession under the will of Moti Ram recorded in the administration paper of two villages, and that the estate conferred on her by the will was that of a Hindu widow, which terminated on her death. In the *wajib-ul-arz* of Daryapur Moti Ram caused the following statement to be recorded :—"Musammat Sohni, wife of my son Salig Ram, shall be regarded as the owner (*malik*) after my death." A similar entry was made in the *wajib-ul-arz* of Alawalpur, with the addition of the words—"No other person shall have anything to do with this property." Both parties are agreed that the statements recorded in the *wajib-ul-arzes* amounted to a testamentary bequest in favour of Sohni. They differ as to the nature of the estate devised to her. Whilst the plaintiffs contend that the said estate was that of a Hindu widow, it is urged on behalf of the defendants that an absolute gift was made in favour of Sohni [19] under the will of Moti Ram. We have therefore to construe the said will.

The rule as to the construction of the will of a Hindu was thus stated by their Lordships of the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) :—"The Hindu law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is

(1) 6 M.I.A. 526 (550).

made and the dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

In *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (1) their Lordships observed :—"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

Bearing these observations of their Lordships of the Privy Council in mind, we have to construe the will of Moti Ram.

[20] We are unable to agree with the contention of the learned counsel for the respondents that every bequest in favour of a Hindu widow should be regarded as the bequest of a life estate only, unless the contrary appears from the terms of the testamentary instrument. In *Hira Bai* v. *Lakshmi Bai* (2), on which the learned counsel has relied, all that the learned Judges held was that "in the absence of express words showing such an intention, a devise to a wife does not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu law" (at p. 378). The learned Judges referred to *Koonjbehari Dhur* v. *Premchand Dutt* (3), as an authority for that view. The case referred to was that of a gift in favour of a wife by her husband, and it was decided on the authority of the Tagore Law Lectures for 1878, p. 333. There the learned author, in dealing with the restrictions on a woman's power over her *stridhan*, remarked that the power of a woman over immoveable property obtained in gift from her husband is not absolute, and she has no right of alienation at any rate during the lifetime of the husband, unless such right is expressly conferred on her by the husband. The present case is not that of a gift made by a husband in favour of his wife. Musammat Sohni was the widow of a pre-deceased son of Moti Ram, and the rule of Hindu law relating to the *stridhan* of a widow acquired under a gift from her husband cannot apply to her. It is not neceesary for us to say for the purposes of this appeal whether or not we agree with the view expressed in the rulings cited above as to the right of a widow taking property under a gift from her husband. In our opinion where the terms of a bequest are ambiguous we have to look to the intention of the person making the bequest, and if from the surrounding circumstances it appears that the intention was to make a bequest of a widow's estate only, that intention should be given effect to and the estate devised should be held to be a widow's estate only. In the present instance the recital in the *wajib-ul-arzes*, which must be regarded as testamentary instruments, is, as we have said, to the effect that Sohni should be regarded as the **[21]** *malik* after the death of Moti Ram, the testator. There are no clear words conferring on her an absolute proprietary title. The use of the word *malik* (owner) is consistent both with an intention to bestow on her a widow's estate and also the estate of an absolute owner. In the *wajib-ul-arz* of a third village, Pali, which is not in dispute in this case, Moti

(1) 2 I.A. 7 (14). (2) 11 B. 573. (3) 5 C. 684.

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Ram said:—"After my death Ganga Sahai, the adopted son, and Musammat Sohni, the wife of Salig Ram, shall have a right to the property." The circumstance of his associating the name of Ganga Sahai with that of Sohni, and the use of the vague expression referred to above indicate in our opinion that the intention of Moti Ram was not to give to Sohni an absolute estate. This conclusion is fortified by the fact that Sohni herself and the defendants and their predecessors in title submitted to a finding of the Subordinate Judge of Meerut made in a suit decided on 21st August 1868, to the effect that Sohni held a widow's estate only in respect of the property left by Moti Ram. That suit was instituted by some of the defendants and the predecessors in title of the other defendants to set aside a mortgage executed by Sohni, and for recovery of possession of the property of Moti Ram held by her. In that suit it was held that she had a life estate in the property and that the alienation would be valid during her lifetime. Both Sohni and the plaintiffs to that suit submitted to that judgment. We do not imply that that judgment operates as *res judicata* in the present case or can be treated as evidence, as between the present parties, as to the nature of Sohni's title. But we cannot lose sight of the fact that Sohni acquiesced in that judgment which declared her to have only a life estate, and, so far as is shown, took no steps to assert an absolute proprietary title. The present defendants allowed Sohni to continue in possession; and when on her death they applied for mutation of names, on the 5th of October 1881, they referred in their application to the decree of the 21st of August 1868 and stated that, as under that decree Sohni and the transferees from her were to remain in possession during her lifetime, they, the applicants, were entitled to have their names entered in the revenue papers after her death. **[22]** These circumstances show that the defendants themselves understood the bequest made by Moti Ram in favour of Sohni to be that of a widow's estate. There can be no doubt that the defendants have not a better title to the property than the plaintiffs. But that fact alone would not certainly entitle the plaintiffs to a decree, if the possession of Sohni was under an adverse proprietary title. Having regard to the terms in which Moti Ram bestowed the property on her, to the inference to be drawn as to his intention from the general understanding among Hindus as to the nature of a woman's estate and to the fact that she herself and the defendants, or their predecessors in-title, regarded her estate as that of a Hindu widow with limited right, we are of opinion that the Court below has rightly held that the plaintiffs were equally entitled with the defendants to succeed to Moti Ram's estate on the death of Musammat Sohni. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

19 A. 22=16 A.W.N. (1896), 168.

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APPELLATE CIVIL.

19 A. 22=16 A.W.N. (1896) 168.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Aikman.

TAPESRI LAL AND OTHERS (*Defendants*), v. DEOKINANDAN RAI AND OTHERS (*Plaintiffs*).* [15th July, 1896.]

Civil Procedure Code, s. 293—Execution of decree—Sale in execution—Order for recovery of deficiency of re-sale—Suit to set aside order—Certificate of amount of deficiency.

Held that a suit will lie to set aside an order passed under S. 293 of the Code of Civil Procedure.

Held also that the fact that certificates provided for by S. 293 of the Code has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency arising on a re-sale of property sold in execution of a decree but not paid for.

[F., 12 Ind. Cas. 360 (361) = 7 N.L.R. 134 (135).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jwala Prasad*, for the appellants.

Mr. *T. Conlan*, for the respondent.

JUDGMENT.

[23] KNOX, BLAIR AND AIKMAN, JJ.—The parties to this second appeal are Babu Deokinandan Rai, and Sheobalak Rai, who have been compelled by an order made under s. 293 of the Code of Civil Procedure, to pay the deficiency of price which happened on a re-sale of property purchased by them and not paid for, and Tapesri Lal and others, the judgment-creditors, who by virtue of that order recovered from Babu Deokinandan Rai and Sheobalak Rai, the aforesaid deficiency of price and the expenses on the re-sale. Babu Deokinandan Rai and Sheobalak Rai claimed in the suit out of which this appeal arises to recover the amount paid by them upon the ground that the judgment-creditor recovered the money without any certificate furnished by the officer holding the sale, a preliminary which they contend was absolutely necessary before the amount could be recovered. Both the Courts below have held that the absence of the certificate mentioned in s. 293 of the Code of the Civil Procedure is a fatal defect. The order of the Court passed without this preliminary certificate is according to them illegal and without jurisdiction. They accordingly decreed the suit brought by the respondents.

In appeal before us the contention is that the suit of the respondent is barred by article 13 of schedule II of the Indian Limitation Act, 1877, and further that the appellant is not prejudiced by the neglect or omission, if any, of the officer holding the sale to certify to the Court the deficiency of price and the expenses attendant on the re-sale.

In our opinion the plea that the suit was barred by limitation entirely fails. It is true that the order passed by the Court under whose directions the sale was held is dated the 2nd of March 1889. But an

* Second Appeal No. 117 of 1894, from a decree of Maulvi Muhammad Ismail, Additional Subordinate Judge of Ghazipur, dated the 21st November 1893, modifying a decree of Babu Sheocharan Lal, Munsif of Rasra, dated the 31st July 1893.

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appeal was lodged from that order, and the date of the final decision in the case by a Court competent to determine it finally was the 10th of March 1892. The respondents are entitled to have this period excluded in computing the period of limitation, and if it be so excluded, the present suit, which was instituted on the 9th of March [24] 1893, was within one year from the 10th of March 1892, and consequently within time.

In arguing the second plea the learned vakil who appeared for the appellants divided his arguments into two heads: the first being that a suit to set aside an order passed under s. 293 was not maintainable; and the second that the certificate mentioned in s. 293 was not so essential that its absence would prevent a judgment-creditor or a judgment-debtor, as the case might be, recovering from the defaulter. His argument was that the order in question had been passed by a competent Court; it was intended by the Legislature, who have made no provision for appeal, to be a final order. He drew our attention to s, 283, and contended that the absence of any similar section relating to orders passed under s. 293 was strong ground for the conclusion that the Legislature did not intend that a suit should be brought to set aside such orders. But there is a vast difference between orders passed under ss. 280, 281, or 282 and orders passed under s. 293. The former class of orders are judicial or *quasi* judicial orders. They are not to be passed except after an investigation made and opportunity given to the parties interested to adduce evidence. No such provision is made with regard to orders passed under s. 293. S. 293 contemplates that the officer holding the sale shall simply go through the arithmetical process of calculating accurately what deficiency of price has taken place and what the expenses attending the re-sale were. To no one interested is any opportunity given of being present at or of questioning the arithmetical process aforesaid. The officer draws up his certificate and upon that certificate the Court also proceeds, at the instance of the parties authorized to set it in motion, to recover the amount certified. just as if the certificate were a decree and the Court were the Court executing a decree. Any order passed by a Court under such circumstances is in effect an administrative and not a judicial order. We know of no precedent or authority standing in the way of such orders being questioned by a separate suit. There being no enactment in [25] bar, the suit was in our opinion one which the Court had jurisdiction to try, and the argument that the suit was not maintainable has no force.

As regards the question whether a certificate by the officer holding the sale is so essential a preliminary that without it a Civil Court cannot at the instance of the judgment-creditor or judgment-debtor, order a recovery from the defaulter, we were referred to no authority or precedent on the point. The learned counsel for the respondents took his stand upon the language used in s. 293. He pointed out to us that the provision requiring a certificate did not exist in Act No. VIII of 1859. Its insertion in the present Code must have been, so he argued, of set purpose. A careful consideration of s. 293 satisfies us that we should not be warranted in drawing the conclusion he asked us to draw from the language contained in it. Two things are provided for by that section. The first is that the deficiency of price and expenses attending the re-sale shall be entered in a certificate to be drawn up by the officer holding the sale. The second is that the deficiency in those expenses shall be recoverable from the defaulter in the manner set out. But

each provision is independent of the other, and there is no word or expression compelling us to hold that the first is a condition precedent to the second. It is easy to see that if it were a condition precedent cases of very great hardship and injustice might ensue. The officer holding the re-sale might die before he had granted the certificate, or he might be prevented in other ways from making such a certificate. His incapacity to grant the certificate might be due to no fault of the judgment-creditor or the judgment-debtor. To debar these persons from recovering money to which they are entitled both in law and equity merely because of such an incapacity would amount to a miscarriage of justice. We prefer to put upon the section an interpretation which it can bear and which will not result in such hardships. The result, therefore, is that this appeal will prevail. The appeal will be decreed. The judgment and decree of the lower appellate Court will be set aside and the case **[26]** remanded to the lower appellate Court with instructions to re-admit it upon its original file of pending appeals and to dispose of it according to law. Costs will abide the event.

Appeal decreed and cause remanded.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, and Mr. Justice Aikman.

LACHMAN DAS (*Plaintiff*) *v.* KHUNNU LAL AND OTHERS (*Defendants*).* [16th July, 1896.]

Hindu law—Joint Hindu family—Liability of grandsons to pay interest on their grandfather's debts—Mortgage.

The mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realisation of the interest secured by the mortgage in addition to the principal amount of the mortgage. *Narasimharav Krishnarav* v. *Antaji Virupaksh* (1), *Nanomi Babuasin* v. *Modhun Mohun* (2), *Hanooman Persaud Panday* v. *Mussamat Babooee Munraj Koonweree* (3) and *Girdharee Lall* v. *Kantoo Lall* (4) referred to.

[R., 31 A. 176=6 A.L.J. 263; 2 C.W.N. 603.]

THE facts of this case sufficiently appear from the judgment of the majority of the Court.

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *D. N. Banerji*, for the respondents.

The Judgment of EDGE, C. J., BLAIR, BANERJEE and AIKMAN, JJ., was delivered by BANERJI, J.—

JUDGMENT.

This appeal has arisen in a suit brought by the appellant under s. 88 of Act No. IV of 1882 for sale under two mortgages dated, respectively, the 25th of October 1881 and the 1st of November 1881,

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* First Appeal No. 139 of 1894, from a decree of Maulvi Ahmad Ali, Subordinate Judge of Aligarh, dated the 18th April 1894.

(1) 2 B.H.C.R. 61 at p. 64.
(2) 13 C. 21.
(3) 6 M.I.A. 393.
(4) 1 I.A. 321.

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executed by one Murlidhar, now deceased. The defendants are the grandsons of Murlidhar, being the sons of his deceased son Ajudhia Prasad.

There is no dispute in this appeal in regard to the mortgage bond dated the 1st of November 1881. It is the other bond with [27] which we are concerned. The amount claimed under that bond is Rs. 1,000, on account of principal, and Rs. 2,334-7-9 on account of interest, total Rs. 3,334-7-9.

The defendants urged that they were not liable under Hindu law to pay as interest any sum in excess of the principal amount secured by the bond, and they paid into Court Rs. 2,000, for payment to the plaintiff.

The lower Court found that the mortgaged property was the joint ancestral property of the family, that the debt had not been incurred for a family necessity, but was a personal debt of Murlidhar, and that it was not tainted with immorality. The Court held that the defendants were liable to pay the debt "by reason of their pious duty as Hindus;" that "their obligation to pay the debt arises out of a rule of Hindu law and is therefore limited by the restrictions imposed by that very same law," and that under Hindu law a grandson was "not bound to pay any interest at all." It accordingly made a decree for the principal amount only and dismissed the whole of the claim for interest, although the defendants had paid into Court Rs. 1,000 on account of interest.

The correctness of this judgment and decree has been assailed in this appeal on behalf of the plaintiff. The findings of fact of the Subordinate Judge have not been questioned, but it is urged that he has erred in dismissing the claim for interest on the authority of Hindu law and that he has misapplied the rules of that law on the subject.

The following authorities were referred to in the course of the argument:—Vrihaspati, Chapter XI (Sacred Books of the East, Vol. XXXIII, pages 319 and 328); Narada (*Ib.* p. 42); Vishnu Smritis, Chapter VI (*Ib.* Vol. VII, p. 44); Colebrooke's Digest, Vol. I, Madras Edition, pp. 185, 207, 208 and 227; the Viramitrodaya (p. 154, Golab Chandra Sarkar's translation); the Vyavahara Mayukha (Mandlik's Edition, p. 112); the Vayavastha Chandrika, Vol. I, pp. 238 and 240; Mayne's Hindu Law and Usage, paragraph 282, p. 324, 5th Edition; *Girdharee Lall* v. [28] *Kantoo Lall* (1); *Nanomi Babuasin* v. *Modhun Mohun* (2); *Narasimharav Krishnarav* v. *Antaji Virupaksh* (3); *Ponnappa Pillai* v. *Pappuvayyangar* (4); *Muddun Gopal Lall* v. *Mussammat Gowrunbutty* (5): *Bissessur Lall Sahoo* v. *Luchmessur Singh* (6); *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (7); and *Lachmi Narain* v. *Kunji Lal* (8).

The question we have to determine is whether the mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realization of the interest secured by the mortgage, in addition to the principal amount of the mortgage, or whether the liability of the mortgaged property in the hands of the grandson extends only to the principal amount. The question is a novel one and is not covered by the authority of decided cases, except a case in the Bombay High Court to which we shall refer hereafter.

The obligation of a Hindu son or grandson to pay the debt of his ancestor, the debt not being of an immoral character, is founded on the following texts:—

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(1) 1 I. A. 321=22 W.R. 56. (2) 13 C. 21. (3) 12 B.H.C.R. 61 at p. 64.
(4) 4 M. 1. (5) 15 B.L.R. 264. (6) 5 C.L.R. 477.
(7) 9 I.A. 128. (8) 16 A. 449.

Narada says:—"The father being dead, it is incumbent on the sons to pay his debt each according to the share (of inheritance), in case they are divided in interests. Or if they are not divided in interests, the debt must be discharged by that son who becomes manager of the family estate.

"If a debt has been legitimately inherited by the sons, and left unpaid by them, such debt of the grandfather must be discharged by his grandsons. The liability for it does not include the fourth in descent." (Sacred Books of the East, Vol. XXXIII, pp. 41 and 42.)

According to Vrihaspati, the father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid [29] before these two even," (Chapter XI, v. 48: Sacred Books of the East, Vol. XXXIII, p. 328.)

The texts of Vishnu, Yajnavalkya and Katyayana are also to the same effect.

The reason for the above rule appears from the following text of Narada:—Fathers desire male offspring for their own sake, reflecting 'this son will redeem me from every debt whatsoever due to superior and inferior beings.' Therefore a son begotten by him should relinquish his own property, and assiduously redeem his father from debt, lest he fall into a region of torment." (Colebrooke's Digest, Vol. I, p. 202; Book I. CLXXXIX).

In the case of the grandson, the obligation to pay the debt of the grandfather is limited to the principal amount of the debt by the following text of Vrihaspati:—

"The father's debt, on being proved, must be paid by the sons as if it were their own; the grandfather's debt must be paid (by his son's sons) *without interest*." (Chapter XI. v. 49, Sacred Books of the East, Vol. XXXIII, p. 328.) Katyayana also ordains that "a debt of the grandfather shall be paid by his grandsons *without interest*." (Colebrooke's Digest, Vol. I, p. 207. Book I, Chapter V. CXCVII.) The same rule was adopted by the Vyavahara Mayukha. (Mandlik's translation, p. 113.)

It is contended on behalf of the respondents that as the Hindu law which imposes on the grandson the obligation to pay the debts of his grandfather limits that obligation to the principal amount of the debt only, the courts in enforcing the obligation should not enforce it unfettered by the limitation.

It may be observed that the liability imposed by the texts of Hindu law referred to above on the son or grandson to pay the debt of his father or grandfather is a personal liability, irrespective of the existence of assets. The courts, however, except in the single case which arose in the Presidency of Bombay, have held that the liability is only proportionate to the extent of the assets which have come to the son or grandson. The courts were evidently of opinion that the texts of the sages on the point contain [30] rules of moral obligation only, directory and not imperative. Most of the rulings bearing on the point have been cited in the note to paragraph 280 of Mayne's Hindu Law and Usage (5th edition, p. 322). The solitary case in the Bombay Presidency to which we have referred is that of *Narasimharav Krishnarav* v. *Antaji Virupaksh*, decided on the 8th of March 1865 (1), in which according to the head note, it appears to have been held that "the grandson of a Hindu is bound to pay the debt of his

(1) 2 B. H. C. R. 61, at p. 64.

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grandfather, independent of assets, but without interest, according to the doctrine of the Maharashtra School." The judgment itself as reported does not contain any reasons for the above ruling, and, even if it can be regarded as an authority at all, it may be an authority in the province governed by the Maharashtra School and not in these provinces where the doctrines of the Benares School of the Mitakshara Law prevail. This decision, however, led to the enactment of the Bombay Act No. VII of 1866 by which the liability of the son or grandson of a deceased Hindu for the debts of the deceased was limited to the extent of the property of the deceased received or taken possession of by the son or grandson and not duly applied. We have not been referred to, nor are we aware of any other ruling in which it was held that a grandson was liable only for the principal amount of the debt of his grandfather. The texts of Vishnu and Yajnavalkya do not place any such limit on the extent of a grandson's liability, but treat the liability of the son and the grandson to discharge the debt of their ancestor as co-extensive. (See Colebrooke's Digest, Vol. I, Book I, Chap. V CLXVIII and CLXX.) It is true, that, according to the decisions of their Lordships of the Privy Council, the pious obligation of a Hindu son or grandson to pay the debt of his father or grandfather, not tainted with immorality, creates a legal liability but their Lordships have not limited the extent of the liability, in the case of the grandson, to the principal amount of the debt only, or, in the case of the son, to the principal and interest not exceeding the principal. In *Nanomi Babuasin* v. *Modhun Mohun* **[31]** (1) their Lordships said—"The decisions have for some time established the principle that the sons cannot set up their right against their father's alienation for an antecedent debt or, *the creditors' remedies for their debts*, if not tainted with immorality." The words we have emphasized clearly show that in the opinion of their Lordships the creditors of the father are entitled to pursue their remedy against the joint ancestral estate for the realization of the amount of the debt due from the father under the contract entered into by him, that is, for the principal and the stipulated amount of interest, where interest has been agreed to be paid. Whatever the texts of the authorities on Hindu Law may be, we are bound to administer that law as interpreted and enforced by their Lordships of the Privy Council. In *Hunooman Persaud Panday* v. *Musammat Babooee Munraj Koonweree* (2) in which the question of the son's liability arose, their Lordships held:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not the nature of the estate, whether ancestral or acquired by the creator of the debt." This rule has been followed in all subsequent cases beginning with the case of *Girdharee Lal* v. *Kantoo Lal* (3). In all these cases their Lordships confined their observations to the nature of the debt of the father and not to the amount of it, and held that if the debt was one which it was the pious duty of the son to pay, the creditor could pursue against the estate in the hands of the son the same remedy that he could have pursued against the father had he been alive. There can be no question that the creditor was entitled to recover from the father the principal amount of the debt as well as interest on that amount, at the contracted rate. He is equally entitled to recover the same from the son, and it is not competent to the son to say that he is not liable to pay a larger amount of interest than that enjoined by the

(1) 13 C. 21. (2) 6 M.I.A. 393 at p. 421. (3) 1 I.A. 321=22 W. R. 56.

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texts of Hindu sages. The same principle applies to the case of the grandson, and it is not open to him to contend that his liability extends only to the principal amount of the debt.

[32] The particular question now before us was not, it is true, considered and determined by the Lords of the Privy Council; but the effect of their rulings is, in our opinion, to render the sons and grandsons of a Hindu debtor liable to the same extent as the debtor himself, provided they were possessed of sufficient family property or assets of the debtor not otherwise duly applied. Any other conclusion will, in our judgment, lead to numerous and serious complications in the framing of a decree for sale under s. 88 of Act No. IV of 1882 in the case of a mortgage of joint ancestral property made by a Hindu who has sons and grandsons and whose sons and grandsons have, under Section 85, been made parties to the suit for sale according to the ruling of the Full Bench in *Badri Prasad* v. *Madan Lal* (1).

In our judgment the Court below has erred in dismissing the claim for interest. We allow the appeal and vary the decree below by adding to the amount of that decree Rs. 2,334-7-9, as interest on the bond of the 25th of October 1881. The appellant will get his costs in the Court below and in this Court.

We extend the time for payment of the mortgage money to the 15th of January 1897.

The objection under Section 561 of the Code of Civil Procedure is not pressed and is dismissed with costs.

KNOX, J.—The facts of this case have been fully recapitulated in the judgment just delivered and therefore I do not intend to go over them again. I only wish to add a few observations upon the question referred looked at from the standpoint of the texts of Hindu Law.

The question which has to be determined is whether a Hindu grandson who is prepared to pay a debt incurred by his grandfather is also bound to pay the interest which may have accrued and would in ordinary circumstances be due and payable in addition to the principal debt. The decision of their Lordships of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (2) to the effect that sons in a Hindu joint family cannot set up their rights against [33] their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality, would appear to compel us to answer the question in the affirmative. But it was contended on behalf of the respondents that the case before their Lordships was not the case of grandsons being made responsible for the debts of a grandfather. It was pointed out that nowhere in that case or in the cases which were cited to their Lordships at the hearing of the case had any reference been made to the text of Hindu Law which deal with the liability of grandsons under such circumstances. All that the respondents maintained in the present appeal was that they were not, according to Hindu law, liable for interest, at any rate in excess of the principal debt. In support of the contention we were referred to several passages from Hindu text-books, the chief being one from Brihaspati, Chap. XI, Sloka 49. That sloka, as translated by Dr. J. Jolly in the Sacred Books of the East, Vol. XXXIII, p. 328, runs as follows :—

"The father's debt on being proved must be paid by the sons as if it were their own, the grandfather's debt must be paid by his son's sons without interest, but the son of a grandson need not pay it at all."

(1) 15 A. 75.

(2) 13 C. 21.

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We were also referred to the same passage in the Digest of Hindu Law by Jagannatha Tarkapanchanana as translated by H. T. Colebrooke (Madras Edition, 1864, p. 185). On the authority of these and other texts to the same effect rests the contention that a grandson who may have to pay a debt incurred by his grandfather is not liable for the interest on such debt. A closer examination, however, of the passage quoted from Brihaspati shows that the contention rests upon insufficient grounds. Brihaspati divides the chapter in which he deals with debt into three portions. The first portion (slokas 1—38) deals with money lent upon the security of pledges or deposits; the second (slokas 39—53) is devoted to money lent upon "trustworthy sureties." The remainder of the chapter is taken up with recovery of money lent. If the case before us falls under any portion of the chapter it would fall under **[34]** the first portion. The cardinal rule relating to the payment of interest upon money lent upon pledges or deposits is contained in Sloka 2* which, subject to restrictions which follow, lays down that interest shall be taken by the creditor so long as the principal remains unpaid. The limit in these cases to interest would appear to be interest equal in amount to the principal. The sloka upon which the learned counsel for the respondents relies is one which deals with debts not so secured, and in the absence of any contrary expressions it must and should be held to have reference to that class of debts alone.

On this ground too the contention of the respondents fails and I would allow the appeal.

Appeal decreed.

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19 A. 34=16 A.W N. (1896) 169.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

MAULA AND ANOTHER (*Defendants*) *v.* BAHALA AND OTHERS (*Plaintiffs*).* [22nd July, 1896.]

Act No. XII of 1881, *N. W. P. Rent Act, ss.* 95 (*n*) 99 (*i*) *and* 210—*Jurisdiction—Civil and Revenue Courts—Suit for recovery of possession by tenant dispossessed by a trespasser.*

Clause (*n*) of s. 95 of Act XI of 1881 must be taken to apply to cases in which a tenant of agricultural land has been wrongfully dispossessed by the landlord, or, at the instance of the landlord, by some one claiming title through the landholder.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Baldeo Ram Dave*, for the appellants.

Maulvi *Karamat Husain*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for possession of an agricultural holding. The plaintiff alleged that he was a tenant

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* Second Appeal No. 664 of 1894, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 16th April 1894, confirming a decree of Babu Shiva Prasad, Munsif of Bijnor, dated the 30th September 1893.

* For Sloka 2, we have in 16 A.W.N. (1896), 183, Sloka 11.

of the holding; that, wanting capital, he took Bhika, through whom these appellants claim, into a kind of partnership in the cultivation, and that, after they had cultivated under [35] this quasi partnership for two or three years, Bhika wrongfully ousted the plaintiff from possession. These appellants pleaded that they were the tenants of the zamindar of the holding. The lower appellate Court found that the plaintiff was the sole tenant, and practically found that the case of these appellants was false. It is to be noticed that the plaintiff alleged a dipossession by trespassers. There were other defendants in the case, and these appellants did not prove that they had held title through the zamindar and that it was at his instance that they dispossessed the plaintiff. The case was one for the Civil Court. Having regard to s. 99, cl. (*j*), and to s. 210 of Act No. XII of 1881, we think cl. (*n*) of s. 95 of that Act must be taken to apply to cases in which a tenant of agricultural land has been wrongfully dispossessed by the landlord or at the instance of the landlord by some one claiming title through the landholder.

Clause (*n*) of s. 95 consequently would not apply on the finding of fact here or to any admission in the plaint. We dismiss this appeal with costs.

Appeal dismissed.

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19 A. 35 = 16 A.W.N. (1896) 167.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BHIKHAM SINGH AND ANOTHER (*Defendants*) *v.* HAR PRASAD AND OTHERS (*Plaintiffs*).* [29th July, 1896.]

Act No. XII of 1881 (*N.W.P. Rent Act*), *ss.* 7, 9 - *Sale of sir land with covenant to relinquish ex-proprietary rights—Non performance of covenant—Suit to recover compensation.*

Where, along with some zamindari, certain sir lands were sold and the vendors purported by their sale-deed to relinquish their ex-proprietary rights in the sir lands, but failed to put the vendees into possession of either the zamindari or the sir lands, it was held that the vendees could not recover from the vendors, as compensation, the consideration money which they had paid in respect of the sir lands.

[F., 22 A. 205; 6 A L J. 555; 2 Ind. Cas. 261; 17 Ind. Cas. 522; 6 O.C. 331; 10 O.C. 243; **Rel. on**, 33 A. (779) (782) = 8 A.L.J. 931 (934) = 12 Ind. Cas. 112 (113); **R.**, 33 A. 695 (700) = 8 A.L.J. 826 (831) = 11 Ind. Cas. 17 (19); **D.**, 10 Ind. Cas. 248 (249).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Satya Chunder Mukerji*, for the respondents.

JUDGMENT.

[36] BANERJI and AIKMAN, JJ.—The defendants appellants by a sale-deed dated the 7th of September 1892, conveyed certain zamindari property to the plaintiffs and covenanted to put the plaintiffs into possession of their sir lands, which they also conveyed by the deed. They disclaimed any rights which might accrue to them as ex-proprietary tenants in respect of the sir lands, and recited in the sale-deed that they

* First Appeal No. 199 of 1894 from a decree of Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated the 4th August 1894.

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had relinquished their ex-proprietary rights from the date of the sale. The plaintiffs not having obtained possession of the zamindari rights and sir lands brought the present suit to recover possession of them. They claimed in the alternative that in the event of actual possession not being awarded over the sir lands, compensation should be made to them by the defendants proportionately to the amount of the consideration paid for the sir lands. The Court below has made a decree in their favour for possession of the zamindari and for Rs. 771 as compensation in respect of the sir lands. The defendants have appealed, and the only contention raised on their behalf is that as the agreement for the sale of the ex-proprietary rights was contrary to law it was void, and therefore the claim for a refund of the consideration money was not maintainable.

There can be no question that the sale-deed, so far as it purported to convey the ex-proprietary rights to the plaintiffs, was in violation of ss. 7 and 9 of Act No. XII of 1881 and was therefore an unlawful and void contract. The plaintiffs, having entered into a contract which was void at the time it was made, and was known to them to be so, cannot legally claim to be placed in the position in which they were before the contract was made, that is they cannot claim that the defendants vendors should refund to them a portion of the sale consideration proportionate to the value of the ex-proprietary rights. This question is concluded by the authority of two important judgments of this Court, *viz.*, Second Appeal No. 300 of 1889,* decided on the 21st July, 1891, [37] and

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*The judgment in S. A. No. 300 of 1889 was as follows :—

STRAIGHT, J.—This was a suit brought by the plaintiffs-appellants to recover from the defendants the sum of Rs. 700 with interest thereupon. It is not denied that the sale transaction in respect of which the claim was preferred was in respect of the sale of a holding of which the defendants were ex-proprietary tenants under s. 7 of the Rent Act; that such sale was prohibited by law; that the plaintiffs paid the consideration money for the sale that they were put in possession, and that it was only by the action of the zamindar in bringing the suit that they were ousted from possession. The matter therefore stands thus: that the plaintiffs and the defendants entered into a contract of sale which in direct terms is prohibited by statute, that the terms of the statute were well known to both the parties, and they severally entered into an unlawful contract with their eyes open. Now it is not a case in which a party having entered into a contract prohibited by law before such contract has been fully executed repudiates it and demands to be restored to his original position, but it is a case of an entirely completed contract in which each party has done all that he could do, has obtained all the rights that he could obtain, in the enjoyment of which he could have remained, but for the interposition of a third party, who, in asserting the illegality of the contract, puts an end to their several positions. I am of opinion that the plaintiffs are not entitled to come in and seek the assistance of a Court of Justice to obtain money which as their share of the illegal contract was paid by them to the defendants. It cannot be denied that both the plaintiffs and the defendants were in *pari delicto* in the matter of the contract and all that was done under it; and it is equally clear that the defendants are persons who are in possession of the money paid to them by the plaintiffs, and being in the position of defendants have the stronger position. Mr. *Sunder Lal* for the appellants has relied upon s. 65 of the Contract Act. In my opinion that section has no application to a case in which two parties with full knowledge of all the facts and the law, presuming that they are well acquainted with the statutory prohibition against what they are doing, enter into a contract which is prohibited by law and the contract is executed to the full extent that it could be executed. Under these circumstances I am of opinion that the decree of the Lower Court can be sustained upon these grounds, and it therefore becomes unnecessary to discuss the question of limitation which has been raised. The appeal is dismissed with costs.

KNOX, J.—I fully concur in the above order, and I would further add that, whatever force there might have been in Mr. *Sundar Lal's* contention, it is quite obvious from the way in which the plaintiffs came into Court that they did not allege that the contract had been discovered to be void. They came into Court alleging that they were entitled to a refund and claimed a refund accordingly.

Second Appeal No. 676 of 1894 decided on the 13th of July 1896. The latter case was even stronger than the present, as in that case the vendors covenanted to return a portion of the purchase money in the event of their failing to deliver possession of [38] the *sir* lands conveyed by the sale-deed. Notwithsanding that covenant, it was held that the plaintiff could not recover, the convenant having been introduced into the sale-deed in order to defeat section 7 of Act No. XII of 1881. Mr. *Satya Chandar* on behalf of the respondents relies on *Fasih-ud-din* v. *Karamat-ullah* (1). That case in our opinion is distinguishable from the present. There the vendor sued to recover possession of the *sir* lands of which the vendee had already obtained possession. It was held that the vendor was not entitled to get back possession from the vendee, through the assistance of the Court, without tendering to the vendee that portion of the purchase money which was the price of the *sir*. That was a case in which the vendor sought by the aid of the Court to get possession of the *sir* land the sale of which was illegal, retaining at the same time in his own hands the benefit derived by him from the illegal agreement. In such a case the Court might equitably refuse to put back the vendor into the position in which he was before the sale, without placing the vendee in a similar position. Such is not, however, the case here. To allow a claim of this description would be to countenance an intentional violation of the law. There is no equity in favor of a person who with his eyes open enters into a contract, the object of which is to defeat the provisions of the law. The plaintiffs were in our judgment not entitled to the decree for Rs. 771 granted to them by the Court below. We allow the appeal to this extent that we reduce the amount decreed by Rs. 771. We affirm the decree below, except as regards the said sum of Rs. 771, and the costs of the suit. The parties will pay and receive costs in the Court below in proportion to the value of the claim now dismissed and decreed. We make no order as to the costs of this appeal.

Decree modified.

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19 A. 39 (P.C.) = 23 I.A. 138 = 1 C.W.N. 52 = 6 M.L.J. 214 = 7 Sar P.C.J. 88.

[39] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

MATHURA DAS AND ANOTHER (*Appellants*) *v.* RAJA NARINDAR BAHADUR (*Respondent*).

[19th June, and 31st July, 1896.]

Mortgage—Post diem interest—Damages—Construction of document—Continuing breach of contracts—Limitation—Act XV of 1877, *Art.* 115 *and* 116.

No payment had been made on an agreement contained in a mortgage-deed for payment of the principal within a year, and interest thereon at a stated rate. The deed provided that the borrower would not transfer the mortgaged property until payment in full of the amount due for principal and interest and that any money paid should be first credited to the latter.

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(1) 8 A.W.N. (1888) 128.

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In a suit brought more than seven years after the date fixed for payment, the Courts below gave effect to the defence that the creditor had no right under the contract to interest at the rate specified therein for the period after that date; and that limitation barred recovery of money by way of damages for a breach of the contract.

Held, that the Courts below had erred as to the effect of the contract, and that there had been a failure to regard the intention shown by the conditions in the mortgage-deed above mentioned, the High Court appearing to have acted on a fixed rule of construction laid down for transactions of this kind, instead of arriving at the meaning of the deed by an examination of its terms. By the true construction of the contract, when the whole of it was considered, the creditor was entitled to payment of the principal with interest at the rate stated in the deed for the entire period of non-payment. This should be down to the date of the decree of the first Court. In the decree should be added interest from its date till payment at six per cent. per annum.

Even supposing the construction put by the Courts below to have been correct, the creditor still might have recovered six years' arrears of interest by way of damages, notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid, and unbarred by time.

The judgment of the Full Bench in *Narindra Bahadur Pal* v. *Khadim Husain* (1) was not approved; as it disregarded conditions in the mortgage deed (which in that case resembled the present deed) indicating the intention of the parties to it.

[F., 20 A. 171 (P.C.)=2 C.W.N. 129=25 I.A. 9=7 Sar. 273; 12 Ind. Cas. 352; 11 M.L.J. 183 (185); **Appr.**, 20 A. 219 (233) (F.B.); 24 C. 699=1 C.W.N. 437; 25 C. 246; 20 M. 149; 20 M. 371; 23 M. 531=10 M.L.J. 101; 23 M. 637 (642); 12 C.P.L.R. 18; 14 C.P.L.R. 49; 2 Ind. Cas. 850; L.B.R. (1893-1900) 457; 2 N.L.R. 162 (168); 2 O.C. 37 (43); 11 O.C. 323; **R.**, 6 Ind. Cas. 664=76 P.L.R. 1910=56 P.W.R. 1910; 16 Ind. Cas. 216 (217); **D.**, 114 P.R. 1901=175 P.L.R. 1901; 95 P.R. 1902=22 P.L.R. 1903; 95 P.L.R. 1902]

APPEAL from a decree (27th April 1891) of the High Court affirming a decree (7th September 1888) of the Subordinate Judge of Gorakhpur.

[40] The appellants were the successors in the firm of the plaintiffs who filed this suit upon a registered deed of mortgage executed on the 17th February 1880 by the late Raja Bhawani Ghulam Pal, who died after the decree of the High Court and whose representatives were brought on to the record for the purposes of this appeal on the 16th July 1892. The latter were now named as respondents; but Raja Narindar Bahadur Pal, the first of them, alone appeared as respondent to support the decree.

The material part of the deed, as well as the facts, appear in their Lordships' judgment.

The principal question raised by this appeal was whether the High Court had rightly construed the agreement in the mortgage-deed to repay the principal borrowed with interest at a specified rate within a year, with certain accompanying agreements; one against the transfer of the security by the mortgagor, and another relating to the appropriation of the payments to be made to the mortgagee. This governed the question whether the interest was to be paid at the specified rate during the whole time in which the debt and interest had remained unpaid. Secondly, it was disputed whether, supposing the contract to be only for a year's interest at the specified rate, compensating damages could be given for non-payment during the subsequent period, or were barred by limitation.

To secure the principal sum of Rs. 19,157, borrowed by him, the Raja mortgaged a mauza in zila Basti, by deed dated the 17th February 1880; and it was thereby agreed that he would repay the amount in full,

(1) 17 A. 581.

principal and interest at Re. 1 as. 6 per mensem," within a year." The borrower agreed that he would not transfer the mortgaged property until payment of both the principal and interest should have been made; and the deed provided that the amounts paid should be first credited to the payment of interest, and that the balance, after that, should go to reduce the principal. Nothing had been paid for principal or interest on the 19th June 1889, when in this suit the representatives of the mortgagee claimed payment, with interest at the rate of Re. 1-6 per mensem, for [41] the whole period, from the 17th February 1880 to the date of suit brought, that interest amounting to Rs. 26,358. The defendant, who disputed the rate of the interest, denied that he was liable for the period after the expiration of a year from the date of the deed at the rate claimed. He also contended that, as the property was not charged as a security for the payment of the interest after the date when the principal had become due, the six years' bar of limitation applied to the claim for damages for breach of contract.

The Subordinate Judge decreed the principal and one year's interest only at the rate stated in the mortgage-deed. The latter he construed as not containing any express agreement to pay interest at the rate specified after the expiration of one year. He was of opinion that no such agreement could be implied, and he held that if the claim for the amount due for interest after the 17th February 1881, should be put forward as damages for the delay in payment of the principal and interest for one year, then the claim by way of such damages would be barred by time, the breach of contract having occurred more than six years before the date of the suit. Some alleged acknowledgments of liability by the defendant were not, in the Subordinate Judge's opinion, sufficient to satisfy section 19 of the Indian Limitation Act, 1877. His judgment was mainly founded on the law laid down in *Mansab Ali* v. *Gulab Chand* (1). The decree was for interest on the amount, which he decreed at the rate of Rs. 12 per annum, from the date of the decree.

On the plaintiffs' appeal the High Court (STRAIGHT and TYRRELL, JJ.) affirmed the decree of the first Court.

The material part of the judgment of the High Court was as follows :—

"The present suit was instituted on the 19th of June 1888, and by "it the plaintiffs sought to recover from the mortgagor-defendant and "the mortgaged property the sum of Rs. 19,157 principal with interest "from the 17th February, 1880, to the date of the institution of the suit, "at the rate mentioned in the bond, amounting to [42] Rs. 26,358-7, "or in all Rs. 45,515-7. The defendant did not deny his liability under "the bond as to the principal or the interest at the rate mentioned in the "bond up to the date on which it became payable, but he objected to the "claim of the plaintiff to the interest *post diem* on the ground that there "was no covenant in the bond for the payment of such interest. The "learned Subordinate Judge, from whose decree the appeal before us has "been preferred, gave the plaintiff a decree for the principal amount due "upon the bond, together with interest for one year amounting to "Rs. 3,156, and he dismissed the rest of the claim.

"The plaintiffs have appealed, and their appeal is confined to two "matters: *first*, the mode in which the learned Subordinate Judge has "construed the bond; and *second*, to the question of *post diem* interest.

(1) 10 A. 85.

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"In other words, two questions only are at issue before us in appeal, "namely, whether the terms of the mortgage-bond, dated the 17th February, 1880, provided for the payment of interest, after the expiry of one "year from the due date of the bond, and whether, regarding the *post diem* interest as damages, the bar of the limitation of article 116 of Act "No. XV of 1877 is saved by any acknowledgment or acknowledgments of "of the kind mentioned in s. 19 of such last mentioned Act.

"As to the first of these two points there does not appear to me any "room for doubt as to the language of the instrument of mortgage which "is clear. It is as follows:—'I shall pay off without any objection the "said amount in full, principal and interest, and at the rate of Re. 1-6 per "cent. per mensem, within a year.....If I fail to pay off the amount "within the fixed term, the said bankers shall be competent to realise the "amount,' &c.

"There is no distinction I can see to be drawn between the present "case and that of *Sri Niwas Ram Pande* v. *Udit Narain Misr* (1), and "as the considered judgment in the case was delivered after we had "heard Pandit Bishambar Nath for the plaintiffs-appellants upon the first "question in this case, the reasoning we applied in that judgment is appli- "**[43]** cable to this appeal, and it is not necessary to repeat here the "remarks we then made. I am satisfied that, upon the language of the "instrument dated the 17th February 1880, there was no convenant for "the payment of *post diem* interest, and that the only footing upon which "the plaintiffs can be recouped for the loss they have sustained by the "non-payment of the mortgage money upon the due date, is by way of "damages, the limitation to a suit for which is provided by Article 116 of "the first schedule of the Limitation Act. That being so, we have now "to consider whether that limitation stands in the way of their getting "any damages. The due date of the mortgage-bond sued upon was the "17th February 1881, and the suit was brought on the 19th June, 1888, "which would be seven years and some three or four months after the "date when the amount of the instrument of mortgage became payable."

The judgment then considered documentary evidence that had been given of an alleged acknowledgment by the defendant of his liability to pay interest upon the bond debt after the due date of the bond and arrived at the conclusion that there was nothing to be found that could be taken to constitute any such acknowledgment within s. 19 of the Indian Limitation Act. The judgment added:—"It is not without regret that I "have placed this construction on these documents. The defendant had "the use of the plaintiff's money for a considerable period of time, and "the rate of the interest in the bond was not an unreasonable one, which, "but for the difficulty of limitation, I should not have hesitated to treat "as a fair basis for estimating damages."

On this appeal—

Mr. *H. A. Giffard*, Q. C., and Mr. *Herbert Cowell*, for the appellant, submitted that there was error in the judgment of the High Court; and that, according to the true construction of the agreement to pay interest, the rate was to be Re. 1 as. 6 a month after, as well as before, the due date. That the rate prescribed by the deed should continue until the payment of the principal should be made was the intention at the time when the contract was **[44]**

(1) 13 A. 330 = 11 A.W.N. (1891) 66.

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made, as evidenced by the terms of the deed. It was not in the contract that the creditor should enforce payment of the debt at due date, or else submit to being paid interest at a reduced rate. On the contrary, it was clear, when the whole deed was read, that although it was to be open to the debtor to redeem within the year, the specified rate of interest was to continue until payment of the principal and interest should be made. This view was supported by the agreements accompanying the mortgage, *viz.*, that the debtor was not to transfer tha mortgaged property till payment had been made of the principal and interest; and that the amounts paid by the debtor should be first credited to payment of the interest, and then that the balance should be credited to payment of the principal. This hardly applied to a payment within the year.

In the next place it was argued that, even if the High Court had been right in its construction, and even if the contract was restricted to the year, for the interest specified, at all events, the creditor would be entitled to interest at a reasonable rate, whether called by that name or not, and whether given by the court under the authority of the Interest Act XXXII of 1839, or awarded by the court as damages, compensating for the breach of contract. Viewing the sum to be awarded as damages, and having regard to the law of limitation, the court could have given six years' interest out of the seven years' and three months' interest claimed, on the assumption that articles 115 and 116 of Act XV of 1877 were applicable. Compensation would be recoverable because the cause of action, in respect of the breach of contract to pay the principal and interest, was a continuing cause of action during non-payment. The High Court had itself pronounced the rate specified in the deed to be a reasonable one. Act XXXII of 1839 was cited, also Act XVIII of 1855, s. 2. A mortgage-deed, similar to that in the present suit had been held by the Calcutta High Court in *Bikramjit Tewari* v. *Durga Dyal Tewari* (1) to be within the meaning, so far as the promise to repay was concerned of the Interest Act above mentioned, which empowered the court to give [45] interest on money payable, within a certain term, under a written instrument. In *Narindra Bahadur Pal* v. *Khadim Husain* (2) the High Court at Allahabad had treated the agreement against any transfer by the mortgagor until payment, as one from which no inference could be drawn in regard to whether the interest after due date should be at the same rate as it had been before that date; and had dealt in the same way with the agreement that money paid by the mortgagor should be first credited to payment of the interest. It was argued that this was wrong. Reference was also made to *Sri Niwas Ram Pande* v. *Udit Narain Misr* (3). This was also erroneously decided on the construction of the contract as to interest. Reference was also made to *Bhagwant Singh* v. *Daryao Singh*(4) and the decision of the Judicial Committee in *Chajmal Das* v. *Brijbhukan Lal* (5).

Mr. *J. D. Mayne*, for the respondent, Raja Narindar Bahadur Pal, referred to the terms of the mortgage-deed contending that by none of those terms was the interest made a charge upon the property mortgaged for more than one year. The interest for the first year was charged upon the land. This went to support the correctness of the opinion that a difference in the rates of interest before and after the due date was not contrary to the terms employed in the deed. The clear restriction to "within the

(1) 21 C. 274. (2) 17 A. 581. (3) 13 A. 330 = 11 A.W.N. (1891) 66.
(4) 11 A. 416. (5) 17 A. 511 = 22 I.A. 199.

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year" had been rightly regarded in the judgment of the Court below He referred to *Narindra Bahadur Pal* v. *Khadim Husain* (1) and the cases cited in the judgment in that case, especially to *Cook* v. *Fowler* (2), cited also in Lala *Chajmal Das* v. *Brijbhukhan Lal* (3); and he referred to the expressions of the judgments in the House of Lords regarding their being no implied contract to pay interest after, at the same rate as before, written promises to pay on a certain date. It was also contended that the breach of contract took place on the failure to pay on the due date, a failure once and for all. In this view of the case the **[46]** High Court had held the claim for damages to be barred. Reference was made to articles 115, 116 and 132, of the Limitation Act XV of 1877.

Counsel for the appellant was not called upon to reply.

Afterwards, on the 31st July, their Lordships' judgment was delivered by SIR R. COUCH:

JUDGMENT.

By a deed dated 17th February 1880, Raja Bhawani Ghulam Pal, the defendant, now represented by the respondents (the first of whom alone defends this appeal), mortgaged and hypothecated a certain mauza to Chhedi Lal, the predecessor in title of the plaintiffs who are now appellants, to secure the principal sum of Rs. 19,157. The deed then proceeded "thus: "And I convenant and record that I shall pay off without any "objection the amount in full, principal and interest at the rate of Re. "1-6-0 per cent. per mensem within a year, without raising any objection "whatever. If I fail to pay off the amount within the fixed term, the "said bankers shall be competent to realize the amount by any means "possible, from my person and the properties mortgaged, and from other "properties belonging to me, and I or my heirs neither have nor shall we "have any objection whatever to it. Until the payment in full of this "amount, principal and interest, I shall not transfer either directly or "indirectly, the mortgaged property to anyone else, and if I do, such a "transfer should be deemed to be false and inadmissible. The amounts "paid by me should be first credited to the payment of interest, and the "balance should be credited to that of the principal, and I shall have them "entered on the back of the document."

No payment having been made, the plaintiff instituted this suit on 19th June 1888, for the usual mortgage decree. The Subordinate Judge of Gorakhpur passed a decree in the usual form for the sum of Rs. 22,313, being the principal of the loan with one year's interest, and a further sum for costs. The rest of the claim he dismissed. He held on the authority of a decision of the High Court in a similar case that the mortgage-deed does not provide for interest after the first year. Being then pressed to **[47]** give damages by way of interest, he held that such a claim being compensation for breach of a contract was barred by articles 115 and 116 of the Limitation Act.

The plaintiffs appealed to the High Court who affirmed the decision of the Subordinate Judge on both points, and so dismissed the appeal, though without costs. From that decree the present appeal is brought Supposing the construction put by the Courts below on the deed to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why.

(1) 17 A 581. (2) L.R. 7 E. and I. A. 27. (3) 22 I. A. 199 = 17A. 511.

The principal debt was not time-barred, and it was not paid. Every day that it remained unpaid there was a breach of contract, and the bar of time applies only to breaches occurring six years before suit.

But it is not necessary to dwell further on this point, because their Lordships think that the Courts below have misconstrued the deed. Indeed they do not find in the judgments any attempt to arrive at the meaning of the deed by an examination of its terms. Both Courts appear to have followed decisions in other cases, according to which it would seem that in the High Court of Allahabad a fixed rule of construction has been laid down for transactions of this kind, without much regard to what the parties have actually said.

The latest case of the kind was decided as late as June 1895, *Narindra Bahadur Pal* v. *Khadim Husain and others* (1) after the decision of the case now under appeal; but it proceeded on the same judicial lines, and as it was referred to a Full Bench because of a discrepancy between the Allahabad and the Calcutta High Courts, it may be taken as the most authoritative statement of the views of the Allahabad Court.

The instrument to be construed resembled very closely that on which this Board is now engaged. The mortgagor covenanted to pay the principal loan with interest within one year. He then hypothecated land to secure "the said sum of money", and covenanted not to transfer the land "until I pay in full the whole of **[48]** the amount of principal and "interest." ..... "If I fail to pay the money with interest, the "mortgagee was to recover the said sum of money with interest" from the property. And there was a provision that payments by the mortgagor should be credited, first to interest and afterwards to principal.

Upon that instrument the Court delivered the following judgment:—

"In our opinion the construction of the mortgage-deed admits of no "doubt. The term was one year from the 28th of April 1879. The mort-"gagees could on the expiration of that year sue for and recover the princi-"pal moneys remaining due at the expiration of that year; in certain events "the mortgagees could before the expiration of that year sue for and re-"cover the principal and interest due at the date of their suit. On the other "hand, the mortgagor could, by payment to the mortgagees or into the "treasury of the Court of the principal and interest due, redeem the "mortgage even before the expiration of the year. The payment of *post* "*diem* interest was not provided for by the mortgage-deed, and certainly, "according to the ordinary construction of such deeds in these provinces, "which we believe to be correct, was not contemplated by the mortgagor. "The conditions in the mortgage-deed binding the mortgagor not to "transfer the mortgaged property, and giving the mortgagee power to "recover the principal money with interest if the mortgagor failed to pay "the principal with interest on the due date, are ordinary conditions "commonly inserted in mortgage-deeds in these provinces, whether it is "intended that interest shall run only to the due date or shall run not "only to the due date but after due date and until the principal sum shall "have been paid. Such conditions are never construed in this Court as "indicating that interest shall continue to run after the due date."

Now there is not, as the learned Judges seem to imply, any different mode of construing language in the North-West Provinces from that which prevails elsewhere. Conditions in mortgage deeds must not be disregarded because they happen **[49]** to be common ones. If it be

(1) 17 A. 581.

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19 A. 39 (P.C.) = 23 I.A. 138 = 1 C.W.N. 52 = 6 M.L.J. 214 = 7 Sar. P.C.J. 88.

true that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment, it is very difficult to say what it does mean. The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor: but it rarely happens, and is rarely contemplated, that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interests points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently bound to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction.

To their Lordships's understanding the meaning of the contract before them is plain enough. The mortgagee cannot, except in certain events, enforce payment for a year. The mortgagor may pay at any time, and is bound to pay in a year's time, "the said amount" (*i.e.*, Rs. 19,157 the only amount yet mentioned) "principal and interest," *i.e.*, whatever interest may be due at the time of payment, whether for a year or a less time. If he fails, the mortgagee may proceed to realize "the amount," the obvious meaning of which is, principal and interest to the time of realization. Then comes the covenant not to transfer until payment "of this [50] amount" (*i.e.*, the amount to be realized "principal and interest") and then the priviso that payments shall be applied first in reduction of interest, and entered on the back of the document. The strictest construction of the words is in accordance with the usual intentions of the parties to a simple mortgage. Why they should be wrested from that construction in favour of an unusual and most improbable intention is not explained.

Their Lordships hold that the plaintiffs are entitled to recover their principal debt with interest at the rate mentioned in the mortgage-deed, up to the date of the Subordinate Judge's decree, and thereafter at the rate of 6 per cent. per annum. The decree of the High Court should be discharged.

The respondents ought to pay the whole costs of suit in both the Courts below. The case should be remitted to the Subordinate Judge to take the proper accounts, and give further directions.

Their Lordships will humbly advise Her Majesty to this effect.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:
Messrs. *Ranken, Ford, Ford and Chester.*
Solicitors for the respondents:
Messrs. *Pyke and Parrott.*

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Before Mr. Justice Knox, Mr. Justice Aikman and Mr. Justice Blennerhassett.

SHAH ABU ILYAS (*Applicant*) *v.* ULFAT BIBI (*Opposite Party.*)*

[14th August, 1896.]

Criminal Procedure Code, Sections 488, 489, 490—*Maintenance—Plea of divorce in answer to an application for enforcement of an order for maintenance of a wife.*

Where in answer to an application for enforcement of an order under section 488 of the Code of Criminal Procedure for the maintenance of a wife, the party against whom such order is subsisting pleads that he has lawfully [51] divorced his wife and therefore the order can no longer be enforced, it is the duty of the Court hearing the application to entertain and consider such plea, and, if it find the plea established, to decline to enforce the order for any period subsequent to the date when the marriage ceased to subsist between the parties.

In such case, where the parties are Muhammadans, the marriage will be deemed to subsist until the expiration of the *iddat*.

In section 489 of the Code the "change in circumstances" referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail a stoppage of the allowance.

So *held* by Aikman and Blennerhassett, JJ., *dissentiente* Knox, J.

In the matter of the petition of Din Muhammad (1); *Abdur Rohoman* v. *Sokhina* (2) *Zeb-un-nissa* v. *Mendu Khan* (3); *In re Kasam Pirbhai and his wife Hirbai* (4); *In re Abdul Ali Ishmailji and his wife Husenbi* (5); *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (6) and *Mussammat Baji* v. *Nawab Khan* (7) referred to. *Nepoor Aurut* v. *Jurai* (8) dissented from. *Mahbuban* v. *Fakir Bakhsh* (9) overruled.

[F., 2 Cr. L.J. 40=5 P.R. 1905 (Cr.)=85 P.L.R. 1895; R., 10 Cr. L.J. 502 (503)=4 Ind. Cas. 140=20 M.L.J. 12 (19)=7 M.L.T. 33 (38); 1 L.B.R. 19.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Mr. *C. Dillon*, for the applicant.

JUDGMENT.

KNOX, J.—Musammat Ulfat Bibi presented an application before a Deputy Magistrate of the first class at Basti, praying for an order of maintenance to be granted in her favour under s. 488 of the Code of Criminal Procedure.

Shah Abu Ilyas, the husband, appeared to answer this application and objected that Musammat Ulfat Bibi was no longer his wife, as he had divorced her on the 11th of September 1895. There is nothing to show whether the divorce which he sets up was a revocable or irrevocable divorce. If it was the latter, the relationship of wife was no longer in existence in October 1895, the time at which these proceedings took place.

The learned Deputy Magistrate considered the objection raised by Shah Abu Ilyas, considered the fact of divorce proved, but held [52] that

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* Criminal Revision No. 184 of 1896.

(1) 5 A. 226. (2) 5 C. 558. (3) 5 A.W.N. (1885) 29.
(4) 8 B. H. C. R. 95. (5) 7 B. 180. (6) 14 C. 276.
(7) 21 P. R. 1894 Cr. (8) 10 B.L.R. App. 33. (9) 15 A. 143.

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Shah Abu Ilyas was liable for the maintenance of his wife for the term of her *iddat*.

He gave an unconditional order, however, for the payment by Shah Abu Ilyas of Rs. 15 per mensem not terminable with the period of *iddat*. No attempt was made by Shah Abu Ilyas to get this order revised.

On the 9th of December Shah Abu Ilyas, instead of getting the order revised, went to a Magistrate and objected that, as the period of *iddat* would expire on the 11th of December, he should not be liable for maintenance after that date. He made the application under section 489. It was refused, and in my opinion rightly refused, as section 489 has no application to such a case.

On the 6th of January 1896, Ulfat Bibi applied for enforcement of the order of maintenance. Her application was under s. 490. The Magistrate before whom it was laid satisfied himself as to the identity of the parties and the non-payment of the allowance due, and granted the application.

It is contended that he should have, in a proceeding instituted under s. 490 of the Code of Criminal Procedure, inquired into the fact whether Musammat Ulfat Bibi was still the wife of Shah Abu Ilyas. I have already considered this contention in *Mahbuban* v. *Fakir Bakhsh* (1) and I see no reason to alter the view I then formed. The law appears to me in s. 490 to be laid down in clear and definite terms, and I should be in my opinion framing new law if I were to add to s. 490 the words—"On the Magistrate being satisfied that the applicant is no longer the wife of the person against whom the order was originally made." If the person against whom the order was made wishes to contest the order, he should in my opinion do so when the order is passed, and not wait until it is about to be enforced. Otherwise we might have the unseemly case of a wife obtaining an order of maintenance from the Magistrate of the District one day, taking it the next day for enforcement to a Subordinate Magistrate, who could apparently then hold that she was not a wife and refuse to enforce it. It may **[53]** be that the law is defective, or it may be that the Legislature intended such cases to be dealt with by superior Courts in revision. I incline to the latter view. In any case, I hold that the words of s. 490 are clear, precise and imperative, and that the Legislature did not intend the Magistrate to whom an order like the present, unconditional and undetermined, was taken to consider any point other than the identity of the parties and the non-payment of the allowance due. I do not think it necessary to refer further to the rulings cited. They have been virtually considered by me in *Mahbuban* v. *Fakir Bakhsh*. I would decline to interfere and would reject the application.

AIKMAN, J.—This is an application for revision presented by one Shah Abu Ilyas under the following circumstances :—

The applicant was married to Musammat Ulfat Bibi.

Ulfat Bibi, on the 19th of September 1895, applied to a Magistrate of the first class for an order under s. 488 of the Code of Criminal Procedure directing her husband to make her a monthly allowance for her maintenance.

When Shah Abu Ilyas was called on to show cause why such an order should not be passed, he alleged that Musammat Ulfat Bibi was no longer his wife, as he had divorced her on the 11th of September 1895.

(1) 15 A. 143.

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When such a plea is put forward in answer to an application for an order for maintenance under s. 488, the Magistrate dealing with the application is not only competent, but it is his imperative duty, to inquire into the plea, and determine on such evidence as may be adduced before him whether the plea is a valid one; that is, whether the relation of husband and wife subsists between the person against whom an order is asked for and the person making the application, for, unless such conjugal relation subsists, a Magistrate has no authority to pass an order for maintenance as between husband and wife. In this case the Deputy Magistrate recorded evidence as to the alleged divorce, but he did not determine upon that evidence whether Shah Abu Ilyas had divorced his wife as he alleged. He contented himself with saying **[54]** that, even if a divorce had taken place, the husband was liable to support his wife during the period of *iddat*, which period had not expired on the 15th October 1895, when the case was disposed of. He directed Shah Abu Ilyas to pay Rs. 15 per mensem for the support of Musammat Ulfat Bibi, but in his order he fixed no period during which this monthly allowance was to continue.

The next stage of the case was that on the 9th of December 1895, Shah Abu Ilyas deposited in Court Rs. 15, being the monthly allowance from the date of the order up to the 15th of November 1895, along with a petition expressing his willingness to pay the allowance up to the 11th of December 1895, on which date, he contended, the period of *iddat* expired, but objecting to pay it after that date.

On the 6th of January 1896, Musammat Ulfat Bibi presented a petition in Court asking for the enforcement of the maintenance order, and stating that, although three months had elapsed, she had only received one month's allowance. (This statement was not quite accurate, as three months did not expire until the 15th of January 1896.) Mr. Munna Lal, the Deputy Magistrate who had passed the order for maintenance, having gone on leave, both these petitions came on for disposal before Mr. D. L. Johnston, Joint Magistrate. Before him Musammat Ulfat Bibi asserted her right to a monthly allowance irrespective of the period of *iddat*.

Shah Abu Ilyas, on the other hand, relying on his allegation of divorce, and on the decision of Mahmood, J. in *In the matter of the petition of Din Muhammad* (1), contended that the order of maintenance had become *functus officio* and incapable of enforcement.

After considering the ruling referred to above, and the ruling of my brother Knox in *Mahbuban* v. *Fakir Bakhsh* (2), the Joint Magistrate suggested to Shah Abu Ilyas that he should put in an application under s. 489 of the Code of Criminal Procedure. Shah Abu Ilyas adopted this suggestion, and on the 25th of January 1896 put in an application purporting to be under **[55]** s. 489, and asking that the allowance should be stopped. The case was disposed of by the Joint Magistrate by an order dated the 28th of January 1896. In that order he came to the conclusion that s. 489 would not cover the present case. That section runs as follows:—"On proof of a change in the circumstances of any person receiving under s. 488 a monthly allowance or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees be not exceeded."

In the case *Nepoor Aurat* v. *Jurai* (3) the Calcutta High Court (Phear and Glover, JJ.) expressed an opinion that the corresponding section

(1) 5 A. 226. (2) 15 A. 143. (3) 10 B. L. R. App. 33.

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(537) of Act No. X of 1872, which does not differ materially from s. 489 of the present Code, would probably apply to a case like the present. Phear, J., observes:—"S. 537 provides a mode in which the person, against whom the order is made, can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband in his presence divorced his wife, such an alteration in circumstances did occur which would justify the Deputy Magistrate upon the application of the husband in altering the order of maintenance in favor of the wife."

Notwithstanding this opinion of the learned Judges of the Calcutta High Court, it appears to me that the view taken by the Joint Magistrate is correct. I entertain no doubt that the "change in circumstances" referred to in s. 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail the stoppage of the allowance. I concur with the following observations of Mahmood, J., in the case of *Din Muhammad* (1):—"The words 'The Magistrate may make such alteration in the allowance ordered as he deems fit,' preceded as they are by the word 'wife,' and followed **[56]** as they are by a limitation as to the amount of the monthly allowance, clearly indicate that 'the alteration in the allowance' contemplated by that section only refers to a power to alter that amount and not to a total discontinuance thereof." The same view was taken in *Abdur Rohoman* v. *Sakhina* (2).

In disposing of the petitions before him, the Joint Magistrate rightly held that a plea of divorce, if made out, would not justify him in cancelling the order of maintenance under the penultimate paragraph of s. 488. The paragraph sets forth three grounds upon proof of which a Magistrate is authorized to cancel an order of maintenance passed in favour of a wife, and divorce is not one of these.

In considering whether he could give effect to the plea of Shah Abu Ilyas, the Joint Magistrate referred to two rulings of this Court, *viz.*, the ruling of Mahmood, J., *In the matter of the petition of Din Muhammad* (1) and the ruling of my brother Knox in *Mahbuban* v. *Fakir Bakhsh* (3), in which he dissented from a previous decision of this Court by Oldfield, J., *viz.*, *Zeb-un-nissa* v. *Mendu Khan* (4). It is with regard to these discordant rulings that the present case has been referred to this bench.

I find myself unable to agree with the view taken by my brother Knox. That view appears to me to be opposed not only to decisions of this Court, but to decisions of the Calcutta, Bombay and Madras High Courts and the Chief Court of the Punjab, and, so far as I can ascertain, it has not been adopted by any authority save my brother Knox. It has been repeatedly held that the Legislature in enacting s. 488 of the Code of Criminal Procedure did not intend to interfere with the right of divorce.

It cannot in my opinion be disputed that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under s. 488 be ordered to provide for the woman's support and I hold that it is only on the supposition of the continued existence of that relationship that the allowance can **[57]** continue. Dealing with the corresponding section of the Presidency Magistrates' Act (No. IV of 1877),

(1) 5 A. 226. (2) 5 C. 558. (3) 15 A. 143. (4) 5 A.W.N. (1885) 29.

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Ainslie and McDonell, JJ. observed:—"In our opinion it is, under the terms of s. 234, *as essential to the continued operation* as to the original making of an order of maintenance that the recipient of the allowance should be *a wife* at the time for which maintenance is claimed, and consequently, for the purposes of Chapter XVIII of the Presidency Magistrates' Act of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of dissolution. *Abdur Rohoman* v. *Sakhina* (1).

In the case *In re Kasam Pirbhai and his wife Hirbai* (2) it was held by Westropp, C. J., and Bailey, J. that a husband against whom a maintenance order had been passed and who had subsequently divorced his wife was no longer liable under the maintenance order. The learned Judges observe in regard to the maintenance order:—"That was a proper order at the time it was made, but we think the ground work of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. On the question that is before us, we say that we do not think that the Magistrate ought to issue an attachment upon, or otherwise to execute the order, it being in fact *functus officio*." That case was followed by Sarjent, C.J., and Melvill, J., in *In re Abdul Ali Ishmailji and his wife Husenbi* (3), where it was held that after a divorce a Magistrate should no longer enforce an order for maintenance.

In the case *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (4) the learned Judges (Prinsep and Beverley JJ.) held that a man who had been ordered by a Magistrate to pay maintenance to a woman on the ground that she was his wife, and who [58] had succeeded in procuring from a Court of competent jurisdiction a declaration that no relationship existed between him and the woman, might ask the Magistrate on the authority of *Abdul Rohoman* v. *Sakhina* (1) and *Abdul Ali Ishmailji* v. *Husenbi* (3) to abstain from giving any further effect to his order for maintenance.

It appears from a note in Prinsep's Code of Criminal Procedure, 11th edition, p. 318, that the Madras High Court has held that a Muhammadan wife divorced after an order for maintenance had been passed in her favour is entitled to maintenance during her *iddat*, but that the order cannot be enforced for a time subsequent to the expiry of the *iddat*.

In the case *Musammat Baji* v. *Nawab Khan* (5) the Chief Court of the Punjab, after considering the ruling of my brother Knox and other rulings referred to above, held that it *is* open to a Magistrate to entertain and inquire into a plea of divorce, and, if he finds it established, to refuse to enforce his order, at least after such date as the divorce operates under the law and custom governing the parties to disentitle the woman to further maintenance.

My brother Knox in the case *Mahbuban* v. *Fakir Bakhsh* (6) held that "when a person in whose favour an order of maintenance has been given takes it before a Magistrate and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance."

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(1) 5 C. 558 (562) (2) 8 B. H. C. R. 95. (3) 7 B. 180. (4) 14 C. 276.
(5) 21 P. R. 1894 (Cr.) (6) 15 A. 143.

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Acting upon this decision the Joint Magistrate in this case directed that the order for maintenance should be enforced, and the Sessions Judge, before whom the case was taken in revision, declined to interfere with the order. I regret that I cannot concur with the decision of my brother Knox, which, as shown above, is opposed to the decisions of all the other Judges who have had to consider the point.

[59] It appears to me to be a mistake to say that the only questions which a Magistrate before whom an order for maintenance is produced under s. 490 has to consider are whether he has jurisdiction over the person affected by the order, and whether he is satisfied as to the identity of the parties.

A most material question which in my opinion it is incumbent on him to consider is whether the order to which it is sought to give effect is still in force, or whether, to use the expression of Westropp, C.J., it has become "*functus officio.*"

Take the case of a man who under s. 488 had been ordered to pay a monthly sum for the support of his illegitimate child until it should attain the age of twelve years. If such an order were produced before a Magistrate under s. 490, I do not think it could seriously be contended that all the Magistrate has to do is to satisfy himself that he has jurisdiction, that the parties are the same, and that the allowance is unpaid. He has further to consider the question of the age of the child, so as to ascertain whether the allowance claimed is or is not due under the order. So in the case of a woman producing under s. 490 an order for her maintenance, the Magistrate has to satisfy himself whether the allowance asked for is or is not due under the order. The order can only have been passed for an allowance to the woman as a wife, and, if she no longer occupies that position, the allowance is no longer due under the order, save for the period before she ceased to be the wife of the person ordered to pay the allowance.

This period, I hold, includes in the case of Muhammadans the period of the *iddat*. It is true that Oldfield, J., in the case from which my brother Knox dissented, held that no allowance was payable after the actual date of divorce, but he gives no reasons for his opinion, which is opposed to the judgment of Mahmood, J., in the case of *Din Muhammad*(1) and of the Madras High Court in the case referred to above. The passage quoted from the Hedaya by Mahmood, J. ("A marriage is accounted still to subsist during the *iddat* with respect to various of its effects, such as the obliga[60]tion of alimony, residence and so forth") is sufficient authority for the continuance of the allowance during the *iddat*.

For the above reasons I would set aside the order of the Joint Magistrate, and direct him to come to a finding on such evidence as may be adduced before him, as to whether Shah Abu Ilyas divorced his wife, and if so, on what date. If he finds that Shah Abu Ilyas did divorce his wife, he should determine what is the period of the *iddat* and enforce the maintenance order for that period and to no later date.

BLENNERHASSETT, J.—The authorities collected by my brother Aikman show a strong consensus of opinion among the High Courts of Calcutta, Bombay, Madras, and the North-Western Provinces, and the Chief Court of the Punjab in support of the view expressed by him.

(1) 5 A. 226.

Following those authorities, I concur in the judgment of my brother Aikman and in the order proposed by him.

BY THE COURT.

The order of the Court will be that the order of the Joint Magistrate be set aside, and the Joint Magistrate inquire into and determine whether Shah Abu Ilyas has divorced his wife, and if he has, that he should determine what is the period of the *iddat* and enforce the maintenance order until the expiry of that period and to no later date.

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19 A. 60=16 A.W.N. (1896), 187. (*a*)

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

THAKURI AND OTHERS (*Plaintiffs*) *v.* BRAMHA NARAIN AND OTHERS (*Defendants*).* [14th August, 1896].

Court-fee—Act No. VII of 1870 *(Court-Fees Act), Sch. ii art.* 17, *cl. vi—Civil Procedure Code, s.* 539—*Prayer for appointment of plaintiffs as trustees—Declaratory relief.*

A prayer in a plaint purporting to be a plaint under s. 539 of the Code of Civil Procedure, that the plaintiffs themselves may be appointed trustees is not a prayer for possession requiring to be stamped at the value of the trust pro-[61] perty, but is a prayer for a relief falling within art. 17, cl. vi. of the second schedule to Act VII of 1870. *Sonachala v. Manika* (1); *Delroos Banoo Begum v. Asghur Ally Khan* (2) and *Omrao Mirza* v. *Jones* (3) referred to and distinguished.

[F., 21 A. 200; Rel. on, 14 C.W.N. 932 (935)=7 Ind. Cas. 92 (93).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is an appeal from an order of the District Judge of Saharanpur rejecting a plaint on the ground that the reliefs sought in the plaint had not been properly valued and the necessary amount of court-fees had not been paid within the time allowed by the Court. One of the plaintiffs-appellants, Thakuri, is dead. We consider that the cause of action survives to the other appellants, and that the appeal may proceed at the instance of those appellants.

The suit was brought under s. 539 of the Code of Civil Procedure by three Hindus who alleged that a trust had been created for certain charitable and religious purposes by Rani Mahtab Kunwar; that the trustee appointed by her had committed a breach of the trust by alienating a portion of the endowed property and that the heirs of the trustee had made a gift of the trust property in favour of the person through whom the defendants now claim. The plaintiffs prayed that it might be declared that the property was endowed property. They further prayed that they should be appointed superintendents of the property and that an injunction should be issued to the defendant forbidding him to interfere with the discharge of the plaintiffs' duties as superintendents.

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* First Appeal No. 266 of 1896 from an order of H. Bateman, Esq., District Judge of Saharanpur, dated 1st October 1894.

(*a*) In 16 A.W.N. (1896) 187, this case is cited as First Appeal No. 266 of 1894.

(1) 8 M. 516. (2) 15 B.L.R. 167. (3) 10 C. 599.

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19 A. 60 = 16 A.W.N. (1896) 187.

They also asked the Court to grant such other reliefs as to the Court might seem proper having regard to the provisions of s. 539 of the Code of Civil Procedure.

The learned Judge was of opinion that the suit was substantially one for possession. He ordered the plaintiffs to value the suit as a suit for possession and to pay the amount of court-fees [62] requisite for such a suit within a time fixed by him. The plaintiffs not having complied with this order he has rejected the plaint.

The learned Judge has relied in support of his view on the ruling of the Madras High Court in *Sonachala* v. *Manika* (1). That case is distinguishable from the present. It was not a suit under s. 539 of the Code of Civil Procedure. If the principle laid down in that case were to be applied to a suit under s. 539, and every suit under that section in which the appointment of trustees was prayed for, or the removal of a trustee was sought, had to be treated as a suit for possession of the property, the salutary provisions of that section would be seriously interfered with and in many cases defeated. A suit under that section is brought for the protection and preservation of endowed property, and it is safe-guarded by the rule which requires that it must be brought by the Advocate-General himself, or with the consent of the Advocate-General or such other officer as the Local Government may appoint in this behalf. Instances may often arise in which the trust property is of considerable value. If court-fees had to be paid with reference to that value whenever it was found necessary to bring a suit to remove a trustee who had committed a breach of his trust, such court-fees might be prohibitive and might prevent the institution of the suit In this case the learned Judge below treats the suit as "obviously a suit for possession." We are unable to agree with his view of the nature of the prayer in the plaint. The plaintiffs nowhere seek possession of the property. Although they ask that they may be appointed superintendents, they might never be appointed to that office. The Judge might see fit to appoint some other person as trustee or superintendent, and no occasion might arise for the plaintiffs taking possession of the property. It might also not be necessary to eject the defendant. If the declaration sought for be made, the defendants might themselves cease to interfere with the property. In our opinion therefore the learned Judge below was not right in holding that this was necessarily a suit for possession.

[63] The learned counsel for the respondents cited to us the case of *Delroos Banoo Begum* v. *Ashgur Ally Khan* (2). That was no doubt a suit similar to the one before us in so far that the plaintiffs in that suit asked to be appointed *mutawallis*; but in that case there were emoluments attached to the office of *mutawalli*, and by reason of those emoluments being capable of valuation it was held that the suit was not one in which the subject-matter could not be valued. In *Omrao Mirza* v. *Jones* (3) it was held that the right to retain control over trust property could not be estimated at a money value and that a suit for that purpose would ordinarily fall within art. 17, cl. vi, of the second schedule to the Court-Fees Act. In that particular case, however, the plaintiff had chosen to put a valuation on the subject-matter of his suit, and the Court held that as that valuation afforded a basis for the assessment of court-fees, the fees should be paid with reference to it. The two rulings therefore in our opinion do not support the contention of the learned counsel for the respondents.

(1) 8 M. 516. (2) 15 B. L. R. 167. (3) 10 C. 599.

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In our judgment the suit as framed embraced a claim for a declaratory decree to the effect that the property in suit was endowed property. For that portion of the claim the amount of Court-fee was Rs. 10. It also embraced a prayer for the appointment of the plaintiffs as trustees. In our opinion it was impossible to estimate at a money value that prayer in the plaint. Consequently the amount of Court-fee payable for that portion of the claim was Rs. 10 under cl. vi, art. 17 of the second schedule to the Court-fees Act. There was a further prayer for an injunction against interference with the discharge of the duties of the plaintiffs as superintendents. Court-fee was payable in respect of that prayer under s. 7, sub-section 4, clause (*d*), according to the amount at which the relief sought was valued in the plaint. The relief in this case was valued at Rs. 100. There is nothing to show that this was an improper valuation. The amount of Court-fees payable for that part of the claim was therefore Rs. 7-8-0. The total amount of Court-fees payable was **[64]** thus Rs. 27-8-0. There was consequently a deficiency of Rs. 10, which the plaintiffs must supply.

We set aside the order of the District Judge rejecting the plaint, and remand the case to his Court with the direction that he should fix a time within which the deficiency should be made good, and, in case of the plaintiffs' failure to supply the deficiency within the time fixed, he should proceed in the manner provided by s. 54 of the Code of Civil Procedure. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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19 A. 64=16 A.W.N. (1896) 177.

MISCELLANEOUS CRIMINAL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

FARZAND ALI (*Applicant*) *v.* HANUMAN PRASAD (*Opposite Party*).*

[19th August, 1896.]

Criminal Procedure Code, s. 526—Transfer of Criminal case—Grounds upon which transfer may be granted.

What the Court has to consider in the case of an application under s. 526 of the Code of Criminal Procedure is not merely the question whether there has been any real bias in the mind of the presiding Magistrate against the accused, but also the further question whether incidents may not have happened, which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. *Dupeyron* v. *Driver* (1) followed.

[F., 35 A. 5 (6)=10 A..L.J. 357 (359)=13 Cr.L J. 823 (824)=17 Ind. Cas 567 (568); 25 B. 179 (183); R., 33 C. 1183=3 C.L J. 637 (648)=10 C.W.N. 793.]

IN this case a complaint was laid against the applicant in the Court of the District Magistrate of Mirzapur by one Hanuman Prasad, the mukhtar-a'am of the Raja of Bijaipur, charging the applicant with offences under s. 417, s. 421 and s. 424 of the Indian Penal Code.

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* Miscellaneous Application No. 135 of 1896.

In 16 A.W.N. (1896) 177 this is cited as Miscellaneous Application No. 135 of 1895.

(1) 23 C. 495.

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CRIMINAL.
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After examination of the complainant on the 14th of April 1896, the District Magistrate ordered a summons to issue for the appearance of the applicant on the 21st of April. The applicant applied to the High Court for the transfer of the proceedings so instituted against him, and these proceedings [65] were in consequence of such application suspended until the 2nd of May 1896, when the High Court made an order rejecting the application for transfer. Subsequently, on the 16th of May 1896, on the deposition of the complainant, to the effect that in his belief the accused was not likely to appear in answer to a summons, the District Magistrate directed a warrant to issue for the arrest of the applicant and fixed the 20th of May for the hearing. On the 20th of May, after recording a further deposition of the complainant respecting an attempt made to serve the warrant issued on the 16th, the District Magistrate directed a proclamation to issue under s. 87 of the Code of Criminal Procedure for the appearance of the complainant on the 24th of June 1896, at the same time attaching, under s. 88 of the Code, all the moveable and immoveable property of the applicant. In August 1896 the applicant presented this present application under s. 526 of the case pending against him in the Court of the District Magistrate of Mirzapur.

Mr. *Amir-ud-din* and Mr. *H. T. Coleman*, for the applicant.

Mr. *C. Dillon* for the opposite party.

JUDGMENT.

BANERJI and AIKMAN JJ.—This is an application under s. 526 of the Code of Criminal Procedure, 1882, for the transfer from the Court of the District Magistrate of Mirzapur of a case now pending in that Court, in which one Hanuman Prasad is the complainant and the applicant is the accused. It is urged that an order for the transfer would be expedient in the ends of justice.

It appears that an application for the transfer of the same case was previously made and rejected for reasons stated in the judgment of this Court, dated the 2nd May 1896. We declined to permit the applicant to urge in support of his present application any ground which had been or could have been put forward on the previous occasion.

We must observe that in the affidavit now filed by the applicant reasons have been assigned as justifying the transfer, some of which are futile and some baseless. The affidavit does not satisfy us that the Magistrate has prejudged the case or that there is the [66] slightest ground for supposing that he will not try and decide the case with impartiality, nor is there anything to show that he is biased against the accused. But, as was observed by the Calcutta High Court in a recent case (*Dupeyron* v. *Driver*) (1), what the Court has to consider in an application like this is "not merely the question whether there has been any real bias in the mind of the presiding Magistrate against the accused, but also the further question whether incidents may not have happened, which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. We approve of this view. We have to consider whether any such incidents have happened in the present case.

(1) 23 C. 495.

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MISCELLANEOUS CRIMINAL

19 A. 64 = 16 A W.N. (1896) 177.

We find that on the 14th of April last the Magistrate, although the charges against the accused were such as would have justified the issue of a warrant in the first instance, and although he was moved by the complainant to issue a warrant, directed a summons only to issue. This certainly was not a circumstance which could be regarded by the accused as indicating the existence of any bias against him in the mind of the Magistrate. Before the date fixed in the summons for the appearance of the accused the first application for transfer had been made to this Court and proceedings in the Magistrate's Court were stayed. When, after the disposal of that application, the case came before the Magistrate, he on the 16th of May 1896 made an order for the issue of a warrant for the arrest of the accused. The Magistrate assigns the following reasons why on this occasion he issued a warrant instead of a summons:—"It is the general belief that Maulvi Farzand Ali will do all he possibly can not to appear in answer to this charge. Rumours are widely current that he is contemplating a pilgrimage to Mecca, or as an alternative that he will cause his death to be given out. It is my belief that a summons will not **[67]** suffice to secure his attendance." It is true that before making the order he examined the complainant, who said:—"It is the general belief that the accused will not appear." But in the examination of the complainant there is no reference to the rumours mentioned by the Magistrate in his order. In the affidavit which has been filed by the Magistrate he refers as his authority for the rumours to information which had reached him from sources which he believed to be reliable. We infer from this that that information was information which the Magistrate had got out of Court. If this is so, not only did he permit rumours relating to the accused in a case pending before him to reach him out of Court, but he allowed his mind to be influenced by such rumours. The order for the issue of a warrant was, as we have said, passed on the 16th of May 1896. Although the accused was said to be residing in another district, the case was set down for hearing on the 20th of May 1896. That date, we may mention, had been directed by the Government of India to be kept as the birthday of Her Majesty the Queen-Empress. On the 20th of May the Magistrate, without waiting for the return of the warrant, directed the issue of a proclamation under s. 87 of the Code of Criminal Procedure, and at the same time ordered the attachment of the whole of the accused's property, moveable and immoveable. Such an order for attachment, we may observe, cannot be made until after the proclamation is issued.

Without for a moment attributing to the Magistrate any desire to act otherwise than in strict accordance with law, and giving him every credit for a wish to act impartially, we feel constrained to say that the hasty procedure of the Magistrate, coupled with his allusion to the rumours referred to above, are incidents which may reasonably create in the mind of the accused an apprehension that his case may not be impartially dealt with by the Magistrate. These incidents have taken place in connection with this very case since the dismissal of the first application for transfer. We therefore think that this is a case in which it is expedient for the ends of justice that an order of transfer should be made.

[68] We accordingly direct that the case be transferred from the Court of the District Magistrate of Mirzapur to that of the District Magistrate of Allahabad.

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APPELLATE CIVIL.

19 A. 68 = 16 A.W.N. (1896) 179.

19 A. 68 = 16 A.W.N. (1896) 179.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

SHAM LAL (*Defendant*) *v.* CHOKHE (*Plaintiff*).* [21st August, 1896.]

Act No. XII of 1881 (*N.W.P. Rent Act*), *s.* 42—*Assessment of price of crops belonging to an evicted tenant—Effect of such assessment.*

Held that where a land-holder having ejected a tenant upon whose holding there are growing crops, applies under s. 42, cl. (*c*) of Act No. XII of 1881 for assessment of the price, he is bound by the assessment which the Revenue Court may make and cannot afterwards refuse to pay the price fixed.

IN this case the plaintiff sued as the representative of a non-occupancy tenant who had been evicted from his holding under s. 36 of the N. W. P. Rent Act, 1881, to recover a sum of Rs 286-11 with interest, alleged to be due by the zamindar on account of crops standing on the land at the time of his father's eviction, which had been taken at a valuation under the provisions of s. 42 of the Act.

The zamindar-defendant pleaded that he had never accepted the valuation and had appealed against it, and that he had never taken the crop.

The Court of first instance (Deputy Collector of Shahjahanpur) found that the zamindar-defendant had never taken possession of the crop and had refused to accept the estimate of the price made by the Tahsildar, and, holding that the plaintiff remained owner of the crop until the compensation was paid and possession delivered, dismissed the suit.

On appeal by the plaintiff the Lower Appellate Court (District Judge of Shahjahanpur) decreed the appeal and the plaintiff's suit, holding that when once the landlord had applied under s. 42 for an estimate he was bound by it and had no option of refusal.

[69] The defendant appealed to the High Court.

Munshi *Madho Prasad*, for the appellant.

Mr. *W. K. Porter*, for the respondent.

JUDGMENT.

AIKMAN, J.—Narain, father of the plaintiff in the suit out of which this appeal has arisen, was a tenant of agricultural land, of which Sham Lal, the defendant in the suit, was the land-holder. The latter procured an order of the Revenue Court for the ejectment of Narain from his holding. At the time it was sought to enforce the ejectment order there were growing crops on the land. When this is the case s. 42 of Act No. XII of 1881 gives the land-holder the option of allowing the tenant to continue to occupy the land, paying adequate rent therefor until the crops have been gathered in. If, however, the land-holder wishes to have immediate possession of the land, he must purchase the crops. If the land-holder desires to adopt the latter alternative, he tenders to the tenant the price of the crops, and clause (*b*) of s. 42 declares that thereupon the right of the tenant to the crops and to use the land for gathering them in ceases, *i.e.*, the property in the crops passes at once to the land-holder. It is not necessary, in order that the property in the crops should pass, that the

* Second Appeal No. 1019 of 1894 from a decree of H. B. Finlay, Esq., District Judge of Shahjahanpur, dated the 18th August 1894, reversing a decree of Syed Abdullah Khan, Deputy Collector of Shahjahanpur, dated the 11th June 1894.

tenant should accept the price offered. The mere tender by the land-holder is sufficient to divest the tenant of all right to and ownership in the crops. It is not in my opinion necessary that the price tendered should be proved ultimately to be the full price in order that the right to the crop should pass. I consider that it is the intention of the Legislature that the tender of a price, even if inadequate, should suffice for that purpose. This, I hold, is the meaning of cl. (*b*), s. 42; and the object is to prevent any uncertainty as to the ownership of the crops, which would in all probability result in the crops being damaged. If the land-holder and the tenant cannot agree as to the price, either of them is at liberty to apply to the Rent Court to make an award as to the price; and it is declared in cl. (*c*) of the section, that the amount of the award so made shall be recoverable as an arrear of rent by suit under the Act.

[70] In this case the land-holder desired to purchase the crops so as to obtain immediate possession of the land. He, I presume, tendered a price to the tenant which the latter thought to be insufficient, for the land-holder had recourse to the provisions of cl. (*c*) of s. 42 and applied to the Assistant Collector to make an award as to the proper price. The matter was referred to arbitration, and in accordance with the decision of the arbitrators the Assistant Collector passed an order determining the price. The landholder appealed to the Collector, who dismissed the appeal. The tenant's son has now sued to recover the price so awarded and has obtained a decree from the lower appellate Court. The defendant comes here in second appeal.

I am of opinion that the appeal must fail. The question for decision is whether a land-holder who has had recourse to the second alternative referred to above, and has expressed an intention of purchasing the crops, can alter his mind, if in his opinion the Rent Court to which a dispute about the price has been referred puts what he considers too high a value on the crop. I think the learned District Judge is perfectly right in holding that the land-holder cannot withdraw his offer to purchase. It is possible that the Rent Court may fix what is really too high a price for the crops, but this is a contingency which the land-holder must face when he chooses the second of the two alternatives.

The appellant relies on an expression of opinion by the Collector when dismissing the appeal in regard to the award. The Collector in his judgment in that case said that if the land-holder thought the price too high, he need not pay, but might let the tenant take away the crops. It is unfortunate for the appellant that the Collector committed himself to this expression of opinion, for in my view it is quite wrong and has misled the appellant.

As the Collector upheld the award, the tenant is by law entitled to recover it, and the decree of the District Judge was right.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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AUG. 21.

APPELLATE CIVIL.

19 A. 71 = 16 A.W.N. (1896) 188.

19 A. 71 = 16 A.W.N. (1896) 188.

[71] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

DESRAJ SINGH AND OTHERS (*Decree-holders*) *v.* KARAM KHAN (*Judgment-debtor*).* [21st August, 1896.]

Execution of decree—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 178—Limitation.

Certain holders of a decree for sale under s. 88 of the Transfer of Property Act applied for execution of their decree on the 6th of January 1887, and the application was granted. A third party, however, appeared and filed an objection under s. 278 of the Code of Civil Procedure which was allowed. Thereupon the decree-holders brought a suit under s. 283 of the Code. They obtained a decree on the 5th of June 1888; but the intervenor appealed, and the final decree in appeal was not passed until the 28th of May 1892. On the 27th of April 1892, the decree-holders again applied for execution of the decree. *Held* that execution was time-barred under art. 178 of the second sch. to Act No. XV of 1877.

[F., 26 A. 156 = 23 A.W.N. (1903) 221; R., 26 A. 140 (144); 2 Ind. Cas. 76 = 45 P.R. 1909 = 68 P.W.R. 1909 = 66 P.L.R. 1909.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—A decree for sale upon a mortgage bond was obtained on the 26th of March 1885. On the 6th January 1887 an application for an order for sale was made, and that application was allowed. Apparently the Civil Court transferred the proceedings to the Collector under s. 320 of the Code of Civil Procedure. The wife of the judgment-debtor filed an objection under s. 278 of the Code of Civil Procedure claiming the property as hers. On the 17th of January 1888 her objection was allowed under s. 280 of the Code, and the attachment was removed. Thereupon the decree-holders brought a suit in accordance with s. 283 of the Code against the successful objector, and on the 5th of June 1888 obtained a decree declaring that the property was liable to be sold under the [72] decree and order for sale of the decree-holders. From that decree the successful objector appealed: her appeal was dismissed by the District Judge on the third of August 1888, and her appeal from the decree of the District Judge to the High Court was dismissed on the 28th of May 1892. On the 27th of April 1892, the decree-holders applied for the execution of their decree of the 26th of March 1885. Their application was dismissed on the ground that it was time-barred. They then appealed to the Court of the District Judge and their appeal was dismissed. They have brought this appeal.

The appellants have relied upon *Basant Lal* v. *Batul Bibi* (1), upon *Chintaman Damodar Agashe* v. *Balshastri* (2), and the Full Bench ruling of this Court in *Paras Ram* v. *Gardner* (3).

* Second Appeal No. 416 of 1894 from an order of G. E. Gill, Esq., District Judge of Mainpuri, dated the 3rd April 1894, confirming an order of Pandit Rai Indar Narain, Subordinate Judge of Mainpuri, dated the 3rd December 1893.

(1) 6 A. 23. (2) 16 B. 294. (3) 1 A. 355.

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APPELLATE CIVIL.
19 A. 71 = 16 A.W.N. (1896) 188.

On the other side the respondent has relied upon an unreported judgment of this Court in F.A. No. 91 of 1891, decided on the 13th of May 1893.

It appears to us that the first two cases relied upon on behalf of the appellants are not in point. Apparently in the case in I.L.R., 6 All., 23, the execution proceedings had been stayed under an order passed under s. 492 of the Code of Civil Procedure. The Full Bench case, whether the Full Bench rightly or wrongly decided the case, appears to us to be in favour of the respondent. It shows that the decree-holders had a right to apply for execution or to proceed with their application immediately on the passing of the decree of the 5th of June 1888 declaring that the property was liable to be sold. In our view the allowance of the objection and the passing of the order on the objection under s. 280 of the Code of Civil Procedure determined the application, and the making of the order under s. 283 would have finally determined the right to bring the property to sale, if the suit against the successful objector had not been brought within the year and decided in favour of the holders of the decree for sale. In our opinion art. 178 of the second schedule of the Indian Limitation [73] Act, 1877, applies, and, more than three years having elapsed after the 5th of June 1888 before the present application was made, the application was time-barred. We dismiss the appeal with costs.

Appeal dismissed.

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19 A. 73 = 16 A.W.N. (1896) 180.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

MANJHLI (*Applicant*) *v.* MANIK CHAND AND ANOTHER (*Opposite Party*).*

[26th August, 1896.]

Criminal Procedure Code, s. 560—Compensation for frivolous and vexatious complaint—Order in the alternative for imprisonment.

It is not competent to a Court in awarding compensation under s. 560 of the Code of Civil Procedure against a complainant for making a frivolous and vexatious complaint to order at the same time that in default of payment of the compensation the person against whom the order is made suffer imprisonment. *Queen-Empress* v. *Punna* (1) approved.

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Jhansi. The facts of the case were as follows:—

A Magistrate of the first class, after he had tried a case in which one Musammat Manjhli was complainant and Manik Chand and Musammat Amano were accused, discharged the accused, and, being satisfied that the accusation against them was false and malicious, directed Musammat Manjhli to pay Rs. 50 to Manik Chand and Rs. 10 to Musammat Amano. He further directed that these amounts should be levied as fines, and if they could not be realised, that Musammat Manjhli shall suffer 30 days' simple imprisonment.

The Sessions Judge, before whom this order was brought on an application in revision, took exception to the order on the ground that

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* Criminal Revision No. 256 of 1896 from an order of Pandit Jawahir Lal, First-class Magistrate of Jalaun, dated the 6th March 1896.

(1) 18 A. 96.

1896
AUG. 26.

REVISIONAL CRIMINAL.

19 A. 73=
16 A.W.N.
(1896) 180.

Magistrate in passing it had not complied with the provisions of clause (*a*) or of clause (*b*) of s. 560 of the Code of Criminal [74] Procedure; and, further, upon the ground that it was not competent to the Magistrate to pass an order for the imprisonment of the complainant until some attempt had been made to recover the amount awarded as compensation. The Judge referred to *Queen-Empress* v. *Punna* (1) and *Ram Jeewan Koormi* v. *Doorga Churn Sadukhan* (2).

The reference was laid for disposal before a single Judge * who being inclined to dissent from the ruling in *Queen-Empress Punna* (1), referred the case to a Division Bench. The following order was passed.

ORDER.

EDGE, C.J., and AIKMAN, J.—We agree with the decision in *Queen-Empress* v. *Punna* (1) and, on the recommendation of the Sessions Judge, set aside the order awarding compensation and in default imprisonment.

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(1) 18 A. 96. (2) 21 C. 979.

*[N.B.—The following is the order of reference of the Single Judge. Though this is not given in the I.L.R. Series, yet it has been inserted *in extenso* for facility of reference:—

KNOX, J.—This case comes up on a reference from the Sessions Judge of Jhansi. It appears from the reference that a Magistrate of the first class after he had tried a case in which one Musammat Manjhli was compiainant and Manik Chand and Musammat Amano were accused, discharged the accused, and, being satisfied that the accusation against them was false and malicious, he directed Musammat Manjhli to pay Rs. 50 to Manik Chand and Rs. 10 to Musammat Amano. He further directed that these amounts "should be levied as fines," and if they cannot be realised Musammat Manjhli shall suffer 30 days' simple imprisonment. The reasons upon which the reference is made are that the order is bad because the Magistrate did not comply with clauses (*a*) and (*b*) of s. 560 of the Code of Criminal Procedure.

I agree with the learned Judge that the record of the Magistrate is distinctly imperfect. No reasons are given for awarding the compensation, and if the Magistrate did record and consider any objections which the complainant urged against the making of the direction (which I think he did) they were very imperfectly recorded. The learned Judge takes a further exception to the Magistrate's order, and says that the Magistrate had no authority to pass the order as to imprisonment until some attempt had been made to recover the amount awarded as compensation; the two orders were illegal; and he cites as his authority the case of *Queen-Empress* v. *Punna* (I.L.R., 18 All. 96) and *Ram Jeewan Koormi* v. *Doorga Charn Sadhu Khan* (I.L.R., 21 Calc. 979). The case last quoted is undoubtedly an authority for saying that it is illegal to make an order for imprisonment until some attempt has been made to levy the amount of compensation in the manner prescribed for the levying of a fine. The learned Judges say that they are not aware of any provisions of law under which a fine is recoverable by imprisonment. They quote s. 386 of the Code Criminal Procedure, s. 64 of the Indian Penal Code, and s. 33 of the Code of Criminal Procedure. Apparently their attention was not directed to s. 5 of Act No. I of 1868, which enacts that the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code and of s. 386 of the Code of Criminal Procedure shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary. So far as I am aware, the Code of Criminal Procedure contains no express provision to the contrary. Sections 386 and 388 of the Code of Criminal Procedure recognise that the rule is that when an offender is sentenced to pay a fine, whether for an offence or otherwise, it is competent to the Court to direct by the sentence of fine that in default of payment of fine the offender shall suffer imprisonment for a certain term. The former section authorises the Court to issue a warrant for the levy of fine by distress and sale of moveable property, and the latter section authorises the Court to suspend the execution of the sentence of imprisonment. The authorities considered by the Calcutta Court were cases decided under the Code of 1872, which did contain an express provision to the contrary of s. 5 of Act No. I of 1868. If the case of *Queen-Empress* v. *Punna* was intended to lay down the same rule, which is doubtful, I find myself unable to follow it.

The Magistrate's order is open to a more serious objection. S. 560 of the Code of Criminal Procedure was intended for cases, and only for cases, in which the Magis-

19 A. 74=16 A.W.N. (1896) 178.

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APPELLATE CRIMINAL.

19 A. 74=16 A.W.N. (1896) 178.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

BRIJ BASI (*Applicant*) *v.* THE QUEEN-EMPRESS (*Opposite Party*).*

[26th August, 1896.]

Act No. XLV of 1860 (Indian Penal Code), s. 451—House trespass with intent to commit adultery—Evidence.

To sustain a conviction under s. 451 of the Indian Penal Code for the offence of house trespass with intent to commit an offence, the prospective offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman the intent to commit adultery with whom is charged against the accused.

[Rel. on, 10 Cr. L.J. 410 (411)=3 Ind. Cas. 895 (896)=3 S.L.R. 86 (87); D., 23 A. 82 (84); 29 A. 46=3 A.L.J. 652=26 A.W.N. (1906), 279=4 Cr. L.J. 291.]

THE facts of this case sufficiently appear from the judgment of the Ccurt.

Mr. *C. Dillon*, for the applicant.

The Government pleader, Munshi *Ram Prasad*, for the Crown.

JUDGMENT.

EDGE, C. J. and AIKMAN, J.—Brij Basi was charged before a Magistrate with having committed the offence of lurking house trespass by night with intent to commit theft punishable under s. 457 of the Indian Penal Code. The Magistrate, finding on the evidence that Brij Basi had no intent to commit theft, altered the charge to one of house trespass in order to the committing of an offence punishable with imprisonment, specifying [75] the offence as adultery with the wife of one Ram Gopal, and convicted Brij Basi under s. 451 of the Indian Penal Code. Brij Basi appealed. The Sessions Judge, agreeing with the Magistrate, dismissed the appeal. Brij Basi has brought this application in revision. Ram Gopal was not the complainant. The complaint was preferred by a nephew of Ram Gopal, who was also living in the house. Ram Gopal was not called as a witness, and there was no evidence that Brij Basi had gone to the house to have connection with the wife of Ram Gopal without the connivance and without the consent of Ram Gopal. The offence of criminal adultery, *i.e.*, of adultery which is recognised by the Indian Penal Code as a criminal offence, is not committed unless connection with the married woman is without the connivance and without the consent of her husband. It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is a necessary part

trate was satisfied that the accusation brought was frivolous or vexatious. It was not intended for a case like this, in which the Magistrate has found that the complaint is evidently false and malicious. False and malicious complaints call for more serious punishment, and the law provides for their being punished in quite a different way. I direct that this reference be laid before a Bench of two Judges.]

* Criminal Revision No. 383 of 1896.

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of the case for the prosecution to negative by evidence such consent or authority. In this case, if Brij Basi had actually been caught in the act of sexual intercourse with the wife of Ram Gopal, assuming that he knew her to be Ram Gopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the consent and without the connivance of Ram Gopal. Brij Basi was convicted of a house trespass in order to commit a criminal adultery with the wife of Ram Gopal. It was consequently necessary to support the prosecution to prove that if Brij Basi had had sexual intercourse on that occasion with the wife of Ram Gopal, it would have been without Ram Gopal's consent or connivance. The Court cannot make assumptions against prisoners in the absence of necessary evidence for the prosecution, and there was no evidence here to show that Brij Basi did commit the trespass in order to commit criminal adultery as that offence is [76] defined by the statute. It was not even proved that Brij Basi had committed criminal trespass on this occasion. There would be no intent on his part to commit criminal adultery or to insult or annoy the owner of the house, Ram Gopal, unless Brij Basi was there to commit criminal adultery with the wife of Ram Gopal, *i.e.*, to have sexual intercourse with her without the consent and without the connivance of Ram Gopal. There could be no intent to insult or annoy Ram Gopal if Ram Gopal was consenting or conniving at the adultery, and there is nothing in this case to show whether or not Ram Gopal was a consenting or conniving party. We allow this application, and we quash the conviction and the order of the Sessions Judge, and, acquitting Brij Basi of the offence of which he was convicted, order him to be at once released.

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PRESENT :

Lords Watson, Hobhouse and Davey and Sir R. Couch.

On appeal from the High Court at Allahabad.

A. B. MILLER, OFFICIAL ASSIGNEE OF THE ESTATE OF RAMKISHEN DAS (*Defendant-Appellant*) *v.* BABU MADHO DAS (*Plaintiff-Respondent*). [17th and 18th June, 24th and 28th July, 1896.]

Insolvency—Attempted preference—Evidence as to statement of a party to a suit, before proceedings—Act No. I of 1872, (Indian Evidence Act), Ss. 18 and 21.

After an adjudication, under the Statute XI. Vic. Cap. 21, of insolvency against a trader in Calcutta, a creditor brought this suit against him, and the official assignee as co-defendant, the latter alone defending. The claim was for payment of a debt, and in default to obtain an order for the sale of land upon which the creditor averred that he held an equitable mortgage by deposit of title-deeds with him, before the adjudication, as security for the debt :—*Held*, that the burden was upon the plaintiff of proving the deposit by way of equitable mortgage to have preceded the adjudication.

The courts below having differed as to whether this prior possession had or had not been proved, an examination of the evidence led to the conclusion that the plaintiff had failed to prove that the title-deeds had been deposited before the date of the adjudication, as alleged by him.

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On the question whether the courts below should, or should not, have received in evidence the testimony of a witness who had been informed by the [77] plaintiff before the adjudication that documents relating to land had then been deposited with him as security by the person, who was afterwards insolvent and who was the first defendant in this suit:—*Held*, that this being an admission by a party within s. 21 of the Indian Evidence Act, 1872, could not be used as evidence in the plaintiff's favour. And *held*, that an erroneous omission to object to the admission of such testimony did not make it available as a ground of judgment.

[R., 6 C.L.J. 22; 12 C.L.J. 18 (20)=9 Ind. Cas. 211; 1 C.W.N. 530; 2 Ind. Cas. 998 (1000); D., 28 C. 142.]

APPEAL from a decree (10th May 1892) of the High Court, reversing a decree (9th April 1890) of the District Judge of Mirzapur.

This suit, instituted on the 6th June 1889, claimed enforcement of an equitable mortgage alleged by the plaintiff to have been effected by the deposit of title-deeds with him by the first defendant, Ramkishen Das, who, having a business in Calcutta, had been adjudicated insolvent on the 2nd March 1889, under the XI Vic. Cap. 21. The immoveables said to have been mortgaged were land, houses, and buildings in thirty-two lots, of which twenty-six were in the Benares district, five in that of Mirzapur, and one in that of Ghazipur, valued at about Rs. 70,000. The plaintiff, Madho Das, now respondent, a banker of Benares, claimed, on account of hundis and interest, Rs. 1,35,304, and in default an order for the sale of the property above-mentioned in respect of that debt. Ramkishen Das, who left Calcutta finally in August 1888, and Benares in the following October, abandoning his business, did not appear to answer the suit, which was defended by the co-defendant alone, the official assignee of the insolvent's estate and effects. In the course of their business together, Ramkishen had drawn upon the plaintiff, in March 1885, four hundis for Rs. 25,000, payable at 11 months date. These were renewed year by year till January 1887. The case for the plaintiff was that when the renewal of the total amount in another hundi was asked for by Ramkishen, the plaintiff pressed him for payment, refusing to renew. The result was that Ramkishen in February 1888 in Calcutta, according to the plaintiff, handed over to the gumashtas sent down by the latter from Benares, the title-deeds of the properties as security for the payment of the [78] debt. On the 6th May 1889, the plainitff informed the official assignee that these securities were in his possession, and asked for a consent to a sale of the properties. The official assignee disputed the plaintiff's right to the title-deeds. On the 6th June following the Calcutta Insolvency Court ordered Ramkishen and his gumashta to attend to be examined in the matter of the insolvency, and to produce all documents. On that date the plaintiff filed, in the court of the Subordinate Judge of Mirzapur, this suit, afterwards on the 19th September 1889 transferred to the District Judge's file. The official assignee's answer, filed on the 10th September, as to his information and belief, in reference to the alleged deposit of the title-deeds, was that they had been obtained by the plaintiff at some time after the adjudication, and transferred with intent to defeat and delay creditors. So that, if that was the fact, the transaction was a fraudulent preference. The principal questions at the hearing were whether the deeds were "deposited by the first defendant with the plaintiff or his agents in Calcutta in February 1888 with the object to create a charge in favour of the plaintiff."

Generally stated, the plaintiff's allegation was that his gumashtas went down from Benares to Calcutta after the Sheoratri festival, which

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would make their arrival to have been about the 10th February 1888, and received the deeds on behalf of their master. On the other side, the case presented on behalf of the official assignee was that the possession of the deeds was most probably obtained through Ramkishen's friend and servant Sanwal Das, and another person Brijrawan Das, who by means of a letter produced, which was dated 27th February 1889, caused Harkishen Das, at that time custodian of the deeds at Benares on behalf of Ramkishen, to hand them over to Jagmohun Das, the plaintiff's agent for the purpose of receiving them; and that this was not done before the 2nd March 1889.

The facts, in full detail, appear in their Lordships' judgment.

At one time, in the course of the proceeding, there was an issue of law raised. This was whether the delivery of title-deeds [79] by Ramkishen in Calcutta would effectuate a valid mortgage of property in the North-Western Provinces. This question was decided by the High Court in the affirmative in the judgment now appealed from, and from that decision no appeal was preferred. A report of that part of the judgment is given in *Madho Das* v. *Ramkishen* (1).

Another question of law not raised until the hearing of this appeal had regard to the inadmissibility under the Indian Evidence Act, 1872, of testimony setting forth statements by parties to suits, before proceedings, when in their own favour.

On the record was the evidence of Rai Baleshwar Prasad, (pronounced to be unimpeachable by the High Court.) that in the beginning of September 1888, he had a conversation with the plaintiff, Babu Madho Das, in which the affairs of Ramkishen were mentioned; and that, in the course of that conversation, the plaintiff said that he had taken certain documents from Ramkishen relating to gardens and houses.

So much of the Indian Evidence Act, 1872, as relates to the question raised in reference to that evidence, is as follows :—

"Section 18. Statements made by a party to the proceeding, or by "an agent to any such party, whom the Court regards under the circum- "stances as expressly or impliedly authorized by him to make them, are "admissions. Section 21. Admissions are relevant and may be proved "as against the person who makes them, or his representative in interest, "but they cannot be proved by or on behalf of the person who makes them "or his representative in interest, except in the following cases :—

"(1) An admission may be proved by or on behalf of the person "making it when it is of such a nature that if the person making it "were dead, it would be relevant as between third persons under "s. 32.

"(2) An admission may be proved by, or on behalf of the person "making it when it consists of a statement of the existence of any state "of mind or body, relevant or in issue, [80] made at or about the time "when such a state of mind or body existed and is accompanied by "conduct rendering its falsehood improbable.

"(3) An admission may be proved by or on behalf of the person "making it, if it is relevant otherwise than as an admission.

"Illustration (*a*).—The question, between A and B is whether a "certain deed is, or is not forged."

"A affirms that it is genuine, B that it is forged.

(1) 14 A. 298.

"A may prove a statement by B that the deed is genuine, and B "may prove a statement by A that the deed is forged; but A cannot prove "a statement by himself that the deed is genuine, nor can B prove a "statement by himself that the deed is forged."

The District Judge decided the suit in favour of the Official Assignee for reasons which he gave at length, but these he summed up as follows:—

"(1) There is no independent evidence to prove the delivery; what "evidence there is consists entirely of plaintiff's servants' statements.

"(2) By the end of 1888 plaintiff certainly knew that defendant 1 "was absconding from his creditors; and, if he had this security, he would "naturally have, at least, threatened to enforce it before 2nd March 1889, "when defendant 1 was adjudicated insolvent; but no one, outside plain-"tiff's office ever saw or heard definitely of, the title-deeds until after 2nd "March 1889.

"(3) The date of delivery cannot be ascertained, we cannot get "nearer than this that it was made about the middle of February 1888.

"(4) There is not a line of writing to evidence the delivery. It is "true that a memo is not necessary, but considering the very large "number of title-deeds and the position and circumstances of plaintiff and "defendant 1, it is hardly conceivable that the delivery would have taken "place without a list, or memo., of some kind. Indeed Baldeo says a list of "title-deeds was made at the time, but it was destroyed. His account of "this list is, however, incredible, *viz.*, that it contained no specification "of the [81] documents otherwise than by dates (except in a few instan-"ces); only the localities in which the houses were situate were also "entered.

"(5) The letter dated 29th January 1888, Ex. No. 17, is intimately "connected with the alleged verbal promise to deliver; but it does not con-"tain the least allusion to such delivery, and the absence of such allu-"sion is almost inconceivable.

"(6) Previous correspondence, especially letter dated 14th July 1885, "shows that plaintiff did not care for this very security, and certainly "was not likely to accept it as adequate security, for his debt of 1½ lakhs "of rupees.

"(7) Plaintiff's possession of the title deeds is accounted for by the "letter dated 27th February 1889. There can I think be no reasonable "doubt that it was written at plaintiff's instance, in consequence of his "pressure for payment, and insisting on some arrangement being made for "the payment of his debt. In pursuance of these instructions, what title-"deeds were proved were made over to plaintiff's agents at Benares."

In reference to the other issue the Judge gave his opinion that if the documents had really been delivered in February 1888, as asserted by the plaintiff, it would have been shown that the object was to create a charge upon them in favour of the plaintiff; that in such a transaction, at that date, there would have been no suspicion of fraud; and that under s. 59 of the Transfer of Property Act, 1882, an equitable mortgage, by deposit of title-deeds, if made in Calcutta, would affect lands outside of Calcutta.

As it was thus found that there was no equitable mortgage, the Mirzapur Court had no jurisdiction, as the plaintiff's claim would be reduced to a mere money demand cognizable in the Insolvent Court.

The suit was accordingly dismissed.

From this judgment the plaintiff appealed to the High Court.

The Official Assignee filed cross-objections, which, however, were not relied upon at the hearing of the appeal.

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[82] The High Court (TYRRELL and KNOX, JJ.) reversed the judgment and decree of the District Judge, and decreed in favour of the plaintiff.

Upon the main issue the Judges came to the conclusion that the evidence of the plaintiff's servants, Baldeo Tiwari and Bhagwan Das, as to the delivery of the title-deeds in February 1888, was substantially correct and faithful, and that it had been discredited on insufficient grounds by the Court below. They also accepted and relied on the corroborative evidence as to the deposit of the title-deeds with Gambhir Chand, and their entry in the "jakar bahi" at Benares. They placed much weight upon the statements made by the witnesses Rai Baleshwar Prasad, and Rai Shyam Kishen, gentlemen of high position in Benares, as to statements made to them by the plaintiff and the defendant, respectively, in September 1888, that documents had been handed to the former by the latter, to satisfy him in regard to his claim. Upon the case set up by the defendant the High Court disbelieved the statement that Harkishen Das was ever in possession at Benares of the title deeds in dispute. They believed that the papers shown by the plaintiff to Nobo Dip Chandar at 7 A.M., on the 3rd March 1889, were the title-deeds which the plaintiff had held since February 1888. And they were of opinion on an examination of dates and times that it was highly improbable that they could have been the papers which Harkishen Das said that he handed over to Jagmohan Das on the morning of the 2nd March.

The Judges accepted it as a fact that the letter of the 27th February 1889, was the *bona fide* composition of Sanwal and Brijrawan. They considered that the letter did not refer to the title-deeds in question, which, according to their view, were never in the possession of Harkishen Das; but that it might have referred to certain miscellaneous documents, lying at Benares, which related to Ramkishen's property at large, and which might have contained information useful to the plaintiff in reference to an independent claim upon the latter by Ramkishen's mother. Upon the question as to the effect of the deposit of title-deeds in Calcutta, as creating [83] an equitable mortgage of lands elsewhere, they agreed with the District Judge.

On this appeal preferred by the Official Assignee—

Mr. *A. Cohen*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, argued that the High Court should have approved the finding of the District Judge. The appellant had a duty in protection of the creditors upon Ramkishen's estate to require the plaintiff Madho Das to prove his claim. The burden was upon the latter, and he had not discharged it. The High Court had omitted to notice many serious discrepancies and contradictions in the evidence of the plaintiff's witnesses, and had placed reliance on evidence that, according to the Indian Evidence Act, was inadmissible. They referred to the admission of the evidence of the two witnesses Rai Baleshwar Prasad and Rai Shyam Kishen. There was no guarantee for the correctness of the statement made to them, however truly and accurately they might have testified as to what they had heard.

Again, in the High Court's judgment the evidence for the defence had not received due effect. The High Court had not placed the right construction on the important letter of the 27th February 1889, and had not seen how far greater probability attached to delivery of the deeds having been at the later date indicated by the witnesses for the defence; than

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their having been deposited at the undefined time suggested in the plaintiff's case.

Mr. *T. H. Cowie* and Mr. *J. D. Mayne*, for the respondent, contended that the High Court was right in accepting the evidence as to the delivery of the title-deeds about the 10th of February, 1888, and in declining to be guided by the comparatively slender evidence that they had not been delivered till the 2nd March, 1889. Both the Courts below were right in holding that the delivery alleged by the plaintiff would have, if proved, constituted a valid equitable mortgage of the properties. The judgment of the High Court should be affirmed.

Counsel for the appellant were not called on to reply.

[84] Afterwards, on the 28th July, their Lordships' judgment was delivered by SIR R. COUCH :—

JUDGMENT.

Ramkishen Das who carried on a large business in Calcutta was on the 2nd of March 1889 adjudicated an insolvent by the High Court at Calcutta and his estate became vested in the appellant as the Official Assignee. On the 6th of May 1889 the respondent's pleaders wrote and sent a letter to the appellant stating that the respondent was a creditor of the insolvent for Rs. 1,53,339 on balance of account with interest, that the respondent held as collateral security for his debt the title-deeds and documents of certain houses and lands situate at Benares, Ghazipur and Mirzapur of the value of Rs. 65 to 70,000, and that the title-deeds of the properties were delivered to the respondent by the insolvent himself at Calcutta in February 1888. And they inquired whether the appellant was prepared to admit the equitable mortgage. On the next day the appellant replied by letter that it would be necessary for him to make inquiries into the matter of the mortgage claim, and if the respondent could prove the mortgage to the satisfaction of the Insolvent Court he would be prepared to consent to the usual order for sale. He added that in the meanwhile he would be obliged if they would send for his inspection a copy of the memorandum which accompanied the deposit of the title-deeds. On the 13th of May the pleaders replied that they were prepared to give the appellant sufficient time to make inquiries, but as he appeared to insist upon their proving the claim in the Insolvent Court, and made it a condition of accepting the mortgagee's right, they were prepared to seek their remedy in a court having jurisdiction to try the question at issue. They added that if the appellant wished to settle the matter out of court they were prepared to give him every facility in making inquiries into the matter, and for this reason they gave him one week's time to make up his mind with reference to the subject of their claim. On the 17th of May the appellant acknowledged the receipt of this letter, and referring to his of the 9th reminded them that they had not complied with the request in it for a copy of the memorandum, [85] and again asked for it. To this the pleaders on the 21st of May replied "by letter " that the title-deeds of certain houses, &c.' were made "over to Babu Madho Das my client's agents Bhagwan Das and Baldevajee at Calcutta 'as collateral security for his debts. No written "memo accompanied the title-deeds at the time of their deposit and for this reason we cannot furnish a copy of the same." On the 6th of June 1889 an order was made by the High Court at Calcutta for the respondent and his gumashta to attend before the Court and be examined in the

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matter of the insolvency and to produce the documents and deeds said to have been deposited. On the same day the respondent filed his plaint in the Court of the Subordinate Judge of Mirzapur against Ramkishen and the appellant praying for a decree for the amount claimed for debt and that in default of payment the properties alleged to have been mortgaged might be sold and the proceeds applied in payment. The appellant in his written statement denied that the title-deeds were deposited as alleged in the plaint.

On the 19th of September 1889 the suit was transferred from the Court of the Subordinate Judge to the Court of the District Judge of Mirzapur. Of the nine issues framed by him the only one which is now material is the fourth. That is:—"Were the title deeds specified in "paragraph 6 of the plaint deposited by defendant 1 with plaintiff or his "agents in Calcutta in February 1888?" The District Judge, in a judgment where the evidence is fully and carefully discussed, found that it was not proved that the title-deeds were delivered to the respondent's gumashtas in Calcutta in February 1888 and dismissed the suit. The respondent appealed to the High Court at Allahabad. That Court came to the opposite conclusion and made a decree in the plaintiff's favour which is the subject of the present appeal.

Now the onus was on the respondent to prove that the title-deeds, which, it appeared, were in his possession when the letter of the 6th of May was sent were deposited by Ramkishen with him or his agents before the adjudication of insolvency. His case depended mainly upon the evidence of Baldeo Tiwari (the Balde-[86]vajee in the letter of the 21st of May) and Bhagwan Das, and their Lordships will first consider their evidence. Baldeo was first examined. He is the gumashta of the respondent and had then been in his service for eleven years. His account of the deposit of the title-deeds was this. There had been for some years large transactions between Ramkishen and the respondent in hundis drawn by the former and accepted by the latter and from time to time renewed. On the 27th of December 1887, a hundi having become mature and the time for renewal having arrived, Ramkishen drew a hundi for one lakh of rupees and sent it to the respondent from Calcutta requesting him to accept it. The respondent refused to accept it, which occasioned a delay of nearly a month. Then Ramkishen came to Benares on the occasion of a marriage in the house of one of his relations. After the completion of the marriage the respondent told the witness that Ramkishen had come to Benares and said:—"Go to him and dun him. "Tell him that I shall never renew this hundi; nay I shall bring an action. "Go to Ramkishen and tell him so." "After a day or two I went to "'Ramkishen and said This time the plaintiff will by no means renew "'the hundi.' Then Ramkishenji said to me go and tell the plaintiff that "'I paid him off when Rs. 2,75,000 was due by me. Now a small "balance is due.' I then came and said so to the plaintiff, who again "said to me—'Go and say that I won't listen.' I then went and told "Ramkishenji that the plaintiff was inflexible. Then Ramkishen said "to me—'Go and tell the plaintiff that if he does not agree I will on "my return to Calcutta give him what papers I have for his satisfac-"tion.' Nay Ram (Ramkishen) had said to me—'If you come yourself I "will give the papers to you or the plaintiff may send any one he likes,' "I went and told this to the plaintiff. This talk took place in the course "of two or three days. I told Ramkishenji—'The plaintiff will not "believe my words unless you write a letter to him.' Then Ramkishen

"had written a letter to the plaintiff in my presence and handed to me "open. There was no one when I had been there. . . I came to the "plaintiff with the letter and I too explained [87] to the plaintiff that "this time Ramkishen offered also to pay interest on the hundis and to "deliver on his return to Calcutta his title-deeds by way of security and "that he should agree to it. The plaintiff then said to me—'Remember "'well to draw a hundi on Ramkishen immediately on the expiration of "'the term promised by him.'"

The letter referred to was produced. It is as follow:—From Ramkishen to B. Madho Das. "Sir—my compliments to you. I send here- "with 4 hundis for Rs. 1,00,000. Sign them and send them with interest "to Rajah Shimdhu Narain Singh. I shall after I have reached Calcutta "send you the interest in 15 or 20 days or you may otherwise draw "a hundi. . . . A sum of nearly Rs. 1,48,000 will be found due to "you in respect of the Nij account up to Sambat 94. I shall pay the "whole of this sum together with interest according to account up to "November 1888, and shall not make another promise nor shall I "give you the trouble to renew the Rajah Sahib's hundis. I shall write "the particulars to you after I have compared what you have written. "The rest is all right. Dated 29th January 1888." The witness said he told Ramkishen the respondent would not believe his word unless he wrote a letter to him, and yet there is nothing in this letter about the most important matter. In a later part of his evidence he gave a different account of when the letter was written. He said that subsequently to the writing of the letter came the proposal for the delivery of documents. "Babu Ramkishen had proposed the delivery of docu- "ments, I myself made no inquiry from Ramkishen regarding the "documents. On the contrary Ramkishen himself had said—'This time "'the plaintiff does not trust me and does not accept the hundi in favour of "'the Rajah Sahib. Therefore I myself shall deliver the title-deeds of "'houses to him when he or his man comes.' Ere the writing of this letter "Ramkishen had not in my presence made mention of the delivery of the "documents." It is evident that at this stage of his examination, having seen the effect of the letter upon what he had before said, he sought to [88] get out of the difficulty by saying that the proposal to deliver the documents was made after the letter was written; but then it may be asked why if, as he had said, the respondent would not believe his words without a letter he did not have this proposal added in the letter; and why if he told the respondent of the offer the latter did not notice that it was not in the letter and was satisfied without having it in. Which is the more probable, that the witness has not told the truth about what passed between him and Ramkishen and what he told the respondent, or that if he has the letter would have said nothing about, it? It is to be observed that Ramkishen, the only person present, had left Calcutta after the adjudication of insolvency and could not be found. Most likely the witness knew this and had no fear of being contradicted or punished for giving false evidence, and he must from his position have been considerably under the power and influence of the respondent. About the deposit of the title-deeds the witness said that he and Bhagwan Das went to Calcutta by order of the plaintiff to take the title-deeds; they called on Ramkishen and said:—"Please "give us what you promised at Benares and leave to go back." The witness, Bhagwan Das, and Ramkishen were there, there was no one else. He demanded the title-deeds from Ramkishen according to

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his promise: Ramkishen put them off on two or three days successively, and finally took the papers which were in the cloth bundle with a list in English out of a box and gave them to the witness who made a list of them in Hindi. There were 33 documents and 55 papers connected with them. The witness requested Ramkishen to write a letter and give it to him, and Ramkishen said—"There is no occasion for a letter. Take "away these papers without it, as the letter if written will require regis- "tration, &c." The witness said that when they were not accompanied by any letter or any other writing how could the transaction be considered to be a mortgage; and thereupon he said—"Take them away as I "say, such is the practice in the town." Their Lordships doubt whether it can be the practice in Calcutta to take mortgage by [89] deposit of title-deeds without a memorandum in writing, but it may be suggested that Ramkishen said this because he wished to conceal the transaction as it would affect his credit. The witness went on to say that he left the papers with Babu Gambhir Chand for three or four days until he went back to Benares, when he took them from him and went to Benares and delivered them to the respondent. Bhagwan Das, who was in the respondent's service and had been his gumashta for thirteen or fourteen years, deposed that Baldeo and he went from Benares and reached Calcutta on the next day and went to Ramkishen instantly and saw him at his office, that they said to him they were ready for the purpose for which he wanted them and he asked them to come to him on the next day or the day after. So far as he believed, they went to him on the next day in the afternoon; he took them upstairs to his private room and brought a bundle from a box; there was a list in it in English and the bundle contained title-deeds. Ramkishen having seen the list and the papers was giving title-deeds to Baldeo after marking his list. Baldeo prepared a list of title-deeds in Hindi in the order in which Ramkishen gave them to him. The number of the papers was compared with both lists and Baldeo said—"Please give a letter and cash also. It would not "be proper to give the papers alone to the plaintiff." Ramkishen replied —"I tried to make arrangement for money, but I could not succeed in "that behalf. It will be irregular to write a letter in connection with this "mortgage. It is the law of the town of Calcutta, I shall pay the money "within the time agreed upon. As the plaintiff has lost patience now I "will very soon get the title-deeds returned by payment of money. It "will be invalid to write a letter for it will require registration." Then the witness said—"Babu Sahib, *i.e.*, the plaintiff, would not be pleased "without taking money. Please give money along with this." He replied—"There is no opportunity now. I shall remit money as soon "as possible and get the things returned." Having taken the list and papers they went to the firm where Gambhir Chand was a gumashta and Baldeo said to him—"Please [90] keep these papers, I shall take "them back while going to Benares." Baldeo having opened the bundle the papers were counted with reference to the list and taken by Gambhir Chand. They went to him five or six days afterwards and took the papers from him and the next day left Calcutta for Benares. On their arrival at Benares the papers were given by them to the respondent, and he ordered them to go and get the same credited in the account book of the firm, which was done by Saligram, munib. In a later part of his evidence the witness said that when Gambhir Chand returned the bundle of papers to Baldeo he read four or five of the papers, that the papers which he read contained both Hindi and Persian; he did not

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recollect whether Gambhir Chand said anything by reading the papers or not.

The Judges of the High Court have said that after mature consideration they had come to the conclusion that the testimony of these two men is substantially and in all its main characteristics correct and faithful. Their Lordships greatly doubt whether, having regard to the position of the men and the want of corroboration in writing, this opinion could reasonably be come to. Gambhir Chand, who said he was the munib gumashta of one of the largest native banking firms in Calcutta and had been their gumashta for about twenty-six years, was a witness for the respondent. He deposed that Bhagwan and Baldeo kept title-deeds with them about two years before the trial. The title-deeds were with them for about three or four days; he asked what were the papers, and they answered they got them from Babu Ramkishen. A bundle of documents was shown to the witness, and he said—"These are the papers and I recognize "them by the seal of the Kazi." The witness asked them why a particular document was not stamped and they said—"It bears the seal of the "Kazi"; they pointed out other papers bearing the seal of the Kazi, and thus he then identified the papers. In cross-examination he said the only means of identification were the seals, that he had not seen the Kazi's seal before, he had never seen seals of this kind before or after the deposit of the papers; he did not know English or Persian, but he [91] noticed the Kazi's seal. Although the identification of the papers may be insufficient, if the witness was speaking the truth when he said that papers were left with him by Bhagwan and Baldeo and they said at the time they gave them to him that they got them from Ramkishen it would be some corroboration of their evidence. Their Lordships are not satisfied with the reason given by the District Judge for disregarding it. It was also sought to corroborate Bhagwan and Baldeo by the entry in the account book, and the evidence of Salig Ram, Ramman Lal and Madho Lal. It is unnecessary to go into the details of this. Their Lordships agree with the District Judge who said he did not attach much weight to this portion of the evidence. The High Court in its judgment says the entry was one which it was easy to make and it was entered in a book which could easily be tampered with.

The next evidence to be noticed is that of Baleshwar Prasad and Rai Shyam Kishen, upon which the High Court has laid great stress, and whose integrity the District Judge said he could not for a moment question. Baleshwar Prasad, who was examined before a Commissioner, deposed that a conversation between the respondent and himself in the beginning of September 1888 turned upon the state of affairs of Ramkishen, that the witness said he had heard that his affairs were not at all satisfactory and that he had left Calcutta never to return, and he advised the respondent to realize the money due by Ramkishen to him, and the respondent answered that as far as practicable he was making endeavours to get his money. He also said he had taken certain documents relating to gardens and houses, and that Ramkishen had also promised to allow him time to pay the money due on Rajah Sambhu Narayan Singh's hundi. He did not recollect whether the respondent mentioned to him the time when the documents were made over by Ramkishen to him. The witness also said on cross-examination that he recollected a conversation with the respondent about the delivery of these documents on two occasions, one was when the respondent was summoned to Calcutta to give evidence relating to Ramkishen's affairs and the other about ten or twelve days before

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[92] the trial. Shyam Kishen deposed that about the end of August or beginning of September 1888 he had a conversation with the respondent and Ramkishen, the respondent had said to him :—"You are a friend of "Babu Ramkishen ; kindly tell him to pay the debt due to me as I am in "want of money ;" that he spoke to Ramkishen who said the respondent should not be uneasy about his money as he had given over documents to satisfy him. The Judges of the High Court say in their judgment of these witnesses "If this witness (Shyam Kishen) is truthful and accurate "the plaintiff's case is true. If this plaintiff's case is false then this wit- "ness has deliberately and wilfully sworn to a false tale. There is no "alternative theory. The circumspect precision as to date precludes the "explanation that the witness was honest but was by mistake referring "to September 1888, occurrences of another and much later date. Simi- "lar observations apply to the evidence of Babu Baleshwar Prasad."

Now s. 21 of the "Indian Evidence Act, 1872," enacts that admissions are relevant and may be proved as against the person who makes them, or his representative in interest, but *they cannot be proved by or on behalf of the person who makes them*, or by his representative in interest, except in three cases named, of which the present case is not one. The meaning of this section is very plainly illustrated by the illustration (*a*) to the section. As to the evidence of Baleshwar Prasad, therefore, the Judges of the High Court have given very great weight to what according to law was not relevant evidence and could not be proved on behalf of the respondent. The erroneous omission before of the Commissioner and the District Court to object to its admission did not make it relevant and their Lordships must in this appeal, as the High Court should have done, entirely disregard it. The evidence of Shyam Kishen of a statement by Ramkishen, if the statement was made before the adjudication of insolvency, is relevant and should be considered. As to this the District Judge said he was a young man who seemed to have vague ideas of time and space and that this evidence was hard to believe. It has been seen that the [93] High Court fully believed his evidence. Their Lordships without in the least imputing to the witness an intention to give false evidence think that the conversation he deposed to is of doubtful value. This was the respondent's case, with the addition that he had possession of the title-deeds after the adjudication of insolvency on the 2nd of March 1889 and the evidence of his attorney relating to it. The appellant sought to show that the respondent obtained the possession after that date. For this purpose he put in a letter dated the 27th of February 1889, written by Bijrawan Das, who had been the head gumashta of Ramkishen for 17 or 18 years, and addressed to Harkishen Das, the gumashta of Ramkishen at Benares. It enclosed a letter as follows :—" Sanwal Das pays his com- "pliments to Bhai Harkishen Das. Show to Babu Jagmohan Dasji the "very time he may ask you to show him all the old papers in respect of "the Benares property or any other place. Out of those papers give him "any papers which he may think fit to be sent. Make a list of the same "and make those papers over to him. He will forward them to me. Do this "work quietly. Don't delay in showing him the papers. 27th February 1889." The letter then ran—"Dear Harkishen Das. I Bijrawan Das pray for your wel- "fare. In accordance with this letter show to Babu Jagmohan Das all the "papers you have about the houses. Don't speak to anybody about this. "(Signeds) Bijrawan Das. Give him any of these papers which he may ask you "to be sent here." Bijrawan Das deposed that he was Ramkishen's munsib for seventeen or eighteen years in Calcutta. He was formerly in Benares

and used to attend to Ramkishen's work there. When he went away to Calcutta Harkishen Das, his nephew, used to work. Ramkishen Das regularly lived in Calcutta and used to visit Benares occasionally. Sanwal Das was his regular attorney for eight or nine months before the business fell in to disorder. The deeds relating to the Calcutta property used to be kept by Ramkishen himself and Harkishen Das used to keep the deeds relating to the properties in Benares, Gazipur and Mirzapur. About the letter he said :—"When the plaintiff (the respondent) was very pressing "in his **[94]** demands then Babu Sanwal Das gave him a letter "about making over certain papers to him. Sanwal Das handed "that letter to me also and I also wrote on it. That letter was sent to "Harkishen Das. That letter was written about the papers, namely, the "deeds in dispute. The latter clause is in my handwriting. The plaint-"iff was present when this letter was written." Harkishen Das deposed that he received the letter by post on the 1st or 2nd of March, that Jagmohan Das is the respondent's son-in-law; he came to him in the afternoon of the day he received the letter and went away without seeing the papers, saying he would come next morning. He came the next morning bringing a clerk with him and having selected thirteen bundles of papers took them and gave a reciept for them in his own handwriting. The receipt was not produced, the witness saying that he received a letter from Sanwal Das asking him to send it, which he said he had not got and it was not produced, and he sent the receipts enclosed in a letter to Sanwal Das. Afterwards on reading a list signed by Jagmohan Das he said the number should be twelve not thirteen. The respondent did not after this evidence had been given offer to examine either Jagmohan or Sanwal. although Harkishen had in his examination in the Insolvent Court in July 1889 more than seven months before the trial deposed that he had received a letter from Sanwal Das about the title-deeds instructing him to send them to Jagmohan Das and he carried out those instructions and made over the title-deeds to him. It was not the duty of the appellant to call either of those persons.

Upon this part of the case their Lordships are unable to agree with the High Court in its opinion that the letter of the 27th of February did not refer to the title-deeds in suit, and they do not see any ground for the High Court speaking of the appellant's "case being surrounded with diffi-"culties, ambiguities and demonstrated falsehoods, the main part of their "position being almost certainly shown to be untrue." Upon the whole of the evidence they are of opinion that the respondent failed to prove that the title-deeds were deposited as a security for his debt as he alleged, **[95]** and they will humbly advise Her Majesty to affirm the decree of the District Court, omitting from it the exception from the costs of defendant No. 2 (the appellant) of the costs of the witnesses Gregory and Apcar, and Baba Kumar Guka and Norendro Nath Seu, which should not have been disallowed, and to reverse the decree of the High Court and order the appeal to it to be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lattey* and *Hart*.
Solicitor for the respondent : Mr *T. C. Summerhays*.

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PRESENT:

Lords Waston, Hobhouse, Macnaghten and Davey, and Sir R. Couch.

[*On petition relating to an appeal from a decree of the High Court at Allahabad.*]

MUHAMMAD IKRAM-UD-DIN (*Defendant*) *v.* MUSAMMAT NAJIBAN (*Plaintiff*). [26th July, 1896.]

Special leave to appeal—Decrees of the High Court made on cross-appeals—Procedure.

The High Court passed a separate decree, on a cross-appeal, identical in terms with those of a decree passed on the appeal in the same suit. From the latter decree an appeal to Her Majesty in Council was then declared by the High Court to be admitted, under s. 603, Civil Procedure But the defendant's application to have his appeal from the decree on the cross-appeal similarly admitted was refused.

The Judical Committee was of opinion that special leave should be granted to appeal from this decree, without further security being required than had already been taken in respect of the appeal in the other.

PETITION for special leave to appeal from a decree (27th June 1891) varying a decree (23rd January 1889) of the Subordinate Judge of Bareilly.

In this suit was contested the proprietary right in a share in zamindari villages and other immoveables situate in the Bareilly district. The property had been inherited by Imami, now deceased, alleged by the defendant, now petitioner, to have been his wife. The co-plaintiffs averred that they were the whole sisters of the deceased, and entitled to their shares, under Muhammadan [96] law, in her property. The defendant Ikram-ud-din alleged that the plaintiffs were half-sisters only to his late wife, who had conveyed to him two of the villages in suit, Jabira and Pachtaur. The plaintiffs had, however, made it part of their case that the defendant's marriage was invalid, and that the conveyance by his alleged wife to him was inoperative.

On the 23rd January 1889 the Subordinate Judge gave judgment in favour of the two sisters. He excepted the two villages, as to which he dismissed their claim. From his decree of that date the defendant appealed, and the plaintiffs cross-appealed to the High Court. The appeal was numbered 64, and the cross-appeal 74. On the cross-appeals the contention was, by the defendant, that the plaintiffs were half-sisters to Imami, and not entitled to the shares given by the first Court in her estate; the plaintiffs contending that the defendant had failed to prove his marriage, and that the conveyance of the two villages to him was ineffectual.

The High Court on the 27th June 1891 varied the decree. The difference between the judgments was that the first Court gave four-sevenths of the disputed estate to the plaintiffs, and the appellate Court one-half. The High Court found the plaintiffs to be half-sisters to the deceased Imami, and, finding that the defendant had been validly married to Imami, held him entitled to the other half of the estate of the deceased Imami. That estate the High Court found to include the two villages above-mentioned, which, in the Court's opinion, had not passed to the defendant by Imami's conveyance.

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The decrees of the High Court, both in No. 64 and in No. 74, were in the same terms, with only the necessary variations. The defendant presented two petitions of appeal for admission of these two decrees to appeal, under ss. 598—600, Civil Procedure; and an appeal in No. 74 was admitted. As to No. 64, the petition was refused. The High Court transmitted the record of all the proceedings relating to No. 74, but omitted all papers exclusively connected with appeal No. 64, including the certified copy of the memorandum of appeal in the latter and the proceedings relating [97] to the appeal, from the decree of the High Court in No. 64, to Her Majesty in Council were also not sent.

The present petition was for special leave to appeal from the last mentioned decree, and for an order that certified copies of the necessary papers be transmitted.

Mr. *H. Cowell*, in support of the petition argued that the application for special leave to appeal from decree No. 64 should be granted. The Code of Civil Procedure did not, in the chapters relating to appeals or to original decrees, authorize more than one decree being made finally disposing of the suit between cross-appellants, and to the same effect. The two decrees made in this suit should have been one, as they were mere duplicates, the one of the other. They were in effect one. One of them could not be modified without the other being in like manner varied, for there could not be two conflicting decrees in one suit, each of them final. The petitioner should have special leave to appeal from the decree in appeal No. 64, without being required to file other security beyond what he had already filed. In any event, the record should be completed.

Mr. *G. E. A. Ross*, for the plaintiff-respondent, did not object to the leave being granted, provided that the papers asked for, and to be transmitted, were those already on the file of the High Court.

OPINION.

Their Lordships were of opinion that they should recommend the granting of leave applied for, without the petitioner having to file any further security than had already been taken. The record should be completed.

Solicitors for the petitioner: Messrs. *Ranken, Ford, Ford* and *Chester*.
Solicitors for the respondent: Messrs. *Pyke* and *Parrott*.

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19 A. 98 (F.B.) = 13 A.W.N. (1893) 87.

[98] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice. Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

SADHO SARAN AND ANOTHER (*Judgment-debtors*) *v.* HAWAL PANDE (*Decree-holder*).* [24th January, 1893.]

Civil Procedure Code, Section 48—Execution of decree—Successive applications for execution in respect of different reliefs granted by the same decree.

Section 48 of the Code of Civil Procedure is not applicable to proceedings in execution of decree. So *held* by Edge, C.J., Tyrrell, Knox, Blair and Burkitt, JJ.

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* Second Appeal No. 500 of 1889 from a decree of J. C. Leupolt, Esq., District Judge of Ghazipur, dated the 16th March 1889, reversing an order of Maulvi Muhammad Abdul Ghafur, Munsif of Ballia, dated the 2nd February 1889.

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Where a decree grants different reliefs, as, for example, possession of land and *mesne* profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief. So held by Edge, C.J., Tyrell, Knox, Blair and Burkitt, JJ., *Ram Baksh Singh* v. *Madat Ali* (1) and *Radha Kishen Lall* v. *Radha Pershad Sing* (2) cited.

IN this case the decree-holder obtained a decree from the High Court on the 22nd June 1881, awarding him possession of certain land together with mesne profits. The decree-holder applied at various times for execution of his decree in respect of the mesne profits only, the last such application having been made on the 23rd of December 1887. On his subsequently applying for execution by possession of the land, the judgment-debtors objected that the execution of the decree in that respect was barred by limitation. This objection was allowed by the Munsif. The decree-holder then appealed to the District Judge, who reversed the Munsif's decision, holding that the effect of the various applications for execution in respect of the mesne profits had been to keep the whole decree alive. The decree-holder thereupon appealed to the High Court, and the appeal was at the instance of Mahmood and Straight, JJ., laid before the Full Bench.

Mr. *D. N. Banerji*, for the appellants.

[99] Mr. *A. H. S. Reid*, Munshi *Jwala Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J.—This is an appeal arising in proceedings for the execution of a decree. The appeal was referred for disposal to the Full Bench of the Court. There are four grounds stated in the memorandum of appeal. No argument has been addressed to us on behalf of the appellant in support of the first, second and fourth grounds. So far as we are concerned those grounds have not been supported. The third ground of appeal raises the question as to whether an order passed on a previous application for execution of the decree was not a bar to the present application. That ground was framed on the supposition that the order referred to decided finally that the decree had been satisfied in full. My brother Judges who are acquainted with the vernacular have considered the application upon which that order was made, and the order, and they tell me that the order related only to the application for execution in the proceedings in which it was made and that the satisfaction therein referred to applied only to the satisfaction of the money part of the decree, *i.e.*, costs and damages. Consequently the third ground of appeal fails. There was, however, another ground not taken in the memorandum of appeal, but which was the main reason why this case was referred to the Full Bench. It has been contended that s. 43 of the Code of Civil Procedure applies to proceedings in execution of decrees, and that the present application in execution of a decree for possession of the property decreed cannot be entertained by reason of the plaintiff in a prior application having applied for execution of the decree in respect only of the damages and costs decreed.

Broadly speaking, s. 43 of the Code of Civil Procedure applies a well known principle of English law. It is a section which prevents one person harassing another by bringing against him more than one suit

(1) N.W.P.H.C.R. (1875) 95. (2) 18 C. 515.

in respect of the same cause of action. The third paragraph of the section makes an exception to the general rule dependent on leave being granted by the Court before the first hearing. It is a section which provides the rule to be followed [100] in the inception and framing of a suit by a person having claims against another in respect of one cause of action. Section 43 cannot in my opinion apply to proceedings in execution of a decree, in which the cause of action in respect of which the suit was brought has merged.

It must not be assumed that I am of opinion that a plaintiff who had obtained a money-decree would be entitled to apply to have that decree executed in parts. What I mean is that it must not be assumed, in my opinion, that a plaintiff who had obtained a decree, we will say, for Rs. 1,000 would be entitled to execute it by successive applications to execute to the extent of Rs. 10, for instance, I do not say whether he would be entitled to split up the execution of his decree or not. That point can be decided when it arises. I only wish to guard myself against being misunderstood. I may say, however, that I have no doubt that a plaintiff would be entitled to make separate applications for the execution of a decree which provided for different reliefs, as, for example, where he obtained a decree for possession, and for mesne profits to be ascertained, he would in my opinion be entitled at once to execute his decree for possession and to execute on a separate and later application his decree for mesne profits when ascertained. In the case of *Ram Baksh Singh* v. *Madat Ali*, (1) Sir ROBERT STUART, C.J., and Mr. Justice PEARSON held that where a decree was of a complex character and granted different kinds of relief to be obtained by process of different kinds there was no valid objection to separate applications for partial execution of the decree. In the case of *Radha Kishen Lall* v. *Radha Pershad Sing* (2) Mr. Justice MACPHERSON and Mr. Justice AMEER ALI, held that s. 43 of the Code of Civil Procedure did not apply to proceedings in execution of a decree, and that where a decree gave reliefs of a different character, such as a decree for possession and a decree for costs, there was nothing in the Code of Civil Procedure to prevent separate and successive applications for execution as regards each of them. I would dismiss this appeal with costs. [and order the execution to proceed].*

[101] TYRRELL, J.— I concur in all respects.

KNOX, J.—I fully agree with the learned Chief Justice, that s. 43 is not a section which governs or applies to proceedings in execution.

BLAIR, J.—I concur entirely in the order proposed and the reasons given by the learned Chief Justice.

BURKITT, J.—I also concur in the judgment of the learned Chief Justice, and I only desire to add that in my opinion, s. 43 of the Code of Civil Procedure, is a section which deals with the frame and initiatory stages of a suit, and is not applicable, after judgment and after the rights of the parties have been decided, to proceedings in execution, any more than, for example, s. 44 would be applicable. As to the case now before me, I have no doubt that the Munsif, by his order of the 23rd of December 1887, did no more than dispose of the execution application immediately before him, namely, the application for recovery of the amount of costs and damages decreed, and that his order had no effect whatever on that

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* Words in rectangular brackets form a portion of the judgment though not given in I.L.R.

(1) N.W.P. H.C.R. (1875) 95.

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portion of the decree which gave the judgment-debtor a right to possession of certain land. I concur in dismissing this appeal with costs.

AIKMAN J.—I concur with the learned Chief Justice in thinking that this appeal should be dismissed with costs.

Appeal dismissed.

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19 A. 98 (F.B.) = 13 A.W.N. (1893) 57.

19 A. 101 (F B.) = 17 A.W.N. (1897) 1.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice. Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Aikman, and Mr. Justice Blennerhassett.

SUBARNI AND ANOTHER (*Defendants*) *v.* BHAGWAN KHAN AND OTHERS (*Plaintiffs*).* [22nd April, 1896.]

Jurisdiction—Civil and Revenue Courts—Act No. XII of 1881 (*North Western Provinces Rent Act*), *ss.* 95, 96.

One Nathu was an occupancy tenant. On his death his widow Jhari continued in occupation of the occupancy holding. After the death of Jhari, one Subarni, alleging herself to be the daughter of Nathu and Jhari applied in the Court of Revenue to have her name entered in the village papers as occupancy tenant of Nathu's holding in succession to him The zamindars were **[102]** made parties to that proceeding. The Court of Revenue decided in favour of the applicant Subarni. The zamindars appealed on the revenue side, but their appeal was dismissed.

Held, that no suit would lie in a Civil Court on the part of the zamindars for a declaration that they and not Subarni were entitled to possession of the occupancy holding in question, and that it should be declared that Subarni was not the daughter of Nathu.

[R., 26 A. 468 = 24 A.W.N. (1904), 109; D., 23 A. 360; 23 A. 481; 24 A. 153; 1 A.L.J. 9 (14).]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, AIKMAN and BLENNERHASSETT, JJ.) was delivered by

EDGE, C. J. :—This is a suit brought by zamindars in which they claim maintenance of possession over certain biswas of land, and ask that it may be declared that after the death of one Nathu Kandu and of his widow, Jhari, the plaintiffs as zamindars were legally in possession of the occupancy holding of Nathu Kandu, and that the female defendant to the suit was not the daughter of Nathu Kandu, and that the order of the Court of Revenue, declaring her to be the occupancy tenant may be declared to be ineffectual.

Nathu Kandu was an occupancy tenant. On his death, his widow Jhari continued in occupation of the occupancy holding, and on her death the present dispute arose. The female defendant Subarni, claiming to be the daughter of Nathu by his wife Jhari, asked the Court of Revenue for possession of the occupancy holding as an occupancy tenant in succession to her parents. On that application, the Court of Revenue decided that Musammat Subarni was, as she alleged, the daughter of Nathu, and entered

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* Letters Patent Appeal No. 19 of 1894.

her name in the papers as the occupancy tenant of the holding. The zamindars, who are plaintiffs in this suit, were parties to that proceeding. Being dissatisfied with the decision of the Court of Revenue they went to the Court of Appeal on the Revenue side. Their appeal was dismissed. They then commenced a fresh campaign by filing the petition of plaint in this case in the Court [103] of the Munsif of Ghazipur. The question in this suit was exactly the question in the Revenue Court proceedings. The Munsif, coming to a different conclusion on the facts from those arrived at by both the Courts of Revenue, decreed the claim. The Subordinate Judge in appeal confirmed the decree of the Munsif. The defendants, *viz.*, Musammat Subarni and her son, brought this appeal. It was decided by a Judge in single Bench. There was an appeal from his judgment under s. 10 of the Letters Patent to a Bench of two Judges and that appeal was referred to the Full Bench.

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Now it is a fact that the application to the Court of Revenue was made by these defendants in this suit. They then sought a decision that they were occupancy tenants of the holding in succession to Nathu. On that application the Court of Revenue decided that they were. The Court of Revenue had to decide the preliminary point, first, namely, whether they had made out their pedigree, *i.e.*, that Musammat Subarni was the daughter of Nathu, as she alleged she was, and his heir. Having found that in favour of Musammat Subarni it made the order the result of which was that the entry in the Revenue records now sought to be impugned was made.

The argument on behalf of the plaintiff has gone almost to this length. It was contended that sections such as s. 10 of Act No. XII of 1881 only apply when the position of landlord and tenant is admitted, and that a Court of Revenue has no jurisdiction finally to decide a matter under s. 10 unless the position between the parties of landlord and tenant is admitted. Precisely the same line of argument, if it was well founded, would lead to the logical conclusion that the Court of Revenue could try no suit for arrears of rent under s. 93 (*a*) unless the position between the parties of landlord and tenant was admitted. That would reduce the position of the Court of Revenue to the position held by arbitrators appointed by consent of parties. If the Court of Revenue could only try suits for rent, for example, or applications made under s. 10, when the relationship between the parties of [104] landlord and tenant was admitted, it would be in the power of the defendant to a suit in the Court of Revenue or of the respondent to an application in that Court to oust the jurisdiction of the Court of Revenue by simply denying the legal relation alleged to exist between him and the plaintiff. The result would be that Courts of Revenue would be Courts having jurisdiction only where the parties consented. That would be rather an extraordinary conclusion to arrive at when we bear in mind that suits under s. 93 of Act No. XII of 1881 can only come before the Civil Court in the stage of appeal, and that the jurisdiction of the Civil Court is absolutely barred, either as a Court of original jurisdiction or as a Court of appeal, in all applications to which s. 95 of that Act applies. Not only was the dispute in this case one in which an application under s. 95 of Act No. XII of 1881 might have been made, but the application of Musammat Subarni and her son was in substance an application under s. 95. It was an application which could not be granted without a determination in her favour of the question as to whether she was a tenant of the occupancy holding. In our view this question cannot be litigated in the

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Civil Court. The decree of the Court of Revenue is final, that decision, by reason of s. 96 (*b*), having the effect of a judgment of a Civil Court, subject to appeal to a Court of Revenue. We allow this appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

19 A. 101 (F.B.) = 17 A.W.N. (1897) 1.

19 A. 104 = 16 A.W.N. (1896) 189.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair, and subsequently before Sir John Edge, Kt., Chief Justice and Mr. Justice Blennerhassett.

MUHAMMAD SIRAJ-UL-HAQ AND OTHERS (*Plaintiffs*) *v.* IMAM-UD-DIN (*Defendant*).* [18th and 25th July, 1896.]

Act No XX of 1863, *ss.* 14, 15—*Religious endowment—Jurisdiction—Court Fee—Act No. VII of* 1870 (*Court Fees Act*), *sch. ii, art.* 17, *cl* 6

Held that Act No. XX of 1863 was applicable to an endowment whereby certain shops had been purchased by subscription and dedicated to the support of a mosque, and was also applicable in respect of a person in possession of the [105] endowed property and professing to act as *mutawalli* even though he might not have been lawfully appointed. *Dhurrum Singh* v. *Kissen Singh* (1) and *Sheoratan Kuari* v. *Ram Pargash* (2) referred to.

Semble that a suit under s. 14 of Act No. XX of 1863 against the superintendent of a religious endowment for misfeasance is a suit which for the purpose of payment of court-fees falls within art. 17, cl. (vi), of the second schedule of Act No. VII of 1870. *Delroos Banoo Begum* v *Ashgar Ally Khan* (3), *Sonachala* v. *Manika* (4) and *Omrao Mirza* v. *Jones* (5) referred to.

[F., 17 Ind. Cas. 270 (273) = 216 P.L.R. 1912 = 181 P.W.R. 1912; Rel. on, 14 C.W.N. 1104 (1106) = 7 Ind. Cas. 164 (165); D., 9 M.L.J. 105.]

THIS was an appeal from an order of a District Judge returning the plaint in a suit purporting to be a suit under s. 14 of Act No. XX of 1863 on the ground that the Court had no jurisdiction to entertain the suit. At the hearing a preliminary objection was raised as to the sufficiency of the court-fee paid upon the plaint, which objection was overruled by the following order:—

KNOX and BLAIR, JJ.—A preliminary objection is raised to the hearing of this appeal. The objection is to the effect that the court-fee paid by the appellants in the Court below is insufficient. The suit is one brought by certain Muhammadan gentlemen in connection with a mosque called the Moti Masjid, situate in the city of Koil, of which the respondent is the *mutawalli*. The reliefs prayed for in the plaint are four in number, over and above the usual prayer for costs. They are as follows:—

1. That Hafiz Imam-ud-din, defendant, may be dismissed from the post of the *mutawalli* of the Moti Masjid under s. 15 of Act No. XX of 1863.

2. That for the management of the aforesaid appropriated property the following seven persons, *viz.*, Khan Bahadur Kunwar Muhammad Lutf Ali Khan, Mumtaz-ud-dowlah, Nawab Muhammad Faiyaz Ali Khan,

* First Appeal No. 28 of 1896 from an order of L. G. Evans, Esqr., District Judge of Aligarh, dated the 14th December 1895.

(1) 7 C. 767. (2) 18 A. 227. (3) 15 B.L.R. 167.
(4) 8 M. 516. (5) 10 C. 599.

the Honorable Haji Muhammad Ismail Khan, Hafiz Maulvi Muhammad Inayat-Ullah, Khwaja Muhammad Husain, Muhammad Sarfaraz Khan and Maulvi Shaikh Muhammad Yusuf Ali, who have been approved of by the Muhammadans of the city, may be appointed new *mutawalli's* (superintendents).

[106] 3. That the Moti Masjid and the whole of the appropriated property appertaining to the said Moti Masjid may be placed under the charge of the new *mutawallis*.

4. That for its future management a scheme according to the form annexed to this plaint or according to any other form which may be proper may be devised by the Court so that the work may be done in accordance with it.

The plaint was originally filed on a 20 rupees stamp. The suit professes to be brought under s. 15 of Act No. XX of 1863. In order to consider the merits of this preliminary objection it is best first to consider what is the nature of the action which can be brought under s. 15 of Act No. XX of 1863. Section 15 defines the interests which entitle a person to sue, and for the nature of the suit which can be brought we must look to s. 14. By that section any person interested in a mosque may sue in a Civil Court the superintendent of such mosque for any misfeasance, breach of trust or neglect of duty committed by such superintendent in respect of the trust vested in him. This is the only kind of suit specified in s. 14. That suit being laid, the action which the Civil Court may take upon the suit is next set out. In the present case the plaintiffs have not contented themselves with simply suing the superintendent for the breach of trust committed by him. They have gone on to dictate to the Court the action which that Court should take. It is important to bear this in mind. The learned vakil who made the preliminary objection based his objection upon the case of *Delroos Banoo Begum* v. *Ashgar Ally Khan* (1). That was also a suit which professed to be based upon s. 14 of Act No. XX of 1863. That suit was brought not merely for the purposes set out in s. 14 of the Act. The plaintiffs claimed a share of the produce of the trust estate as an appurtenance to the office of *mutawalli*. They also asked that they might be made *mutawallis* in place of the defendant. Such a suit was clearly not one for a declaratory decree alone. In the case before us the plaintiffs, although they have burdened their plaint with **[107]** dictating to the Court the way in which they wished the Court to exercise its powers, have neither asked to be appointed themselves as *mutawallis* nor have they asked for any benefit of any kind to be awarded to them as the result of the suit. Herein is a marked difference between the case of *Delroos Banoo Begum* v. *Ashgar Ally Khan* and this case. The next case cited to us in the same behalf was the case of *Sonachala* v. *Manika* (2). There is nothing in the report which shows whether that suit was laid under the Act or Regulation prevalent in Madras which corresponds with Act No. XX of 1863. But in that case the plaintiff did not bring a suit against the trustees only for misfeasance or breach of trust but also for the removal of the defendant from management, for the appointment of the plaintiff as manager, and for the removal of certain buildings. It also was a case differing from the one before us. In reply our attention was called to several precedents to be found in the Madras series of the Indian Law Reports; but they were all precedents connected

(1) 15 B.L.R. 167.

(2) 8 M. 516.

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with tarwads and in no way connected with the case before us. The case of *Omrao Mirza* v. *Jones* (1) was also cited, and under that precedent the plaintiffs, who had under orders of the Court paid Court fee upon the value given by them for the purposes of jurisdiction on the several reliefs claimed by them, contended that no further Court fee need be paid and the case might, as held by the Court below, be held to be one falling under s. 7, sub-section 4, cl. (*c*) of Act No. VII of 1870. They did not, however, abandon the contention that the case was one which really fell under sch. ii, art. 17, cl. (vi) of the Court Fees Act (Act No. VII of 1870). The precedent *Omrao Mirza* v. *Jones* would apparently support the plaintiffs in the contention that they have in any case paid sufficient Court fees. If it were necessary in this case to decide whether the case was one which fell under sch. ii, art 17, cl. vi of Act No. VII of 1870, we should have been inclined to hold that it does, as in our opinion a suit laid as this suit is under s. 14 of Act No. XX of 1863 is a suit merely against the superintendent for misfeasance. It is a suit of a **[108]** peculiar nature, and, so far as we can see, it is not one in which it is possible to estimate at a money value the subject-matter of the suit and is not otherwise provided for in the Court Fees Act. In any case sufficient Court fees in our opinion have been paid and the preliminary objection fails.

The appeal subsequently came on before a different Bench for disposal on the merits.

The facts of the case sufficiently appear from the order reported above and from the subsequent judgment on the appeal.

Mr. Amir-ud-din, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLENNERHASSETT, J.—This appeal has arisen in a suit against one Hafiz Imam-ud-din, who was acting, whether duly appointed or not, as the *mutawalli* of a mosque. The suit was filed in the Court of the District Judge. An objection, was taken that the District Judge had no jurisdiction, and he made an order returning the plaint to be presented to the proper Court. There was no question as to the local jurisdiction of the District Judge. The real question was—was the suit one to which s. 14 of Act No. XX of 1863 applied? The District Judge considered that that section did not apply; hence his order. The plaintiff has appealed.

For the respondent-defendant it has been contended that s. 14 of Act No. XX of 1863 can only apply to a mosque which has been endowed with land, and that it can only apply when it is alleged that the defendant was lawfully appointed trustee of the mosque.

The contention as to the land arises in this way. Certain Muhammadans in the city subscribed and purchased with the subscription certain shops with which the mosque was endowed. They became *waqf*. They are not the less *waqf* because they are the result of subscription and not the result of a dedication by a single owner. When the shops were purchased and dedicated to the mosque the land upon which they stood passed with them. Indeed there is nothing in the point. The contention appears to be that **[109]** because it is not said in the plaint that the land on which the shops stood was specially dedicated to the mosque, there was no dedication of the land.

(1) 10 C. 599.

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We agree with the judgment of the High Court of Calcutta in *Dhurrum Singh* v. *Kissen Singh* (1) that s. 14 of Act No. XX of 1863 is generally applicable to all religious endowments of this nature. In *Sheoratan Kunwari* v. *Ram Pargash* (2) it was decided by this Court that it was not essential to bringing a suit under s. 14 of Act No. XX of 1863 that the endowment should ever have been taken under the Board of Revenue.

As to the other point, the defendant, although he appears to have entered upon the mutawalliship without election or specific appointment does not pretend that he is a trespasser. He does not say that he is not the *mutawalli* of the mosque. We find him in possession professing to be the *mutawalli* of the mosque, and as such s. 14 of Act No. XX of 1863 would apply to him.

The suit was properly brought in the Court of the District Judge, who alone had jurisdiction. We allow this appeal with costs. We set aside the order of the Court below with costs and direct the District Judge to receive the plaint and to enter it on the file of pending suits in his Court and to proceed with the suit according to law. The plaint, which is at present on the file in this Court, will be returned to the counsel for the appellants that it may be presented to the District Judge.

Appeal decreed.

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19 A. 109 = 16 A.W.N. (1896) 191.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blennerhassett.

QUEEN-EMPRESS v. RAM SUNDAR AND ANOTHER.*

[30th July, 1896.]

Criminal Procedure Code, s. 188—Act No. XLV of 1860, s. 363—Kidnapping from lawful guardianship—Offence committed outside British territory—Jurisdiction—Certificate of Political Agent.

The absence of the certificate of the Political Agent required by s. 188 of the Code of Criminal Procedure is an absolute bar to the trial of a case to which the provisions of that section apply.

[110] *Semble* that the offence of kidnapping from lawful guardianship punishable under s. 363 of Act No. XLV of 1860, is not a continuing offence.

[F., 26 A. 197 = 23 A.W.N. 233; 27 C. 1041 (1053) = 4 C.W.N. 645; R., 24 B. 287 (290) = 1 Bom. L.R 678.]

THE facts of this case are as follows :—

The child of a British Indian subject residing in Nepal, but close to the frontier, was missed, and was eventually found in company with one Ram Sundar and a woman, Musammat Anupa, at Basti, in the Gorakhpur district.

The case was inquired into by a Magistrate at Basti, but without the certificate required by s. 188 of the Code of Criminal Procedure, having been obtained from the Political Agent in Nepal.

According to the Magistrate who inquired into the case, there was no direct evidence as to whether the kindnapping actually took place in Nepal territory, though the presumption was that it occurred in Nepal.

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* Criminal Reference No. 386 of 1896.

(1) 7 C. 767.

(2) 18 A. 227.

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19 A. 109=16 A.W.N. (1896) 191.

The Magistrate committed Ram Sundar and Anupa to the Court of Sessions at Gorakhpur, and upon this commitment a reference was made to the High Court by the joint Sessions Judge asking that the commitment should be quashed as being bad in law, owing to the absence of the Political Agent's certificate as mentioned above.

The Public Prosecutor (for whom Mr. *A. E. Ryves*) for the Crown.

JUDGMENT.

EDGE, C. J. and BLENNERHASSETT, J.—The offence of kidnapping for which Ram Sundar and Musammat Anupa have been committed for trial took place in Nepal. The charge was inquired into by a Magistrate in British India, and the commitment for an offence under s. 363 of the Indian Penal Code was made, but no certificate of the Political Agent in Nepal, which is required by the provisions of s. 188 of the Code of Criminal Procedure as a condition precedent to the hearing of the charge in British India, was produced or is shown to have been issued. The proviso to s. 188 is prohibitive, and under the circumstances, we hold that the Magistrate had no jurisdiction. We quash the commitment.

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19 A. 111=16 A.W.N. (1896) 191.

[111] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* O'BRIEN.* [21st August, 1896.]

Criminal Procedure Code, ss. 179, 185—Jurisdiction—Place where consequences of act ensued—Criminal breach of trust—Act No. XLV of 1860 (Indian Penal Code), s. 408.

B., an employè of a Company, the office of which was at Cawnpore, was charged with the offence punishable under s. 408 of the Indian Penal Code. The complainant alleged that B being in charge on behalf of the Company, at a place in Bengal, of certain goods belonging to the Company and being ordered to return the said goods to Cawnpore, never did so, and failed to account for the goods or their value, to the loss of the Company. *Held*, that on the statement of the case by the complainant the Courts at Cawnpore had jurisdiction to inquire into the charge, inasmuch as the consequence of B's acts, namely, loss to the Company occurred in Cawanpore.

[F., 32 A. 397 (398)=7 A.L.J. 319 (320)=11 Cr.L.J. 372 (373)=6 Ind. Cas. 563 (564); 35 A. 29 (33)=10 A.L.J. 431 (433)=13 Cr.L.J. 856 (857)=17 Ind. Cas. 792 (793); R., 5 Ind. Cas. 830=11 Cr.L.J. 253=7 P.R. 1910=7 P.W.R. 1910=172 P.L.R. 1910; 8 Ind. Cas. 595=8 Bur. L.T. 10; 67 P.L.R. 1901; 18 P.W.R. 1909 (Cr.)=8 Cr.L.J. 175; D., 34 A. 487 (489)=10 A.L.J. 45 (47)=13 Cr.L.J. 479=15 Ind. Cas. 319; 5 A.L.J. 333=28 A.W.N. (1908) 115 (116)=7 Cr.L.J. 394.]

IN this case, one W. O'Brien, an employee of the Muir Mills Company, of Cawnpore, was sent to Manbhum, in Bengal on business of the Company. While in Bengal, certain goods belonging to the Company were sent to him for sale, the Company having some intention of starting an agency in Bengal. Subsequently, however, the Company altered their plans and demanded the return of the goods, or of their value if sold. The goods were not returned, and ultimately, after repeated demands, the Company filed a complaint in a Magistrate's Court at Cawnpore, charging O'Brien with the commission of criminal breach of

* Criminal Miscellaneous No. 133 of 1896.

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trust under s. 408 of the Indian Penal Code. Upon this, O'Brien applied to the High Court under s. 185 of the Code of Criminal Procedure, asking that it might be declared that the Court at Cawnpore had no jurisdiction to inquire into the alleged offence, on the ground that, if any offence had been committed by the applicant, that offence was committed in Bengal and not within the jurisdiction of any Criminal Court at Cawnpore.

Mr. *C. Dillon*, for the applicant.

The Public Prosecutor (for whom Mr. *W. K. Porter*), for the Crown.

JUDGMENT.

EDGE, C. J.—This is an application to the High Court to act under s. 185 of the Code of Criminal Procedure. The case against the applicant is one of an offence alleged to have been [112] committed by him under s. 408 of the Indian Penal Code. The contention on his behalf is that, if he committed any offence, it was committed in Lower Bengal and not within the Magistrate's jurisdiction at Cawnpore. Of course I express no opinion whatever as to whether the applicant committed an offence at all. That matter has yet to be decided. If, however, he parted with goods of his employers in Lower Bengal and did not remit the price of those goods, as he was bound to do, to his employers in Cawnpore, it appears to me that the case comes within s. 179 of the Code of Criminal Procedure; that the consequence of the applicant having made away with, for his own purposes, goods of his employers in Lower Bengal, or the price of them, if he did so, was that a loss of the value of those goods ensued to his employers in Cawnpore. It might be very difficult to prove where the actual offence of breach of trust was committed. Of course, the applicant denies he has committed any. At one time he said the goods were on their way to Cawnpore. Another time he said the goods were at Lucknow. The goods have disappeared. The applicant went to Cawnpore and failed to account. The matter can be inquired into at Cawnpore, and the Magistrate at Cawnpore has jurisdiction in the case. I dismiss the application.

As to the charge relating to the coal, I have not sufficient facts before me to decide whether the Magistrate has jurisdiction to inquire or not.

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19 A. 112=16 A.W.N. (1896) 182.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

MUTASADDI AND OTHERS (*Applicants*) *v.* MANI RAM (*Opposite Party*).*

[2nd September, 1896.]

Criminal Procedure Code, ss. 545, 547—Fine—Portion of fine paid as compensation to complainant—Sentence of fine set aside—Recovery of compensation from complainant—Procedure.

On a sentence of fine being passed, it was ordered, under s. 545 of the Code of Criminal Procedure, that a portion of the fine should be paid as the compensation to the complainant, it was so paid. Subsequently the sentence was set aside in revision by an order of the High Court which directed that the fines should be refunded.

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* Criminal Revision No. 431 of 1896.

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19 A. 112=16 A.W.N. (1896) 182.

[113] *Held*, that the sum which had been paid to the complainant was recoverable under this order as part of the original fine, and that it was recoverable by process under section 547 of the Code and not by suit in a Civil Court.

[R., 29 P.R. 1903=2 P.L.R. 1904.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Roshan Lal*, for the appellant.

The Government Pleader (for whom Pandit *Suraj Nath*), for the Crown.

JUDGMENT.

AIKMAN, J.—The applicants were convicted by the Joint Magistrate of Dehra Dun, of an offence punishable under s. 411 of the Indian Penal Code. Four of them were sentenced to be fined Rs. 40, and the remaining two to fines of Rs. 20 each, or, in default, to undergo one month's rigorous imprisonment. By his order, the Joint Magistrate directed that, out of the total sum of Rs. 200 imposed as fine, Rs. 100 should, under the provisions of s. 545 of the Code of Criminal Procedure, be paid to Mani Ram, the complainant in the case, as compensation. The fines were paid, and, the case not being an appealable one, Rs. 100 were at once paid to the complainant. The six accused persons applied to this Court for revision of the Joint Magistrate's order. A Bench of this Court, consisting of the learned Chief Justice and my brother Banerji, set aside the convictions and sentences imposed upon the applicants, and further directed that the fines, if paid, be refunded. When the applicants applied to the Magistrate for the refund of the fines in compliance with the order of this Court, the sum of Rs. 100 was repaid to them. As regards the balance of Rs. 100 they were directed to sue the complainant Mani Ram in the Civil Court.

The applicants come here asking for the revision of this order. In my opinion the order of this Court directing that the fines which the applicants paid should be repaid to them implies an order that the fines, in whosesoever hands they might be, should be payable to them. In my opinion the provisions of s. 547 of the Code of Criminal Procedure are wide enough to cover a case like the present. I see no reason why the applicants should be driven to have recourse to a civil suit against the complainant Mani Ram in order [114] that the direction of this Court as to the repayment of the fines should be given effect to. It is doubtful even whether in a Civil Court they would have any remedy against Mani Ram, as it was from the Magistrate and not from the applicants, that Mani Ram received the money. I set aside the Magistrate's order and direct him to call upon Mani Ram to refund the applicants' money which was paid to him. If he refuses, the Magistrate will take action in the manner directed in s. 547 of the Code of Criminal Procedure, and, when the money had been recovered, if it is recovered, will repay it to the applicants.

19 A. 114=16 A.W.N. (1896) 195.

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REVISIONAL CRIMINAL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

19 A. 114= 16 A.W.N. (1896) 195.

BALWANT AND ANOTHER (*Applicants*) *v.* KISHEN (*Opposite Party*).*
[10th November, 1896.]

Jurisdiction—Transfer of Magistrate—Order passed by a Magistrate after his successor had entered upon his appointment—Criminal Procedure Code, s. 12.

By an order of the Local Government Babu Dila Ram, a Magistrate exercising jurisdiction in the Meerut district, was transferred from that district "on the arrival of Kunwar Kamta Prasad."

Held, by Banerji, J., that the effect of the order of transfer so expressed was that Babu Dila Ram ceased to have jurisdiction as a magistrate within the Meerut district from the time when Kunwar Kamta Prasad commenced work as a magistrate in that district.

Held, by Aikman, J., that the effect of the said order was that Babu Dila Ram ceased to have jurisdiction on the arrival of Kunwar Kamta Prasad; but whether such arrival was his arrival within the limits of the district or at headquarters was not clear from the order.

Empress of India v. *Anand Sarup* (1) referred to.

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Meerut. The facts of the case are fully stated in the judgment of Banerji, J.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

BANERJI, J.—This case has been referred by the learned Sessions Judge of Meerut, under the following circumstances. On the 9th of June 1896, Babu Dila Ram, a magistrate of the first class, granted sanction under section 495 of the Code of Criminal [115] Procedure, 1882, for the prosecution of Balwant and Tika for offences punishable under ss. 211 and 193 of the Indian Penal Code. It was contended on behalf of Balwant and Tika that Babu Dila Ram had ceased to have jurisdiction in the district of Meerut, on the date above mentioned, and was not competent to make the order of sanction. By notification of Government dated the 7th of May, 1896, Babu Dila Ram was transferred from Meerut to Ballia, "on the arrival of Kunwar Kamta Prasad." I presume that this must be taken to mean—on the arrival of Kunwar Kamta Prasad in Meerut, and the assumption by him of the office of Deputy Collector in that district. We have no information as to the date of the arrival of Kunwar Kamta Prasad at Meerut, but he took over charge of his duties on the 26th of May, 1896, a fortnight before the date on which Babu Dila Ram passed the order complained of. The question which arises in this case is whether, after the arrival of Kunwar Kamta Prasad at Meerut and the assumption by him of the charge of his duties as magistrate, Babu Dila Ram ceased to have any jurisdiction in the district of Meerut. By s. 12 of the Code of Criminal Procedure, the Local Government may from time to time define local areas within which a magistrate may exercise all or any of the powers with which he may be invested. Babu Dila Ram's competency to exercise his powers as a magistrate in the district of Meerut, was derived from the order of the Local Government posting him

* Criminal Revision No. 426 of 1896.

(1) 8 A. 563.

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19 A. 114 = 16 A.W.N. (1896) 195.

as a magistrate to that district. His jurisdiction to exercise his powers in the district ceased as soon as the order for his transfer to another district came into effect. The notification of Government to which I have referred declared that Babu Dila Ram was to be regarded as transferred from Meerut to Ballia on the arrival of Kunwar Kamta Prasad. In my opinion that notification should be read with the notification which precedes it, *viz.*, that Kunwar Kamta Prasad was to be posted "on return from leave" to the Meerut district; and, placing a reasonable construction on the notification relating to the transfer of Babu Dila Ram, I am of opinion that the words "on arrival of Kunwar Kamta Prasad" in that notification should be construed **[116]** to mean—on the assumption by Kunwar Kamta Prasad of his duties as magistrate. The continuance of Babu Dila Ram to exercise his powers in the Meerut district depended, according to the notification of Government, upon the happening of a particular event, namely, the assumption of his duties by Kunwar Kamta Prasad. Babu Dila Ram, therefore, ceased to have jurisdiction in the Meerut district from the 26th of May, on which date Kunwar Kamta Prasad took over charge of his duties. From that date he could exercise no jurisdiction in the Meerut district as a magistrate. This case is within the principle of the ruling of the Full Bench in *Empress of India* v. *Anand Sarup* (1). In that case it was held that Mr. Mulock ceased to retain his jurisdiction as a magistrate in the district of Meerut on being relieved by Mr. Fisher. That was the case of a District Magistrate who held a specific office and who ceased to hold that office as soon as he was relieved of his duties by another officer. The case of a Deputy Collector exercising the powers of a magistrate is no doubt different. Any number of such officers may be appointed by Government to a particular district, and the assumption of the office of Deputy Collector by one officer in a district does not necessarily lead to the result that another Deputy Collector who has been performing the duties of a magistrate in that district ceases to have jurisdiction in the district. The jurisdiction of each officer within a specific area depends, as I have said, upon the orders of Government appointing him to exercise jurisdiction within that area. In this case the notification of Government to which I have referred, worded as it was, had the effect of transferring Babu Dila Ram from the Meerut district as soon as Kunwar Kamta Prasad took over charge of his duties in that district, and he no longer continued to be a magistrate in the Meerut district. That being so, he had no jurisdiction on the 9th of June, 1896, to make the order complained of. Had the notification of Government transferring Babu Dila Ram from Meerut not been worded in the way in which it was worded, and had it been to the effect that **[117]** Babu Dila Ram was to be transferred from Meerut to Ballia on being relieved of his duties in the Meerut district, I should have had no hesitation in holding that he had jurisdiction to make his order of the 9th of June, as he was not relieved of his duties in the Meerut district until that date. Such a notification would have attained the object contemplated in the letter of Government dated the 23rd April 1896, to which the learned Public Prosecutor drew our attention. Having regard, however, to the terms in which the order for the transfer of Babu Dila Ram was made, I must hold that he ceased to have jurisdiction in Meerut as soon as Kunwar Kamta Prasad assumed charge of his duties in that district. I would set aside the order made by Babu Dila Ram on the 9th June 1896.

(1) 3 A. 563.

1896 NOV. 10. — REVISIONAL CRIMINAL. — 19 A. 114 = 16 A.W.N. (1896) 195.

AIKMAN, J.—I concur with my brother Banerji in thinking that the order made by Babu Dila Ram on the 9th of June 1896 was without jurisdiction and must be set aside. I consider that we must be guided in this case by the principle laid down in the decision by the majority of this Court in the Full Bench case, *Empress of India* v. *Anand Sarup* (1). In that case the Government notification appointed Mr. Mulock, who was then officiating Magistrate and Collector of Meerut, to officiate as Magistrate and Collector of Gorakhpur on the happening of a certain event *i. e.*, on his being relieved by Mr. Fisher. It was held in that decision that on the happening of that event Mr. Mulock ceased to exercise any jurisdiction in the Meerut district. In the present case the effect of the Government notification is to declare that Babu Dila Ram on the happening of a certain event ceased to have any jurisdiction in the Meerut district. If that event happened before the order in this case was made, that order was made by a magistrate who had no jurisdiction to make it. The event in this case, the happening of which determined the jurisdiction of Babu Dila Ram in the Meerut district, was the arrival of another magistrate named Kunwar Kamta Prasad. That arrival had undoubtedly taken place two weeks before the order complained of was [118] passed. I feel bound to express my opinion that the form of the order of transfer is open to objection. It is not clear whether the arrival was the arrival within the Meerut district or the arrival at the head-quarters of that district. In either case the exact time of the arrival might be unknown to the officer whose transfer depended upon it, and he might in consequence pass an order when his jurisdiction had ceased. The learned Public Prosecutor endeavoured to support the order on two grounds. The first ground was that the notification of Babu Dila Ram's transfer referred to him only as Deputy Collector and did not refer to him as Magistrate. He therefore contended that, notwithstanding this notification and the arrival of Kunwar Kamta Prasad, Babu Dila Ram might still be able to exercise jurisdiction as magistrate. In my opinion this contention is untenable. Babu Dila Ram was invested with powers of a magistrate and these powers are exercised by him in any district to which he may be posted. Even if the contention could be sustained, it lands us in a worse dilemma, for it would follow that Babu Dila Ram is still a magistrate of the Meerut district and all the orders passed by him as magistrate in the Ballia district would be without jurisdiction. The next ground on which the learned Public Prosecutor endeavoured to support the order was a letter of Government No. 1007 dated the 23rd of April 1896. In paragraph 3 of this letter it is directed that in the case of transfers Magistrates and Deputy Commissioners should examine the files of any subordinate whose transfer is impending and arrange so that the officer shall so far as possible clear his file before making over charge of his office. With the object which the Government had in view in issuing this letter I most cordially sympathise. There is no doubt that the departure of a magistrate either on leave or transfer leaving cases partially heard results not only in great delay in the disposal of cases but in additional expense and inconvenience to the parties. By cl. (*a*) of s. 350 of the Code of Criminal Procedure an accused is entitled when a magistrate takes up a case partially heard by his predecessor to demand that the witnesses be resummoned and reheard. If the design of Goverment in the letter referred to [119] be carried out, it would obviate the delay and expense

(1) 3 A. 563.

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which arise from the exercise of the privilege thus given to the accused by law. But the power of a District Magistrate to allocate work is confined to the allocation of work amongst magistrates who are for the time being his subordinates. If the effect of a Government order is to transfer a Magistrate from a district, the District Magistrate of that district has no longer any authority to make any arrangement in regard to the work of the magistrate so transferred. Whilst there can only be one District Magistrate, the number of other magistrates in a district is only limited by the discretion of the Local Government, inasmuch as it may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates in a district. There would be a difficulty in providing that any magistrate subordinate to the District Magistrate should be transferred on his making over charge of his office inasmuch as there is no particular office of which he can make over charge. If, as suggested by my brother Banerji, the notification of Government were to run—"on being relieved of his duties" —the difficulty would, I think, be obviated, and the object which the Local Government had in view in issuing the letter of the 23rd of April 1896, would be capale of being attained. I concur in thinking that the order made by Babu Dila Ram on the 9th of June must be quashed.

BY THE COURT,

The order of the Court is that the order of Babu Dila Ram, dated the 9th of June 1896, is set aside.

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19 A. 119 = 16 A.W.N. (1896) 192.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

QUEEN-EMPRESS *v.* BHADU.* [10th November, 1896.]

Practice—Pleading—Qualified plea of guilty—Evidence to be taken.

In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused.

[F., 3 Cr. L.J. 80 = 54 P.R. 1905 (Cr.) = 169 P.L.R. 1905; R., 5 A.L.J. 157 (158) = A.W.N. (1908) 54 = 7 Cr. L.J. 295.]

[120] THE facts of this case were as follows:—

The appellant Bhadu was a young man of about 20 years of age who had a wife about the same age as or a little older than himself. (The Civil Surgeon in the report of his *post mortem* examination states that "the body was that of a well developed woman aged about 22 years.") The wife had been living in her father's house, and refused to live with Bhadu: Bhadu at last came himself to fetch her, but his wife declined to return with him. According to Bhadu's own statement made before the Magistrate, she refused to go and then said to him:—"*Chal ware, tum kahan rahe?*" On this Bhadu got angry and struck his wife with a *kulhari*, inflicting wounds which resulted in her death. At his trial in the Court of Session Bhadu pleaded:—"I killed my wife. She abused me. Called me *ware*. No one was present. I killed her with a *kulhari*." On this plea, as on a plea of guilty, Bhadu was convicted without evidence being taken. He appealed to the High Court.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

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* Criminal Appeal No. 1078 of 1896.

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APPELLATE CRIMINAL.

19 A. 119 = 16 A.W.N. (1896) 192.

JUDGMENT.

EDGE, C.J., and BLENNERHASSETT, J.—Bhadu was convicted on his own plea without evidence being recorded in the Sessions Court. He was charged with the offence punishable under s. 302 of the Indian Penal Code. The case against him was that he had murdered his wife. His plea as recorded is as follows:—"Guilty. I killed my wife. She had abused me. Called me '*ware*.' No one was present. I killed her with a *kulhari*." We are not clear whether the word "guilty" in the plea was Bhadu's or was the interpretation of the Judge of the meaning of Bhadu's plea. In any event it was not an unqualified plea of guilty; and although the words of abuse which Bhadu said had been used might not have effect to take the case out of s. 302 of the Indian Penal Code, they put a qualification on his admission and made it necessary in our opinion that the trial should proceed and evidence should be taken. In this country it is dangerous to assume that a prisoner of this class understands what are the ingredients of the offence under s. 302 of the Indian Penal Code, and what are **[121]** the matters which might reduce the act committed to an offence under s. 304. Even in England it used to be the practice of some judges, and probably is still, although they were not bound to do so, to advise persons pleading guilty to a capital offence to plead not guilty and stand their trial. One of us has known that course followed in numerous cases. We set aside the conviction and sentence, and send this case back to the Court of Session with a direction to the Judge to take the evidence in the case and proceed on the basis of the plea not being an unqualified plea of guilty.

[The case was subsequently tried on evidence taken before the same Sessions Judge, and Bhadu was again convicted and sentenced to death, the conviction and sentence being upheld by the High Court on the 4th of February 1897.]

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19 A. 121 = 17 A.W.N. (1897) 2.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SHANKAR DIAL (*Applicant*) *v.* A. M. VENABLES (*Opposite Party*).*

[28th November, 1896.]

Criminal Procedure Code, s. 195—Sanction to prosecute—"Court to which appeals ordinarily lie"—Collector—District Judge.

For the purpose of granting or revoking a sanction to prosecute refused or granted under s. 195 of the Code of Criminal Procedure, an Assistant Collector of the first class is subordinate to the District Judge. *Hari Prasad* v. *Debi Dial* (1), followed, *Queen-Empress* v. *Ajudhia Prasad* (2) considered.

One Shankar Dial in a suit which was being tried before an Assistant Collector of the first class was alleged to have made use of a forged document. The Assistant Collector was asked to sanction the prosecution of Shankar Dial, but refused. The order refusing sanction was passed on the 1st of August 1895. Subsequently, on the 21st of August 1895, the Assistant Collector cancelled his order of the 1st of August and granted sanction for the prosecution of Shankar Dial. On application under

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* Criminal Revision No. 622 of 1896.

(1) 10 A. 582.

(2) 15 A.W.N. (1895) 121

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s. 195 of the Code of Criminal Procedure to the High Court this second order of the [122] 21st of August was set aside on the ground that the Assistant Collector had no further jurisdiction to deal with the matter. On the 1st of June 1896, the said Assistant Collector being at that time officiating Collector of the District, application was again made to him to sanction the prosecution of Shankar Dial in respect of the matter above referred to. On the 8th of June 1896 the Officiating Collector of the district passed an order declining to interfere and referring the applicant to the High Court for orders. The applicant, however, took this order before the Sessions Judge, who, on the 19th of September 1896, made an order sanctioning the prosecution of Shankar Dial. Shankar Dial accordingly applied to the High Court under s. 195 of the Code of Criminal Procedure for revocation of the sanction granted by the Sessions Judge.

Mr. *J. Simeon*, for the applicant.

Mr. *Roshan Lal*, for the opposite party.

The Government Pleader (*Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C. J.—Shankar Dial, in a suit in a Court of Revenue made use of a document which is alleged to have been forged. An Assistant Collector of the first class who was trying the case refused to sanction the prosecution of Shankar Dial. However, the same Assistant Collector, at a subsequent date, having changed his mind assumed jurisdiction and granted sanction. He granted the sanction on the 21st of August 1895. On an application in revision in this Court the order granting sanction was set aside on the ground that the Assistant Collector of the first class had, by his refusal of the 1st of August 1895, exhausted his jurisdiction to interfere in the matter. The order of the High Court was passed on the 16th of December 1895. The applicant, who was desirous of bringing Shankar Dial to justice, waited until the 1st of June 1896, when the officer who had been the Assistant Collector of the first class was acting as Collector of the district, and then applied to him for sanction. He declined to interfere, and referred her to the High Court for orders. The lady, however, applied to the District Judge, who, on the 19th of September 1896, made an [123] order sanctioning the prosecution of Shankar Dial. Shanker Dial had now applied to this Court to exercise its revisional powers and set aside the order of the District Judge.

The application is based upon two grounds—the one, that the Court of the District Judge is not the Court to which appeals ordinarily lie from the Court of an Assistant Collector, and the other, on the merits of the application itself.

As to the first ground, that depends upon the construction to be put upon the penultimate paragraph of s. 195 of the Code of Criminal Procedure, 1882. That paragraph is as follows :—"For the purpose of this section every Court, other than a Court of Small Causes shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie." That paragraph does not mean to give the jurisdiction to the Court to which the appeal in the matter in which the false document was used happened to lie. If that construction was put on the paragraph, it might happen that there would be no Court which could exercise the power of revoking or granting sanction which had been given or refused by the Lower Court, as no appeal might lie in the particular case in which the perjury was committed or the false document used. It is impossible to say what the Legislature intended by

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that penultimate paragraph. To take the case of an Assistant Collector of the first class. Where an appeal would lie from his decision would depend upon the nature of the matter before him. The appeal might lie to the District Judge, to the Collector of the District or to the Commissioner of the Division. There are some cases in which no appeal would lie at all. As remarked by me in a somewhat similar case—*Hari Prasàd* v. *Debi Dial* (1)—" I doubt whether the framers of s. 195 of Act No. X of 1882 had present to their minds the difficulty or ambiguity in this respect arising out of the provisions of the Rent Act, XII of 1881." (That is, Act No. XII of 1881). I might add that a similar difficulty might arise in deciding whether the High Court or the Court of the District Judge is the Court to which appeals ordinarily [124] lie from the Court of the Subordinate Judge. The Legislature has placed the Courts in a most difficult position. It is impossible, in my opinion, for a Judge to give any satisfactory reason for holding in this case that the Court of the District Judge was the Court which had jurisdiction, and that the Collector would not have had jurisdiction and yet it was not intended by the Legislature that two Courts should have concurrent jurisdiction, or that the matter should be left in doubt. For reasons of convenience I am of opinion that we should apply the principal of decision of this Court in *Hari Prasad* v. *Debi Dial* (1). If that decision had been present to my mind or had been brought to my attention in the case of *Queen-Empress* v. *Ajudhia Prasad* (2), I should have followed it. I candidly confess that it is impossible for me to say which of these decisions is right. It is for the Legislature to say that, and by enactment to interpret s. 195 of the Code of Civil Procedure. I would hold accordingly that the District Judge had jurisdiction to make the order sanctioning the prosecution in this case.

So much for the legal aspect of the case. As to the merits, it is obvious that this lady, in making these different applications and allowing months to elapse before bringing the matter to a conclusion, was actuated, not by a desire to further the interests of justice, but by a desire to oppress her opponent through the action of the Criminal Courts. There has been no explanation given of the delay between the 16th of December 1895 and June 1896. I would allow the application on the merits and would revoke the sanction to prosecute which has been granted.

BANERJI, J.—I agree in the order proposed by the learned Chief Justice and in his reasons for holding that the District Judge had jurisdiction to make the order complained of.

AIKMAN, J.—I am of the same opinion as the learned Chief Justice and concur in all that he has said.

BY THE COURT—The order of the Court is that the application is allowed and the sanction is revoked.

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(1) 10 A. 582.

(2) 15 A. W. N. (1895) 121.

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NOV. 30.

APPELLATE CIVIL.

19 A. 125 = 16 A.W.N. (1896) 197.

19 A. 125 = 16 A.W.N. (1896) 197.

[125] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

BALDEO DAS (*Applicant*), *v.* SUKHDEO DAS (*Opposite Party*).*
[30th November, 1896.]

Civil Procedure Code, s. 344 et seq—Insolvency—Application for a declaration of insolvency showing that applicant has assets apparently in excess of his liabilities —Burden of proof.

It does not follow that because a person has assets of a nominal value in excess of his liabilities he is not entitled to be declared an insolvent. But where a person applies to be declared an insolvent and shows in his statement that his assets exceed his liabilities, he must show also that by the sale of his interests or other realization of his assets a sum would not be secured which would enable him to pay his debts in full. *Jowalla Nath v. Parbatty Bibi* (1) discussed.

[R., 21 A.W.N. 79; 9 M.L.T. 431 (437).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C.J. and BURKITT, J.—Baldeo Das, a judgment-debtor arrested in execution of a decree against him, applied under s. 344 of the Code of Civil Procedure to be declared an insolvent. The applicant filed a schedule of his assets and liabilities, and it is not suggested that he had done anything which, under s. 351 of the Code, would be a bar to a declaration of his insolvency being made. However, the schedule of assets and liabilities showed this, that the applicant had assets of the value of over Rs. 12,000, and his liabilities amounted to a little over 6,000. It is true that much of the assets consisted of moneys lent upon mortgages or shares in sums of money lent upon mortgages, but he had also zamindari and some other assets. He filed no statement containing an estimate of the present realizable value of his assets; and, for all we know from this record, the sale of his zamindari and of his mortgagee interests under the mortgages might realize more, and that promptly, than would enable him to pay his debts in full. [126] The Court below dismissed his application and he has brought this appeal.

The decision of the High Court at Calcutta in *Jowalla Nath* v. *Parbatty Bibi* (1) has been pressed upon us on behalf of the appellant. Now we entirely agree with what is said in that judgment that "it is quite an error to suppose that a man is not entitled to be declared an insolvent because the sum total of his assets is larger than the sum total of his debts. It may well be, and is frequently the case, that a man's securities are locked up and are not available at the time he is called upon to pay his debts; but he is none the less entitled to be declared an insolvent, unless he is found guilty of dishonest conduct." It is obvious that a man may have assets of the nominal value of Rs. 20,000 and liabilities amounting to no more than Rs. 6,000, and yet at the time he may be insolvent, that is, unable

* First Appeal No. 61 of 1896, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 14th May 1896.

(1) 14 C. 691.

to pay his debts in full. His assets might be unrealizable, except at such a sacrifice as would leave the proceeds insufficient for the payment of his debts. In such a case the man would be an insolvent. But in our opinion where a man applies to be declared an insolvent and shows in his statement that his assets exceed his liabilites, he must go further and show that by sale of his interests, or other realization of his assets, a sum would not be secured which would enable him to pay his debts in full. That the applicant has not done in this case. The onus was on him. We entirely dissent from that portion of the judgment in the Calcutta case in which it is said that the Judge "could not refuse to declare the applicant an insolvent unless he found affirmatively that the applicant had brought himself within what I may call the penal clauses of s. 351." If the law were as put in the sentence which we have quoted, it would apparently be immaterial whether the man who applied under s. 344 of the Code of Civil Procedure to be declared an insolvent was actually insolvent or was capable of paying his debts ten times over. The truth is that the chapter in question, namely, Chapter XX of the Code of Civil Procedure, in which these [127] sections occur, is a chapter dealing with "insolvent judgment-debtors," that is, with judgment-debtors who are incapable of paying their debts at the time. The chapter does not apply to a judgment-debtor who is not insolvent. Insolvency is what lies at the root of all the provisions of the chapter. In the present case the applicant apparently desires by a declaration of insolvency to appoint the Court his agent to collect his debts and to escape the worry of having to do it for himself. We dismiss this appeal with costs.

Appeal dismissed.

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19 A. 127=16 A.W.N. (1896) 199.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkitt.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* MAHADEI (*Plaintiff*) *v.* SHIAM LAL AND OTHERS (*Defendants*).*

[1st December, 1896.]

Act No. XIX of 1873 (N.-W.P. Land Revenue Act), s. 241—Jurisdiction—Civil and Revenue Courts—Suit to recover moveable property sold on account of an arrear of revenue due by a person other than the owner of the property.

Where in satisfaction of an arrear of revenue due by certain defaulters some cattle belonging to another person, who had no concern with the land in respect of which the arrear was due, were sold, it was *held* that the remedy of the owner of the cattle lay entirely in the Courts of Revenue and that no suit would lie in a Civil Court respecting such sale.

[Appr., 5 O.C. 228 (230); F., A.W.N. (1905), 237.]

THE plaintiff brought her suit in the Court of a Munsif against the Secretary of State, defendant first party, Shiam Lal and Piari Lal, defendants second party, and Baijnath and Harcharan Das, defendants third party, on the allegation that certain immoveable property belonging to her, namely, some cattle and a cart, had been wrongfully sold by the tahsil officials in order to realize an arrear of revenue which was not due by her,

* First Appeal No. 65 of 1896, from an order of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 24th April 1896.

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19 A. 127 = 16 A.W.N. (1896) 199.

but by the defendants second party, and had been purchased by the defendants third party. She prayed that the sale might be set aside, and claimed restoration of the property or its value.

The defendant first party pleaded that the suit was not congnizable by a Civil Court, and that the property sold in fact belonged to the defendants second party. The defendants second party [128] pleaded the same defence. Of the defendants third party only one appeared, and he pleaded that the property had been purchased in good faith at a public sale.

The Court of first instance, (Munsif of Sambhal) held that, by reason of s. 241 of Act No. XIX of 1873, it had no jurisdiction to entertain the suit, and dismissed it.

The plaintiff appealed, and the Lower Appellate Court (Subordinate Judge of Moradabad), holding that the jurisdiction of the Civil Courts was not ousted, decreed the appeal and made an order of remand under s. 562 of the Code of Civil Procedure. From this order of remand the defendant first party appealed to the High Court.

The Standing Counsel (Mr. *E. Chamier*), for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This appeal has arisen in a suit which was brought to recover certain moveable property, alleged to belong to the plaintiff, which had been sold for an arrear of revenue due by some of the defendants, or for the value of the property, and to have the sale set aside. The first Court dismissed the suit on the ground that the jurisdiction of the Civil Court was barred by s. 241 of Act No. XIX of 1873. The Lower Appellate Court, taking a different view of the law, set aside the decision of the first Court and made an order of remand under s. 562 of the Code of Civil Procedure. From that order one of the defendants, the Secretary of State for India in Council, has appealed.

It seems a hardship that a person whose cattle, or other moveable property, have been sold for an arrear of land revenue due by another person, and in respect of land with which the owner of the moveable property is not concerned, should be debarred of his right of suit in a Civil Court and should be left to such proceedings by appeal or otherwise as may be opened to him in the Courts of Revenue. However, we cannot decide this case on questions of hardship. We have to decide it according to the construction of the Statute. This clearly was a claim not only connected with, but [129] arising out of, a process enforced on account of an arrear of revenue. The sale which it is claimed to set aside was a sale for arrears of revenue, and the claim was one within s. 181 of Act No. XIX of 1873. The claim in this case consequently falls within either cl. *(i)* or cl. *(j)* of s. 241 of Act No. XIX of 1873. There is nothing in either of those clauses to suggest that the exclusion of jurisdiction is limited to claims made by the person who is actually in default in payment of his land revenue. It appears to have been the intention of the Legislature to reserve to the jurisdiction of Courts of Revenue all such claims. We find on referring to Act No. XII of 1881, in the somewhat analogous case of an illegal distress for rent, that the suit of the person injured, although the distrainer may have acted fraudulently and without title, is by the operation of ss. 87 and 93 of that Act reserved exclusively for the jurisdiction of Courts of Revenue.

For these reasons we are of opinion that the decree of the first Court was right. We set aside the order of the Lower Appellate Court remanding the suit, and we restore the decree of the first Court. The suit will stand dismissed with costs in all Courts.

Appeal decreed.

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APPELLATE CIVIL.

19 A. 127 = 16 A.W.N. (1896) 199.

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19 A. 129 = 16 A.W.N. (1896) 193.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt,

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MUHAMMAD ALI KHAN (*Petitioner*) *v.* PUTTAN BIBI AND OTHERS (*Opposite-parties*).* [2nd December, 1896.]

Act No. VII of 1889 *(Succession Certificate Act), s. 4—Certificate not to be given for collection of part only of a debt—Debt in part satisfied.*

A certificate for collection of debts under Act No. VII of 1889 may be given for the collection of any one or more separate debts of the deceased ; but not for the collection of part only of a debt. Where, however, a portion of a debt in respect of which a certificate is sought has been discharged, it is not necessary for the applicant to pay duty on more than the unsatisfied portion of the debt.

[F., 32 A. 335 (336) = 7 A.L.J. 255 (257) = 5 Ind. Cas. 424 ; 33 A. 327 (332) = 8 A.L.J. 79 (85) = 9 Ind. Cas. 127 (128) ; 21 A.W.N. (1901) 125 ; R., 15 C.L.J. 384 (388) = 16 C.W.N. 231 (234) ; 70 P.R. 1904.]

ONE Muhammad Ali Khan applied for a certificate under Act No. VII of 1889 for the collection of his share, amounting to Rs. 1,50,000, of the dower debt of Rs. 11,00,000 of his deceased daughter. The debt was to be collected from Aijaz Wali Khan, the **[130]** husband of the deceased lady. The application was resisted on behalf of the minor children of the lady in respect of whose dower the claim was made on the ground that a certificate for collection of part only of the debt could not be given, and that the applicant ought to apply for a certificate to collect the whole of the dower debt, giving security for the due application of the shares of the other persons entitled. The Lower Court (District Judge of Bareilly) dismissed the application, holding that the Court could not grant a certificate for partial collection of a debt. From this order the applicant appealed to the High Court.

Mr. *Conlan* and Pandit *Moti Lal*, for the appellant.

Mr. *D. N. Banerji* and *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—A Muhammadan lady, who was entitled to something more than eleven lakhs of rupees as her dower, died. Her husband appears to have discharged that portion of the dower debt which was inherited by his son by the transfer of some property. The husband also inherited a portion of the dower debt. The father of the deceased lady has brought a suit against the husband of the deceased lady to recover his share, *i.e.*, the father's share, which he took by inheritance to his daughter in the dower debt. He had applied for a certificate entitling him to collect debts to the amount of Rs. 1,50,000. It was necessary under s. 4 of Act No. VII of 1889 that he should have a certificate. The Judge declined to grant such certificate unless the applicant paid the

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* First Appeal No. 76 of 1896, from an order of E. J. Kitts, Esq., District Judge of Bareilly, dated the 12th June 1896.

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DEC. 2.
APPELLATE CIVIL.
19 A. 129=16 A.W.N. (1896) 198.

2 per cent. duty on the whole debt, *i.e.*, the debt of eleven lakhs odd, which was due to the Muhammadan lady. There has been a uniform series of decisions in this Court according to which a certificate cannot be granted to collect a part only of a debt. There is no decision of this Court, or, so far as we know, of any other Court, which says that an applicant for a certificate, either under the present Act or under the former Acts, must apply for a certificate, to collect all the debts due to the deceased. We think it would be against public policy that a certificate to collect part only of a debt should be granted, as it would tend to multiplication possibly of suits in respect of one [131] liability and the harassment of debtors; but it appears to us to be contemplated by the Act that a certificate may be granted for the collection of any one debt, or of more debts than one, without obtaining a certificate for the collection of all the debts due to the deceased.

It appears to us that the applicant must pay the duty for a certificate entitling him to collect the whole of the dower debt which at the date of the application was due and payable. In calculating what the amount of that debt was, the son's share by inheritance, which has been discharged, and the husband's share which he holds in his own hands in satisfaction of his own share in the inheritance, will be deducted, and the duty will be payable on the balance. To that extent we allow this appeal, but without costs.

Order modified.

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19 A. 131=16 A.W.N. (1896) 200.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

NATHU WILSON (*Petitioner*) *v.* C. H. MCAFEE AND ANOTHER (*Opposite Parties*).* [3rd December, 1896.]

Act. No. II of 1882 (*Indian Trusts Act*) *ss.* 55, 60, 61, 74—*Order dimissing application for removal of a trustee—Civil Procedure Code, s.* 2—*Decree—Appeal.*

No appeal will lie from an order dismissing an application for the removal of a trustee, such order not being a "decree" within the meaning of s. 2 of the Code of Civil Procedure, and not being otherwise appealable.

IN this case, one Nathu Wilson, claiming as sole legatee under the will of his mother, applied to the District Judge of Saharanpur for the removal of the trustees appointed for the carrying out of the provisions of his mother's will. The applicant alleged that one of the trustees, by name McAfee, who was an executor under and had proved the will, had, after mismanaging the property for a time, informally renounced his executorship without rendering accounts. Upon this the Court had, on the motion of the applicant, appointed, under s. 74 of the Indian Trusts Act, a pleader of Dehra Dun, of the name of Morton, to carry out the provisions of the will. The applicant went on to allege that the trustee so [132] appointed had been guilty of various acts inconsistent with the proper discharge of his duties as trustee, by reason of which the applicant had suffered injury, and he prayed that "the Court may take charge of the property mentioned in the will under s. 60 of Act No. II of 1882 and

* First Appeal No. 89 of 1896, from an order of J.W. Muir, Esq., District Judge of Saharanpur, dated the 4th June 1896.

protect it from injury and administer it through some able and reliable person," and that an injunction might issue to the trustee in possession restraining him from interference with the property in question.

On this application, the District Judge, after considering the allegations made against the acting trustee, found that no acts amounting to a breach of trust had been proved against him, and that no reason existed for removing him from his office, and accordingly dismissed the application.

The applicant appealed to the High Court.

Mr. *D. N. Banerji* and Babu *Jogindro Nath Chaudhri*, for the applicant.

Mr. *A. E. Ryves*, for the respondent Morton.

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JUDGMENT.

EDGE, C.J., and BURKITT, J.—This is an appeal from an order under the Indian Trusts Act, 1882 (Act No. II of 1882), refusing to remove a trustee. Mr. *Ryves* has objected that no appeal lay. Mr. *Banerji* contends that the order was a decree, as that word is defined in s. 2 of the Code of Civil Procedure. So far as we are aware, this point has never been decided. The case of *Mohima Chunder Biswas* v. *Tarini Sunker Ghose* (1) is not of much assistance, as in that case Act No. VIII of 1890 which was the Act in question, did provide for appeals in certain cases We think it would be stretching the definition of "decree" in s. 2 of the Code of Civil Procedure to hold that it included a refusal to dismiss a trustee. We are of opinion that the appeal did not lie, and we dismiss it with costs.

Appeal dismissed.

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19 A. 133 = 17 A.W.N. (1897) 4.

[133] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

JANKI (*Defendant*) *v.* BHAIRON AND ANOTHER (*Plaintiffs*).*

[9th December, 1896.]

Hindu Law—Interpretation of document—Will—Intention of testator—Devise to wife—Widow's estate—Stridhan.

One Debi Din, a separated sonless Hindu, made a will in favour of his wife of which the material clause was as follows:—"After my death the said Musammat * * * is to be the person in possession and ownership in place of me, the executant of all the bequeathed property aforesaid by right of this will." Debi Din died leaving a widow and a daughter who was married to one Janki. The widow obtained possession of the property dealt with by the will on the death of Debi Din. The daughter died in the lifetime of the widow, who thereupon made a will leaving the property which had come to her from Debi Din to Janki. On the death of the widow certain persons alleging themselves to be the nearest reversioners to Debi Din claimed the property.

Held that, on the wording of the will and having regard to the surrounding circumstances of the case, the testator having no near male heirs, and the plaintiffs, if reversioners at all, being remote reversioners, the intention of the testator, Debi Din, was to leave the property in question to his widow as her *stridhan*, to descend to her heirs. *Koonjbehari Dhur* v. *Premchand Dutt* (2) dissented from,

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* First Appeal No. 78 of 1896, from an order of J. Denman, Esq., District Judge of Allahabad, dated 3rd July, 1896.

(1) 19 C. 487.

(2) 5. C. 684.

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DEC. 9.

APPELLATE CIVIL.

19 A. 133=
17 A.W.N.
(1897) 4.

Moulvie Mahomed Shumsool Hooda v. *Shewuk Ram* (1) and *Hira Bai* v. *Lakshmi Bai* (2) distinguished.

[Appr., 25 A. 351 ; R., 2 O.C. 226 (231) ; 9 O.C. 119 ; 1 S.L.R. 211.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—Debi Din made a will by which he bequeathed all his property to Musammat Lachminia. She was his wife. By this will, he said :—" After my death the said Musammat is to be the person in possession and ownership in place of me, the executant, of all the bequeathed property aforesaid by right of this will." We need not refer to the rest of the will. Debi Din died. He was sonless, but he left his widow and a daughter surviving him. The daughter was married to Janki, the defendant in this case. She had no sons by Janki ; but she had daughters, who are still living. The [134] daughter died in her mother's lifetime, and thereupon Lachminia made a will in favor of Janki. After the death of Lachminia, the plaintiffs, claiming to be reversioners of Debi Din, brought the present suit against Janki claiming to have him ejected and to get possession of the property. There is no doubt that Debi Din was a separated Hindu. There is equally no doubt that he had no male relation of near kinship. These plaintiffs, if they were related to him at all, and were reversioners, were distant. The first Court held that the property passed under the will to Lachminia as her *stridhan* and that on her death her heirs became entitled to it, and consequently dismissed the plaintiffs' suit, the plaintiffs not being heirs to Lachminia. The Court of first appeal construed the will as a gift to Lachminia of nothing more than she would have taken if her husband Debi Din had died without a will, and, setting aside the order of the first Court, made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought.

It is contended on behalf of the respondents that, the will not containing any words to show that Debi Din intended that Lachminia should take an estate of inheritance which she could alienate of her own free will, the will gave her nothing beyond what she would have taken had there been no will. In support of that view Mr. *Baldeo Ram* has cited to us several cases, amongst them the case of *Kunjbehari Dhur* v. *Premchand Dutt* (3). It appears to us that if the learned Judges in that case intended their view of the law to be of general application, it would be impossible for a husband ever to make a gift of immoveable property to his wife which would become her *stridhan*, unless he gave her the power of alienation, which we do not conceive to be a correct view of the Hindu law on this subject.

Another case to which Mr. *Baldeo Ram* referred to us was *Moulvie Mahomed Shumsool Hooda* v. *Shewuk Ram* (1). In that case their Lordships of the Privy Council had not to decide the point before us, and indeed did not decide it. Another case [135] cited to us was *Hira Bai* v. *Lakshmi Bai* (2). It is obvious from that case that the point before the Judges was really whether the gift was one of an estate of

(1) 2 I. A. 7. (2) 11 B. 573. (3) 5 C. 684.

inheritance which could be alienated, or merely the gift of a Hindu widow's life estate. In the case before us it is obvious that Debi Din did not intend to confer upon his wife a power of alienation. Neither would he in law have intended to confer upon her a power of alienation if he had expressly given this property to her as her *stridhan* without adding a power to alienate. The result would have been that she could not have alienated. That may be gathered from page 762 of Mayne's Hindu Law and Usage (5th edition).

The question which we have to decide is—what was his intention? Did he intend that this property should be her *stridhan*, with the result as a matter of law that upon her death it would go to her heirs, or did he intend merely to give her that interest in the property which she would have had if he had died without making a will at all? No doubt cases do arise in which, owing to the disputes as to the property or as to the legal position of an alleged adopted son or of a widow whose husband claimed to be separate, wills are made, which, if the husband was separate or the alleged adopted son was really an adopted son, would be unnecessary. In every case, first the language of the will, and then the surrounding circumstances have to be looked at, in case the language is doubtful. Now in this case the language which was used in the will was consistent with a gift of *stridhan* or with the mere formality of making a gift of a life interest which would have devolved upon Lachminia, whether the will was made or not. There are no circumstances shown to have been existing at or before the date of the will which suggest that, if Debi Din had died without a will, Musammat Lachminia's right to enjoy the property as a Hindu widow for her life would have been challenged by anyone. Consequently there was no reason for Debi Din making a will to be used in a dispute which no one suggests was likely to arise. It was reasonable under the circumstances, even from a **[136]** Hindu point of view, there being no near kinsmen, and but the plaintiffs, who were doubtful reversioners, that Debi Din should make such a will, the effect of which would be to secure his property to his own descendants, though in the female line, and to secure it, as he probably hoped, without any objections being raised by questionable reversioners. The wisdom of his making a will is apparent from the present suit; for here are people coming forward to claim as reversioners as to whose position as reversioners there may be some doubt. In our opinion Debi Din intended to confer upon his wife after his death an estate larger than, and possessing incidents different from those appertaining to, the estate which Lachminia would have taken as his widow if Debi Din had died intestate. We hold that he did confer upon her an estate which was more extensive than that which she would have had simply as a Hindu widow, and consequently that the estate conferred upon her became her *stridhan*, and that the plaintiffs, whether they are Debi Din's reversioners or not, have no title. We allow the appeal, and set aside the decree below and the order of remand, and restore and affirm the decree of the first Court with costs.

Appeal decreed.

1896
DEC. 12.

APPELLATE CIVIL.

19 A. 136 = 17 A.W.N. (1897) 6.

19 A. 136 = 17 A.W.N. (1897) 6.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

BHAGWATI PRASAD (*Decree-holder*) *v.* JAMNA PRASAD (*Respondent*).* [12th December, 1896.]

Civil Procedure Code, s. 583 — Execution of decree — Resiitution of an advantage obtained by virtue of a decree subsequently reversed on appeal.

The holder of a decree of the High Court for costs assigned his rights under that decree. The assignee caused his name to be brought on to the record as transferee in place of the decree-holder, and he, and after him his legal representative, executed the decree against the judgment-debtor. The decree was appealed to the Privy Council, but the assignee was not a party to the record in that Court. The Privy Council reversed the decree Thereupon the successful plaintiff applied under s. 583 of the Code of Civil Procedure to obtain restitution from the representative of the assignee of the amount realized in execu-[137]tion of the decree of the High Court. *Held* that, whether or no the amount realized by the assignee was recoverable by suit, it was not recoverable by proceedings under s. 583 of the Code, inasmuch as the assignee was no party to the decree of the Privy Council.

[F., 5 C.W.N. 426; R., 20 A. 139 (142); D., 28 A. 337 = 3 A.L.J. 110 = A.W.N. (1906) 43.]

THIS was an appeal from an order made upon an application under s. 583 of the Code of Civil Procedure. The facts of the case are as follows:—One Bhagwati Prasad brought a suit on a mortgage against Bir Bhaddar. His suit was decreed by the Court of first instance (Subordinate Judge of Gorakhpur) on the 9th of September 1885. Bir Bhaddar appealed to the High Court, which, on the 3rd of June 1887, decreed the appeal and dismissed the plaintiff's suit with costs. The plaintiff then, on the 2nd of December 1887, applied for leave to appeal to Her Majesty in Council. On the 24th of December 1887, Bir Bhaddar, the successful appellant in the High Court, assigned to one Madho Ram the decree which he had obtained from the High Court. Madho Ram had his name entered upon the record of the executing Court as assignee of the decree, and he, and after him his son and legal representative, Jamna Prasad, executed the decree against Bhagwati Prasad. Neither Madho Ram, however, nor Jamna Prasad, was made a party to the record of the appeal in the Privy Council. On the 15th of March 1893, the appeal of Bhagwati Prasad to the Privy Council was decided in his favour. Subsequently Bhagwati Prasad applied to the Court of the Subordinate Judge of Gorakhpur under s. 583 of the Code of Civil Procedure to recover from Jamna Prasad, in execution of the decree of the Privy Council, the costs, which Madho Ram and Jamna Prasad had realized from him in execution of the decree of the High Court. Jamna Prasad objected that, inasmuch neither he nor Madho Ram had been parties to the decree of the Privy Council, that decree could not be executed against them. This objection was allowed and the decree-holder's application dismissed. The decree-holder thereupon appealed to the High Court.

Messrs. *T. Conlan* and *W. K. Porter*, and Munshi *Madho Prasad*, for the appellant.

Mr. *G. E. Foy* and Pandit *Sundar Lal*, for the respondent.

* First Appeal No. 236 of 1895, from an order of Pandit Rai Indar Narain, Subordinate Judge of Gorakhpur, dated the 16th November 1895.

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DEC. 12.

APPELLATE CIVIL.

19 A. 136 = 17 A.W.N. (1897) 6.

JUDGMENT.

[138] EDGE, C.J., and BLAIR, J.—In his appeal in this Court one Bir Bhaddar obtained a decree reversing the decree of the Subordinate Judge of Gorakhpur with costs. Bir Bhaddar was a defendant in the suit. The plaintiff appealed to Her Majesty in Council making Bir Bhaddar the respondent to his appeal. Her Majesty in Council set aside the decree of this Court and restored with costs the decree of the Subordinate Judge of Gorakhpur. Now on the 2nd of December 1887, the plaintiff in the suit presented his application to this Court for a certificate under s. 599 of the Code of Civil Procedure. The certificate was granted in January 1888. On the 24th of December 1887, Bir Bhaddar had assigned the decree for costs which he had obtained in this Court to Madho Ram. The appeal to the Privy Council was admitted on the 25th of July 1888. The order of Her Majesty in Council was dated the 15th of March 1893. The plaintiff in the suit had notice long before the termination of the appeal to Her Majesty in Council that Madho Ram was the assignee of Bir Bhaddar's decree for costs, and, long before the determination of the appeal to Her Majesty in Council, Madho Ram in his lifetime, and subsequently Jamna Prasad, the appellant here, as Madho Ram's representative, executed, under s. 232 of the Code of Civil Procedure, the decree of the High Court for costs against the plaintiff and obtained satisfaction of that decree. The plaintiff took no steps to bring either Madho Ram, or, after his death, his representative Jamna Prasad, on the record of the appeal to Her Majesty in Council. The plaintiff now seeks under s. 583 of the Code of Civil Procedure to obtain restitution from Jamna Prasad of the costs which he paid under the decree of the High Court to Madho Ram and Jamna Prasad.

Assuming for the present purposes, but not deciding, that s. 583 of the Code of Civil Procedure would apply to a decree passed in an appeal to Her Majesty in Council, we are of opinion that the plaintiff in the suit cannot have execution of the decree of Her Majesty in Council against Jamna Prasad personally or against him as representative of Madho Ram. Neither Madho **[139]** Ram nor Jamna Prasad was made a party to the appeal before Her Majesty in Council; and it appears to us that, as neither of them was a party to that appeal, and as Her Majesty in Council did not order that Jamna Prasad personally or as representative of Madho Ram should make restitution, the order of Her Majesty could not be executed so far as Jamna Prasad is concerned.

No case has been brought to our attention in which a decree was held to have been executable under s. 583 for restitution against a person who could have been made, but was not made, a party to the appeal in which the decree was passed. We have been referred to the decision of this Court in *Kishen Sahai* v. *The Collector of Allahabad* (1). In appears to us that that case was not in point. In that case the order of Her Majesty in Council set aside the decree of the Sadr Court and restored and affirmed the decree of the District Judge, although one Banke Lal, who had derived a material advantage as a litigant in the suit from the decree of the Sadr Court, was not a party to the appeal to Her Majesty in Council. It does not appear whether or not their Lordships of the Privy Council when they delivered their judgment advising Her Majesty to set aside the decree of the Sadr Court and to restore and affirm the decree of the District Judge were aware that in so doing they were advising that the

(1) 4 A. 187.

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APPELLATE CIVIL.

19 A. 136 = 17 A.W.N. (1897) 6.

decree which Banke Lal had obtained from the Sadr Court should be taken away from him, although he was not a party to the appeal to Her Majesty in Council. All that can be said about that case is that Her Majesty in Council having set aside the decree of the Sadr Court, reinstated and affirmed the decree of the District Judge, and under that decree Banke Lal as a party to it was liable.

This Court has, we believe, invariably declined in appeal adversely to alter the position of a decree-holder who has not been a party to the decree before it. We think it would be dangerous to depart from that principle. We dismiss the appeal with costs in this Court and affirm the order of the Court below.

Appeal dismissed.

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19 A. 140 = 17 A.W.N. (1897) 7.

[140] REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair,

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BASHIR-UD-DIN (*Auction-purchser*) *v.* JHORI SINGH (*Judgment-debtor*).* [16th December, 1896.]

Civil Procedure Code. s. 310A—Execution of decree—"Order"—"Decree"—Appeal.

No appeal will lie from an order passed under s. 310A of the Code of Civil Procedure refusing to accept a deposit tendered under that section on the ground that it was too late.

[Diss., 29 A. 275 = A.W.N. (1907) 64 = 4 A.L.J. 135; **F.**, 30 A. 379 = 5 A.L.J. 557 = A.W.N. (1908) 157; **R.**, 27 A. 263; 25 B. 418; 30 M. 507 = 17 M.L.J. 291 = 2 M.L.T. 347; 34 M. 417 (421) = 6 Ind. Cas. 429; 5 C.L.J. 204; 8 Ind. Cas. 429 (431) = 21 M.L.J. 928 (933) = 9 M.L.T. 152 (154) = (1910) M.W.N. 662 (663); 5 O.C. 377; 9 O.C. 214 (215).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chander Mukerji*, for the appellant.

Mr. *H. C Niblett*, for the respondent.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—This is an application under s. 622 of the Code of Civil Procedure. The property of Jhori Singh, the respondent here, had been sold in execution of a decree. The last of the thirty days allowed to a judgment-debtor for making the deposit under s. 310A of the Code of Civil Procedure in this case was a holiday on which the Court was closed. The thirty-first day was also a holiday on which the Court was closed. Upon the thirty-second day Jhori Singh applied to make the deposit under s. 310A. The amount which he proposed to deposit was sufficient to bring him in that respect within the section. The Munsif held that the deposit could not be made, as it had not been made within thirty days of the sale. In so holding the Munsif was wrong. It is true that the Limitation Act (Act No. XV of 1877) did not apply, but clauses 1 and 2 of s. 7 of Act No. 1 of 1887 (The General Clauses Act, 1887) applied. The deposit accordingly was tendered within time and should have been received. Jhori Singh appealed from the order of the Munsif to the Court of the District Judge. Before the District Judge the

* Civil Revision No. 36 of 1896, from an order of H. E. Holme, Esq., District Judge of Shahjahanpur, dated 8th June 1896.

question whether or not an appeal lay does not appear to have been raised. The District Judge in appeal set aside the [141] order of the Munsif, and made an order allowing the deposit and setting aside the sale. It is from that order of the District Judge that this application in revision is made.

No appeal lay under s. 588 of the Code of Civil Procedure from an order under s. 310A of that Code. The case did not come within s. 244 of the Code. It was simply a question between the judgment-debtor and the purchaser at auction sale. It was immaterial to the decree-holder whether he received his money from a deposit made by the judgment-debtor or from the price paid by the purchaser at the auction sale. It has been held by this Court that a purchaser at an auction sale is not a representative within the meaning of s. 244 of a party to the suit, in execution of the decree in which the sale has taken place. Consequently the case did not come under s. 244, and the order of the Munsif could not be treated as a decree which was appealable. The District Judge in hearing and determining the appeal before him exercised a jurisdiction not vested in him by law, as no appeal lay to his Court from the order in question. Under s. 622 of the Code of Civil Procedure we make an order setting aside the order of the District Judge in appeal and restoring the order of the Munsif which he had set aside. We regret to be obliged to take this course, as the Munsif was clearly wrong in the order which he made. We make no order as to costs. We may mention that the same question as to jurisdiction was decided by this Court in the unreported case Revision No. 3 of 1896, decided on the 11th of March 1896.

Appeal dismissed.

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19 A. 142 = 17 A.W.N. (1897) 7.

[142] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

INDO MATI (*Judgment-debtor*) *v.* GAYA PRASAD AND ANOTHER (*Decree-holders*).* [17th December, 1896.]

Civil Procedure Code, s. 372; ss. 2, 244, 588—Order dismissing application to be brought on the record—"Decree"—"Order"—Appeal.

An appeal will lie from an order dismissing an application under s. 372 of the Code of Civil Procedure to be brought upon a record as representative of a deceased party, such order being a decree within the meaning of s. 2 of the Code.

[F., 22 A. 390; R., 57 P.R. (1903) = 126 P.L.R. 1903; D., 24 A. 342 = 22 A.W.N. 84; 24 A. 532 = 22 A.W.N. 112; 4 C.W.N. 403.]

THE respondents to this appeal had obtained a decree for sale on a mortgage against one Chaudhri Raj Kunwar, who was the husband of Rani Indo Mati, the appellant. After the death of her husband Rani Indo Mati applied to the Court which had passed the decree (Subordinate Judge of Mainpuri) stating that the property to which the decree applied had devolved upon her in virtue of the will of Rani Lachhmin Kunwar, to whom it had been transferred on the 19th of September 1895, and praying that she might be made a party to the execution proceedings, and that, under s. 87 of the Transfer of Property Act, 1882, six months' time

* First Appeal No. 37 of 1896, from an order of Moulvi Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.

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APPELLATE CIVIL.
19 A. 142=
17 A.W N.
(1897) 7.

might be granted to her in which to make arrangements for satisfying the decree. Upon this application the Subordinate Judge, without issuing notice to the other side, passed the following order:—"This is not an application on behalf of a party to the suit, but on behalf of a third person. Time has been granted twice; it cannot be granted now. It is ordered that the application be rejected." Against this order the applicant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—The appellant here, Rani Indo Mati, applied to be brought on the record of a suit for foreclosure in which a decree under s. 86 of the Transfer of Property Act, 1882, had been made, and to have the day appointed for the **[143]** payment postponed. She claimed to be the representative in interest of the mortgagor, who was the defendant in the suit. The Court below dismissed her application, apparently on the ground that she was not a party to the record, and that the day appointed by the decree for payment had been twice postponed on the application of the mortgagor. The application was dismissed without notice to the other side. The applicant brought this appeal.

A preliminary objection has been taken on behalf of the respondents that the appeal does not lie. It is contended, and we think rightly, that the application to be brought upon the record was one under s. 372 of the Code of Civil Procedure, and in support of the argument that the appeal does not lie clause 2 of s. 588 of the Code has been used to show that the only appeal given by s. 588 from an order passed under s. 372 is an appeal from an order dismissing an objection to an application made under s. 372. There is no doubt that, if the allegations as to title of the appellant are true, the interest of the mortgagor had vested in her before she made her application to the Court below. It appears to us that the dismissal of her application was an adjudication on the representative right which she claimed, and, as an order under s. 372 dismissing an application is not an order specified in s. 588, the order dismissing her application would be a decree as that word is defined in s. 2 of the Code of Civil Procedure, and in our opinion an appeal lay, the case coming within s. 244 of the Code.

The Court below should have issued notice to the other side, and first of all determined the question as to whether the applicant was a representative, and, if she was what she alleged herself to be, she should have been brought on the record, and in that event the Court should have gone on to consider whether or not the time should have been extended under the proviso to s. 87 of the Transfer of Property Act, and that would depend upon whether the applicant succeeded in showing good cause for the postponement. It would be premature on our part to express any **[144]** opinion as to whether there was good cause or not, as the other side should be allowed an opportunity of producing evidence on the point if necessary. We set aside the order of the Subordinate Judge and remand the case under s. 562 of the Code of Civil Procedure to his Court for the application to be disposed of on the merits. The costs of this appeal will abide the result.

Appeal decreed and cause remanded.

19 A. 144=17 A.W.N. (1897) 18.

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DEC. 18.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

LALMAN (*Judgment-debtor*) *v.* GOPI NATH (*Decree-holder*).*

[18th December, 1896.]

19 A. 144 = 17 A.W.N. (1897) 18.

Civil Procedure Code, s. 357—*Insolvency—Execution of decree—Limitation.*

Section 357 of the Code of Civil Procedure provides a limitation of its own and in substitution for the limitation provided for the execution of decrees by the Indian Limitation Act, 1877.

IN this case one Lalman applied to the District Judge of Farukhabad, on the 11th of April 1889, to be declared an insolvent, and was discharged by an order under s. 355 of the Code of Civil Procedure on the 7th of October 1890. On the 21st of February 1896, Gopi Nath, one of the judgment-creditors of Lalman, applied to the Court for execution of his decree against certain property which he alleged to have been acquired by the insolvent subsequently to his discharge. To this application the insolvent objected, pleading, *inter alia*, that execution of the decree in question, was barred by limitation, the provisions of s. 357 of the Code of Civil Procedure not being exclusive of the rules of limitation for the execution of decrees prescribed by Act No. XV of 1877. This objection was disallowed and execution was ordered to proceed, a new receiver being appointed. The judgment-debtor appealed to the High Court.

Mr. *E. A. Howard*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—In our opinion s. 357 of the Code of Civil Procedure provides a limitation of its own and in [145] substitution for the limitation provided for the execution of decrees by the Indian Limitation Act, 1877. It could not have been the intention of the Legislature that when there was no property other than that previously vested in the receiver and exempted from execution, and no property subsequently acquired possibly until eleven years after the discharge of the insolvent, the judgment-creditors, in order to keep their decrees alive, should be obliged to make fruitless applications for execution during the period to which the provisions of s. 357 apply. We dismiss this appeal with costs.

Appeal dismissed.

* First Appeal No. 170 of 1896, from an order of G. A. Tweedy, Esq., District Judge of Farukhabad, dated the 13th April 1896.

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APPEL-
LATE
CIVIL.

19 A. 145=
17 A.W.N.
(1897) 19.

19 A. 145=17 A.W.N. (1897) 19.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

DIWAN SINGH AND OTHERS (*Defendant*) *v.* JADHO SINGH (*Plaintiff*).*
[23rd December, 1896.]

Act No. III of 1871 *(Indian Registration Act)*, s. 50—*Registered and unregistered documents—Priority—Notice.*

Held that s. 50 of the Indian Registration Act, 1877, will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registrable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed. *Abool Hossein* v. *Raghu Nath Sahu* (1), *Hathising Sobhai* v. *Kuvarji Javher* (2) and *Krishnamma* v. *Suranna* (3) followed. *The Agra Bank* v. *Barry* (4) and *Ram Autar* v. *Dhanauri* (5), referred to.

[**Affirmed**, 20 A. 252; **F.**, 30 A. 238=5 A.L.J. 607=A.W.N. (1908) 99; **R.**, 25 A. 366=23 A.W.N. 81; 27 B. 452 (472); 9 C.W.N 14; 8 Ind. Cas. 597 (599)=3 Bur. L.T. 13=5 L.B.R. 184 (188); 10 Ind. Cas. 233 (234).]

THIS was a suit for sale upon a mortgage. The mortgage in question was executed on the 14th January 1893, and, being for a sum below Rs. 100, was not registered. The defendants to the suit comprised the mortgagor, a subsequent mortgagee and certain persons who had purchased the property mortgaged to the plaintiff under a registered sale-deed executed subsequently to the plaintiff's mortgage. The vendee defendants resisted the suit, relying on their sale-deed and on s. 50 of the Registration Act, 1877.

[146] The Court of first instance (Munsif of Phaphund) dismissed the plaintiff's claim so far as the defendants vendees were concerned, but him a decree for money against the mortgagor only.

On appeal by the plaintiff, the lower appellate Court (Subordinate Judge of Mainpuri) found as a fact that the defendants vendees at the time when their sale-deed was executed had notice of the plaintiff's mortgage, and, following the decision of the Madras High Court in the case of *Krishnamma* v. *Suranna* (3) decreed the plaintiff's claim for sale.

The defendants vendees appealed to the High Court.

Munshi *Madho Prasad*, for the appellants.

Babu *Satya Chandar Mukerji*, for the respondent.

JUDGMENT.

AIKMAN, J.—The suit out of which this appeal arises was brought by the plaintiff, who is respondent here, to recover money due to him under a mortgage-deed. The mortgage is dated the 14th of January 1893. The amount secured by it was less than 100 rupees, and the registration of the deed was not compulsory. It was not registered. On the 9th of January 1895, the appellants before me purchased the mortgaged property by a sale-deed which was registered. It has been found by the lower

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* Second Appeal No. 308 of 1896, from a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 16th January 1896, modifying a decree of Munshi Tara Prasad, Munsif of Phaphund, dated the 15th April 1895.

(1) 13 C. 70. (2) 10 B. 105. (3) 16 M. 148.
(4) 7 E. and I.A. 135. (5) 8 A. 540.

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Court that the appellants, when they bought the property, had notice of the plaintiff's mortgage.

The lower appellate Court, following a Full Bench decision of the Madras High Court (*Krishnamma* v. *Suranna*) (1), has held that the fact of the defendants appellants having notice of the plaintiff's mortgage deprived them of the right to rely on the provisions of s. 50 of the Registration Act (Act No. III of 1877), which provides that certain documents shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property, not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

It is clear that this enactment makes no reference whatever to the holder of a subsequent registered document having notice of the prior [147] unregistered one, and lays down broadly that the former shall have priority over the latter; but, notwithstanding this, the High Courts of Madras, Bombay and Calcutta (*vide* the Madras ruling before quoted: for Bombay, *Hathising Sobhai* v. *Kuvarji Javher* (2), and for Calcutta, *Abool Hossein* v. *Raghu Nath Sahu* (3), have considered themselves at liberty to apply the equitable doctrine of notice to cases like the present. These have, it would appear, been in a great measure influenced by the decisions of the English Courts; see in particular the case of *The Agra Bank* v. *Barry* (4). In that case (at p. 148) Lord Cairns observed that "by decisions which have now well established the law, it has been settled that, notwithstanding the apparent stringency of the words contained in the Act, still if a person registers a deed, and if at the time he registers the deed either he himself or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which though executed is not registered, the registration which he actually effects will not give him priority over that earlier deed." The *ratio decidendi* in that case was, it appears, that the object of registration laws being to give parties who enter into a transaction with regard to property notice of previous transactions concerning that property, that object is accomplished if the person who enters into a subsequent transaction has *aliunde* notice of a deed affecting the property and executed before his own. There is no case in this Court exactly in point, unless it be the decision in *Ram Autar* v. *Dhanauri* (5) the facts of which are not quite on all fours with this case. There is, however, no decision of this Court on the question of notice as affecting the provisions of s. 50 of the Registration Act which is adverse to the decisions of the High Courts above referred to. Following those decisions I hold that the plea based on the provisions of s. 50 of the Registration Act must fail. The appeal is dismissed with costs.

Appeal dismissed.

(1) 16 M. 148.
(2) 10 B. 105.
(3) 13 C. 70.
(4) 7 E.I.A. 185.
(5) 8 A. 540.

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DEC. 23.
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19 A. 148 = 17 A.W.N. (1897) 20.

19 A. 148 = 17 A.W.N. (1897) 20.

[148] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair and Mr. Justice Banerji.

RAM NATH AND OTHERS (*Defendants*) *v.* BADRI NARAIN AND OTHERS (*Plaintiffs*).* [23rd December, 1896.]

Pre-emption—Wajib-ul-arz—Effect of a co-sharer vendee joining with himself in his purchase a stranger.

When in the purchase of immoveable property in respect of which a right of pre-emption exists, a vendee, being a person entitled to purchase, joins with himself in the purchase a stranger, then, in the event of a suit for pre-emption being brought, if the interest of the co-sharer vendee can be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed only as against the stranger, the rights of the co-sharer vendee being equal or preferential to those of the pre-emptor. If, however, the interest of the co-sharer vendee cannot be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed as against both. *Sheobharos Rai* v. *Jiach Rai* (1) approved. *Sheo Dyal Ram* v. *Bhyroo Ram* (2), *Guneshee Lal* v. *Zaraut Ali* (3), *Manna Singh* v. *Ramadhin Singh* (4), referred to.

[Diss., 48 P.R. 1907 = 81 P.L.R. 1908 = 107 P.W.R. 1907; F., 19 A. 311; R., 19 A. 324; 16 Ind. Cas. 979 = 276 P.W.R. 1912; 7 O.C 22 (30); 6 P.R. 1909 = 23 P.L.R. 1909 = 7 P.W.R. 1909 = 1 Ind. Cas. 91 (92)]

THIS was a suit for pre-emption based upon a *wajib-ul-arz*. The *wajib-ul-arz* provided that co-sharers should have a right of pre-emption if a sale was made to a stranger. The sale in dispute was a sale of shares in four villages. There were several vendees, of whom two were strangers. In the sale-deed the respective share of each vendee was defined, but it was not specified what portion of the sale consideration was to be paid by each vendee. So far as appeared from the deed the purchase money was one lump sum. The plaintiffs, who were co-sharers, made all the vendees defendants to the suit and claimed to pre-empt the whole property covered by the sale-deed.

The Court of first instance (Additional Subordinate Judge of Gorakhpur) decreed the claim as against all the defendants, holding, upon the question whether the co-sharer vendees had lost their rights by joining strangers with them in the purchase, that the case was governed by the decision in *Manna Singh* v. *Ramadhin* [149] *Singh* (4) and that the co-sharer vendees having associated strangers with them in the purchase must themselves be regarded as strangers.

The defendants vendees appealed. The lower appellate Court (District Judge of Gorakhpur) dismissed the appeal, holding on the question above referred to that the shares purchased by the strangers could not be separated from the shares purchased by the co-sharer vendees, because not only a separate specification of shares but a separate specification of purchase money was necessary. The District Judge referred to the case of *Sheobharos Rai* v. *Jiach Rai* (1).

The defendants vendees appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

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* Second Appeal No. 750 of 1894, from a decree of V.A. Smith, Esq., District Judge of Gorakhpur, dated the 8th May 1894, confirming a decree of Kunwar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 20th September 1893.

(1) 8 A. 462.
(2) S.D.A. N.W.P. (1860) 53.
(3) N.W.P.H.C.R. (1870) 343.
(4) 4 A. 252.

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The respondents were not represented.

JUDGMENT.

EDGE, C.J., BLAIR and BANERJI, JJ.—This was a suit for pre-emption brought on the *wajib-ul-arz* of the village. By the *wajib-ul-arz* co-sharers had a right of pre-emption in the case of a sale made to a stranger. The sale in this case was effectuated by one sale-deed. The vendees were five in number, some of them being co-sharers. The share sold to each of the five vendees was specified in the sale-deed, but there was no specification of the proportion of the purchase money which was paid by the respective vendees. The purchase money of the whole was one lump sum, so far as appears from the deed. The plaintiffs, who were co-sharers, brought this suit, making all five vendees defendants and claiming to pre-empt the whole property comprised in the sale-deed. They obtained a decree in the first Court and also in the Court of first appeal. From the decree of the latter Court this appeal has been brought.

The decisions on this point in these Provinces are but four. The earliest reported decision of which we are aware is that in the case of *Sheo Dyal Ram* v. *Bhyroo Ram* (1). There was no specification of the separate share sold to each vendee in that case. It was held that the co-sharer vendee must have a decree against **[150]** him for pre-emption because he had associated with himself in the purchase strangers to the village. The next earliest reported case in these Provinces is that of *Guneshee Lal* v. *Zaraut Ali* (2). In that case this Court, wrongly, in our opinion, held that there was no specification of the share sold to each of the purchasers. The Court conceived that the specification in the schedule at the foot of the deed of sale could not be read into the body of the sale-deed as part of the contract between the vendor and the vendees. In our opinion it formed part of the contract. The next case is that of *Manna Singh* v. *Ramadhin Singh* (3). There was one joint price with no specification of the proportions in which it was to be borne by the vendees, but the share purchased by each vendee was separately specified. It appears to us that the learned Judges in that case decided it on the principle of law which applies when a co-sharer seeking pre-emption associates with himself in the suit as a plaintiff a stranger to the village. It appears to us that that principle does not apply to a suit against a co-sharer who has associated strangers with himself in his purchase. Where a co-sharer associates with himself as a plaintiff a stranger to the village in a suit in which he seeks to enforce the village contract or the village custom as to pre-emption, he comes into Court asking that the custom shall be enforced against the defendants, although in the very inception and maintenance of his suit he is breaking the custom himself, and he mixes up his own rights as a co-sharer with those of strangers who could have no common right to pre-empt with him. In the case of a defendant co-sharer in a suit for pre-emption who has associated with himself in his purchase a stranger to the village, he stands upon his right as a co-sharer ; he seeks the assistance of the Court to enforce nothing. The next and last case upon this subject in the reports of these Provinces is that of *Sheobharos Rai* v. *Jiach Rai* (4). In that case the four shares purchased by the respective vendees were separately specified, and the share of the purchase money **[151]** paid by each separate vendee was also separately

(1) S.D.A. N.W.P. (1860) 53.
(2) N.W.P.H.C.R. (1870) 343.
(3) 4 A. 252.
(4) 8 A. 462.

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specified. In that case this Court held, and we think rightly, that the plaintiffs, who were seeking pre-emption, were not entitled to a decree against the defendant vendee co-sharer. We think that the principle of law applying in these cases is correctly laid down in the following passage from the judgment in the case to which we have last referred :—"In the two last mentioned cases the shares are separately specified, and where such shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal, but not preferential, rights." Mr. Justice Mahmood, from whose judgment we have quoted, having, as we conceive correctly, expounded the law on this subject in the passage which we have cited, went on to illustrate his views from the case then before him, and in illustrating his views referred to a sale in which the interests of the vendees were not only separately specified *qua* share, but *qua* purchase money. In our opinion where in cases of this kind the sale-deed specifies the interest or share purchased, so that it shows what was the particular property purchased by each of the vendees, whether by definition of share or plot, the vendee co-sharer, who is a co-sharer of equal rights of pre-emption with the plaintiff co-sharer, cannot be disturbed in the rights acquired by him under the sale-deed, and it is immaterial whether the proportion of the purchase money found or to be found by each of the vendees is or is not specified in the sale-deed. It happens in most suits for pre-emption that the Court has to ascertain what was in fact the true price; and the rules which guide the Court in ascertaining what is the true price where there is only one vendee can equally be applied to ascertain what is the share of each vendee in the total amount of [152] the true price paid for the whole property sold. Where the share of each vendee in the property sold is specified in the sale-deed, the actual property to which the right of pre-emption is attached is ear-marked and specified in the sale deed. The object of pre-emption is to exclude strangers from the village and not co-sharers of equal rights. Where from the sale-deed it can be ascertained what is the share, area of property or interest in the village which the stranger has purchased, that share, area or interst alone can be the object of pre-emption in the suit. Where the share purchased and the proportionate price to be paid by each vendee are specified in the sale-deed it would not be necessary to make the co-sharer vendee a defendant in the suit: but where there is no such separate specification of the proportionate part of the purchase money to be paid by each vendee, the co-sharer vendee would be a necessary party to the suit for pre-emption, as the proportionate part of the purchase money of each vendee would have to be ascertained. Where a co-sharer chooses to associate with himself in the purchase a stranger to the village, and the sale-deed does not on the face of it disclose the particular share or interest purchased by the co-sharer vendee on his own behalf, as distinct from the share or interest purchased by the stranger, then the rule of pre-emption can only be enforced by treating the co-sharer vendee as if he were in the same position as the stranger in decreeing pre-emption against him. In such a case the bargain made between the vendees and the vendor is one joint in all its incidents.

It is necessary to refer an issue to the lower appellate Court under s. 566 of the Code of Civil Procedure for findings in order to enable us to dispose of the case. The Court below will try the following issue, taking such evidence as may be produced before it and may be relevant:—

What was the true price paid by each vendee?

The Court will find in the case of each vendee the price paid by him. Ten days will be allowed for filing objections on the return of the finding.

Issue referred.

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19 A. 153=17 A.W.N. (1897) 22.

[153] APPELLATE CIVIL.

Before Mr. Justice Aikman.

DHUMAN KHAN (*Defendant*) *v.* MAHAMMAD KHAN (*Plaintiff*).*

[24th December, 1896.]

Trespass—Right to access of light and air—Suit by person who had not obtained an easement by prescription—Easement.

The owner of a house, the light coming to which is obstructed by an erection made upon adjoining land by a person who, *qua* such adjoining land is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light. But where the person causing such obstruction is the rightful owner of the adjoining land or acting with the permission of the owner, no such action as aforesaid will lie against him unless the plaintiff has acquired an easement. *Jeffries* v. *Williams* (1) and *Jootoor Achanna* v. *Vanamala Venkamma* (2) distinguished.

[R., 34 M. 173 (174)=20 M.L.J. 803 (805)=7 M.L.T. 352=(1910) M.W.N. 117 =6 Ind. Cas. 266].

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Mr. *Karamat Husain*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

AIKMAN, J.—The parties to this suit are neighbours occupying adjoining houses in the city of Allahabad. The houses stand at right angles to one another. The house of the plaintiff looks towards the west, and that of the defendant towards the south. The land in the angle formed by the houses was alleged by the plaintiff to belong to him. It has been found by the Courts below that this land does not belong to the plaintiff, but is a portion of a public lane, the ownership of which is vested in the Municipality. The plaintiff has a balcony and windows in the front of his house. He came into Court alleging that a month before the date of the institution of his suit the defendant had constructed a balcony supported by stone rests, which, projecting from the front of his (defendant's) house, interfered with the plaintiff's balcony and with the light and air of one of the plaintiff's windows, and he prayed for the demolition of a portion of the defendant's balcony. The lower Courts have given the plaintiff a decree, and the defendant comes here in second appeal. The

* Second Appeal No. 1020 of 1895, from a decree of Babu Brijpal Das, Subordinate Judge of Allahabad, dated the 31st May 1895, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 20th December 1894.

(1) 20 L.J. Ex. 14. (2) 5 M.L.J. 24 (25).

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19 A. 153 = 17 A.W.N. (1897) 22.

[154] plaintiff did not in his plaint allege that he had acquired any right of easement. The finding of the Court below is that the plaintiff's balcony and window have not been in existence for more than fifteen years at the outside, It is clear that this term is not sufficient to create a right of easement. But the lower appellate Court, relying on the case *Jootoor Achanna* v. *Vanamala Venkamma* (1), has nevertheless decreed the claim. In my opinion that case is not in point. In that case it was held that it was not necessary for the plaintiff, who received light through a window in his wall opening on a piece of vacant ground the property of Government, to establish prescriptive rights against the defendant, who was a wrong doer, and that the mere fact of the plaintiff's enjoyment was sufficient to entitle him to an injunction. The learned Judge who decided that case relied on the decision in *Jeffris* v. *Williams* (2). In that case it was objected by the defendants that the plaintiffs had not alleged that they had acquired any right of support from the soil in which the defendants had been excavating mines. In his judgment Parke B. remarked with reference to this plea:—"If it had appeared in the declaration that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the objection would have been fatal; because, arguing against a person having the right to the adjoining soil, or claiming under one that had all his rights to interfere with the soil, it would be necessary for the plaintiffs to show a title to a support of the soil according to the doctrine laid down in *Wyatt* v. *Harrison*; but if the defendant is not stated in the declaration to have any such right, and is therefore *prima facie* a wrong doer, the declaration, it seems to us, would be sufficient." It appears from this that the principle upon which that case and the case in the Madras High Court were decided was that the defendant was a wrong doer. In the present case, however, the defendant has received permission from the owner of the soil, that is from the Allahabad Municipality, to construct the balcony which projects from his house. This [155] being so, I am of opinion that the principle of *Jeffries* v. *Williams* (2) will not apply, and that the plaintiff was not entitled to the relief he asked for, inasmuch as he had not acquired by prescription any easement as against the defendant or the Municipality. Taking this view, I hold that this appeal must succeed. I set aside the decrees of the lower Courts and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

(1) 5 M.L.J. 24 (25).

(2) 20 L.J. Ex. 14.

19 A. 155 (P.C.)=24 I.A. 22=7 Sar. P.C.J. 111.

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PRIVY COUNCIL.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Morris, and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

19 A. 155 (P.C.)= 24 I.A. 22= 7 Sar. P.C.J. 111.

MUHAMMAD ABDUL MAJID *v.* MUHAMMAD ABDUL AZIZ AND OTHERS. [13th November and 9th December, 1896.]

In a suit for land and mesne profits, inquiry as to the latter deferred by the judgment—Civil Procedure Code, ss. 45, 212 and 244.

A Court, which had virtually adjudged mesne profits to the claimant in the same judgment in which it decided that she was entitled to the immoveable property claimed, left open the question of the amount of those profits to be decided in subsequent proceedings. In the decree which followed no mention was made of the profits.

Held that it was competent to the Court to defer the inquiry in that manner, nothing in the Code of Civil Procedure preventing such a disposal of the suit. If there had been a technical omission in the decree, it had not affected the right of the plaintiff.

[D., 6 C.W.N. 672.]

APPEAL by special leave from a decree (22nd July 1892) of the High Court reversing a decree (2nd June 1890) of the Sudordinate Judge of Jaunpur.

The point in dispute arose out of the disposal of a claim to land and the mesne profits by a judgment on the 18th June 1880 of a Court which determined the question of title and possession in favour of the plaintiff, but postponed the inquiry as to the amount of the profits to be dealt with in another and future proceeding. The decree had nothing in it as to mesne profits. The decision as to the proprietary right was supported by the judgment of the High Court on the 6th January 1882, and by the order of the [156] Queen in Council in *Muhammad Abdul Majid* v. *Fatima Bibi* (1) on the 24th June 1885. As to the mesne profits, the defendant, M. Abdul Majid, raised the question whether it was competent to a Court to hold the inquiry as to them, the decree of the original Court not having ordered them, and the judgment of that Court having separated them from the claim to the title in a manner unauthorized, as he contended, by the Code of Civil Procedure. Act No. X of 1877 was in force when the suit was first heard, but the law under Act No. XIV of 1882 was the same in this respect. Whether the above was a valid objection to the amount of the mesne profits being now determined was the question decided on this appeal.

The claimant's title, as appears in the report in I.L.R,, 8 All. 39, was under the will of Muhammad Baksh, father of Fatima and grandfather of M. Abdul Majid, whereby the father of the last-named was entrusted with the management of the property devised. The plaintiff Fatima brought her suit on the 5th May 1879 to obtain possession from the son, with mesne profits from 1283 to 1285, Fasli, inclusive, amounting to about Rs. 90,000. To the latter part of her claim M. Abdul Majid made answer as follows in his written statement, depositing in Court the amount mentioned by him :—" As regards the plaintiff's claim for pro-" fits, the defendant never denied it. The plaintiff's allegation is wrong.

(1) 8 A. 39.

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"Under a correct and proper account prepared by the defendant (in "accordance with the principle admitted during the life-time of the "deceased Maulvi) from the account books of the estate, commencing from "1278 Fasli to the end of 1285 Fasli, Rs. 15,168-8-6½ has been found to "be due to the plaintiff. The defendant deposits it in Court, together "with extracts from accounts."

An issue was fixed as to the amount, and the judgment of the first Court, in the terms which are quoted in full in their Lordships' judgment on this appeal, gave the Court's reason, on the 18th June 1880, for postponing the inquiry into this part of the claim.

[157] The inquiry was fixed for the 13th September 1880, but the absence of the record, for the hearing of the appeal on the other question, caused the first delay. On the plaintiff's petition the High Court, on the 6th June 1881, ordered the Subordinate Court to proceed with the inquiry forthwith.

In their judgment of the 6th January 1882, affirming the decree as to the plaintiff's title, the High Court stated that the question of mesne profits was not before them.

On the 19th July 1882, the High Court again directed that the Subordinate Judge should proceed with the inquiry forthwith.

On the order of the High Court the hearing was fixed for the 29th July 1882, but it was again postponed, and the 29th May 1883 was appointed.

On the 15th December 1882, the defendant applied to the Subordinate Judge for a postponement of the proceedings till the decision of the Privy Council upon the question of title should be known. It was not shown by the record what was done upon this. However, on the 21st July 1883, there was a petition from the defendant before the High Court for their interference, under s. 15 of the Letters Patent of 1866, on the ground that the Subordinate Judge had acted without jurisdiction in proceeding to inquire into the amount of the mesne profits. The following order was then made by Straight, J., who adverted to its not being clear whether the question had been regularly brought before the High Court:—"It would have been better, no doubt, had the decree in terms directed an inquiry, but the judgment virtually does, and the requirement of s. 212 of the Code would therefore seem to have been satisfied. The application is refused with costs." On the 8th November 1883, the defendant filed a petition for special leave to appeal against the last-named order, which was refused with costs on the 12th December 1883.

On the 27th June 1885, the order of Her Majesty, in accordance with their Lordships' report, dismissed the defendant's appeal on the question of title, as reported in I. L. R. 8 All. 39.

[158] In the meantime the case as to the mesne profits was sent by the Subordinate Judge to the District Judge; and by him back to the Subordinate Judge on the 3rd February 1885. On the 24th February 1886, the District Judge, having, as was admitted on all hands, no authority so to do, transferred the decision of the case to the Subordinate Judge. In his order of that date, the District Judge gave his opinion that it would be necessary to have the decree of the 18th June 1880 amended by inserting in it a direction as to mesne profits, and he suggested that this might be done upon a petition from the plaintiff. From this order the plaintiff appealed, but withdrew her appeal on the 15th November 1887. When the case formally came before the Subordinate Judge, no application was

made for an amendment of the decree. Beyond the filing of a petition by the defendant that the pending proceeding might be struck off, "as wholly irregular," nothing appeared to be done till the 22nd January 1890, when the 13th March was fixed for hearing. This took place on the 16th May, and judgment was given, on the 2nd June, to the effect that the transfer to the file of the Subordinate Judge was wholly beyond the powers of the District Court, and that the Subordinate Judge had no jurisdiction to decide the case upon the merits. It was, therefore, struck off the file.

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Against this order the plaintiff appealed to the High Court, which, on the 22nd July 1892, pronounced the judgment now under appeal. The Court was of opinion that the Subordinate Judge, who first dealt with the case, had power, under s. 45 of the Civil Procedure Code, to try, separately, the questions of title and mesne profits, and that the pending proceeding for the ascertainment of mesne profits was not a proceeding in execution of a defective decree, but a continuation of the original suit, for the purpose of passing a decree upon a part of the case which had been left untried. They agreed that the re-transfer by the District Judge to the Subordinate Judge, on the 24th February 1886, was wholly without jurisdiction, and that the course, he, the Subordinate Judge, ought to have adopted, was to return the **[159]** papers to the District Judge. This they directed him now to do, setting aside the order of 2nd June 1890. They distinguished *Puranchand* v. *Roy Radhakishen* (1), a Calcutta Full Bench decision, from this case.

An application by the defendant for a certificate of the fitness of the case for the admission of an appeal to Her Majesty in Council was refused by the High Court on the 10th February 1893.

The defendant thereupon applied for special leave to appeal alleging that "the principal reason adduced by the High Court for refusing a certificate was that the petitioner might have raised the same points on the previous application for leave to appeal to Her Majesty in Council in 1883." The order so referred was the order of STRAIGHT, J., above set forth.

The application having been granted.

Mr. *J. H. A. Branson*, and Mr. *W. A. Raikes*, appeared for the appellant, on this appeal.*

Mr. *J. D. Mayne*, for the respondent.

The argument was mainly the following:—The Court of first instance, in its judgment of the 18th June 1882, by dividing the claim into two parts, and deciding one part of the suit itself, and leaving the remaining part to be decided in a future proceeding, acted beyond its powers. Any inquiry or order made, in pursuance of that Court's order, would be irregular and invalid. The decree of the 18th June 1880, having contained nothing as to mesne profits, the Court executing it had no power to entertain a claim for any, or to assess them. The plaintiff had appealed against the order of the Judge of the 24th February 1886 and had afterwards abandoned that appeal. Accordingly, the decision of the Judge was as against her final. Thus the decision of the Subordinate Judge of the 2nd June 1890 striking the case off the file was correct, and met the requirements of the case.

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* In this appeal Fatima Bibi was represented by her sons Muhammad Abdul Aziz and others, she having died on the 5th of March 1894.

(1) 19 C. 132.

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[160] Reference was made to *Mosoodun Lall* v. *Bheekaree Singh* (1). LORD WATSON referred to *Burgess* v. *Morton* (2).

Counsel for the respondent was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered on the 9th December 1896 by LORD HOBHOUSE :—

This case exhibits as lamentable a waste of time and money in litigation as ever came under their Lordships' observation. An account which the plaintiff asked for in the year 1879, and to which her right was affirmed in the year 1880, has not even been commenced ; the defendant having been allowed to delay it by objections to the formal regularity of the procedure. The question still is whether the respondents, who represent the original plaintiff, shall have the account taken. The High Court has decreed in their favour. The appellant, who was the original defendant, contends that their right has been extinguished.

In May 1879 Fatima Bibi, the mother of the respondents, filed her plaint against Abdul Majid, claiming possession of a share in her father's estate, and mesne profits for three years. She valued the profits at nearly a lac of rupees. The defendant denied the plaintiff's right to possession. He admitted her right to some profits, which he put at somewhat more than Rs. 15,000. He paid that sum into Court, whence it has been paid out to the plaintiff.

In an early stage of the suit it was declared by order of Babu Kashi Nath Biswas, then Subordinate Judge of Jaunpur, that the adjudication on the title should be taken first, and that then the question of profits should be taken up ; and the Court adhered to that arrangement, though the times contemplated for the two trials were put off. On the 18th June 1880, Kashi Nath Biswas delivered judgment on the question of title. As to some items the plaintiff's claim was dismissed. As to the bulk of the property the decree was in her favour.

On the other part of the case the Subordinate Judge made the following statement:—

[161] "As the question of mesne profits was to have taken a very long time in "examination of *jamabandi* accounts of numerous villages, it was proposed by the "parties that the Court should take up and decide other issues in the case. I should "have been glad to decide the whole case together, and with that view I purposely "delayed giving judgment on the issues on which I have taken down evidence and "heard the arguments on both sides, but, as I am leaving the district, I cannot, in "fairness to both parties, any longer refuse to give judgment on the issues tried by me."

And after he had given his decision on the title he added :—"The "last two issues cannot now be decided, and must be left to my successor "to decide." Those issues related to mesne profits and to costs.

The formal decree was confined to the question of title and possession. It is now contended by the defendant that this mode of proceeding was wholly beyond the power of the Court, and therefore cannot be the ground of any further proceeding in the suit. If indeed the decree had gone on to direct an inquiry as to profits, that, it is admitted, would have been right ; but, because the postponed inquiry is only mentioned in the judgment, everything is wrong ; and that, though the course taken was proposed by the parties, was adopted by the Court, was attended by manifest advantage, and by no inconvenience that any one can suggest. It is difficult to imagine a more frivolous pretext for resisting a just claim. Their Lordships agree with the High Court that the proceedings were competent to the Court and were substantially right.

(1) 6 W.R. Mis. Rul. 109.

(2) L.R. (1896) A.C. 136.

The defendant appealed from the decree of June 1880, first, to the High Court who affirmed it in January 1882, and, secondly, to Her Majesty in Council who affirmed it in June 1885. The plaintiff was put into possession of her share (it does not appear when, nor is it material), and then there remained no question except those reserved, *viz.*, the profits and the costs of suit.

In the years 1880 and 1881 occurred some not very intelligible transfers of the case from the new Subordinate Judge to the District Judge, Mr. Howell, and back again from the District Judge to the Subordinate Judge, with the result that the question of profits was postponed till after the decision of the High Court on the question **[162]** of title. After that decision, in February and March 1882, the then Subordinate Judge, Mr. Benerji, settled 14 issues, but did not proceed to try them. The plaintiff complained to the High Court of the delay, and on the 19th July 1882 the High Court ordered the Subordinate Judge to proceed without any further delay. This order appears to have been wholly ineffectual. The Subordinate Judge ordered postponements extending to the 29th May 1883. On that day he refused further postponement, because of the High Court's order, but no progress was made.

The defendant now appears to have changed his tactics, and for the first time we hear him complain that the proceedings of June 1880 were illegal. In some way (we have not got his petition) he brought that question before the High Court who delivered the opinion in which their Lordships have stated their concurrence. That was on the 21st July 1883. The defendant then endeavoured to appeal on this point to Her Majesty in Council, but leave was refused on the 12th December 1883.

After that it seems that the High Court transferred the case into the Court of the District Judge of Jaunpur; but still the suit made no progress. On the 24th January 1886 the then Judge, Mr. Hudson, delivered judgment, but only to bring fresh causes of delay. In direct disregard of the decision of the High Court he gives effect to the defendant's frivolous objection to the procedure of 1880, decides that he is not in a position to dispose of the case, and directs that it shall be restored to the file of the Subordinate Judge. With that, he makes a suggestion that the decree should be rectified and should "determine the period over which "the inquiry into mesne profits shall extend, before entering on the sub-"ject-matter of inquiry."

As regards this suggestion, which the Subordinate Judge appears to have taken as an order binding on the parties, the first part is unsubstantial, and the second impracticable. The arrears of profits recoverable are limited by law, but the inquiries necessary to ascertain what the arrears are cannot be limited until the facts are known, which is usually in the course of making the inquiries.

[163] The District Judge also intimates that it is illegal to have a separate trial for the costs of a suit. But the judgment of June 1880 does not contemplate any such thing. Doubtless the costs of the suit would depend on the results of the two disputes, as to profits and as to title, and it was most reasonable and convenient to postpone the decision on costs till all the rest of the suit could be determined.

The plaintiff appealed to the High Court against Mr. Hudson's order; but on the 15th November 1889 she withdrew her appeal, which was struck off the file. No explanation is given of the long delay or of the reason for withdrawal. It is now contended by the defendant that the effect of withdrawal was to bind the plaintiff to Mr. Hudson's

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view of the invalidity of the proceedings of 1880. It seems to their Lordships that it bound her to nothing except submission to the transfer made by the order which the withdrawal left standing.

On the 2nd June 1890 a third Subordinate Judge, Nil Madhab Rai, delivered his decision. He follows Jaunpur precedents in disregarding the order of his immediate superior and in refusing to touch the question of mesne profits. He holds that, in restoring the case to the Subordinate Judge, Mr. Hudson acted illegally, and that he, Nil Mahdeb Rai, had no jurisdiction. But he adds that, if he had, it would be necessary to follow the suggestions (he calls them orders) of Mr. Hudson, which the plaintiff declined to do. He refuses to send back the case to the District Court; he refuses to report it for order of that Court; not being able to find in the Code any directions for such an emergency. Then, having again stated that there was no case before him, he deals with the case by striking it off the file and apportioning costs.

The plaintiff appealed to the High Court, who delivered judgment on the 20th July 1892. In recounting the dismal history of the case the learned Judges express an opinion that the delays, which they attribute to the action of the defendant, amount to an abuse of the process of the Courts, and they intimate that the Jaunpur Courts have not done their duty. They re-affirm the [164] opinion given in July 1883 that the course taken by Subordinate Judge Kashi Nath Biswas was a lawful one. They discharge the decree of Subordinate Judge Nil Madhub Rai and direct the file to be sent to the Court of the District Judge.

The amount in question being above the appealable value, and the order being final in its nature as regards the defendant's liability to account, the defendant applied for leave to appeal as in ordinary course, to Her Majesty in Council. The High Court refused leave. By a petition which the defendant presented for special leave it appeared that the main ground for that refusal was that the defendant's grounds for appeal were the same as he might have raised on appeal in 1883; but that is not a valid reason for refusing a certificate for appeal in a case which in other respects is fit for appeal in ordinary course. Of course, their Lordships were not aware, and on an *ex parte* application they hardly could have been aware, of that which appears after argument and examination, *viz.*, the worthless character of the defendant's objections to the account demanded by the plaintiff.

The learned Judges of the High Court have examined the Code minutely to show that Subordinate Judge Kashi Nath Biswas acted under its provisions. Their Lordships think that such an examination is hardly necessary. The Subordinate Judge had before him a case consisting of two parts; a question of title, and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties, and they proposed, that the first part should be decided and the second reserved for decision. In point of fact the first part has been the subject of successive appeals by the defendant, who successfully struggled against the trial of the second part pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a lawsuit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition. Neither can it be pretended that the Court did not do justice in giving a decision on the leading part of the case at a time when it was not possible to decide on the subsidiary part. Even if the Court had erred in [165] form, it was in form only, not misleading or injuring anybody; and

to treat such an error as a bar to the proceedings reserved for further decision is a serious miscarriage of justice. Their Lordships are not so well placed as are the Judges of the High Court for forming an opinion on the way in which the Jaunpur Courts discharged their functions; but they think it right to add that nothing in this record leads them to form any opinion of the action of those Courts, since the first judgment in January 1880, more favourable than the opinion expressed by the High Court.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed, and the decree of the High Court affirmed. Whether a fresh reference to the District Judge will bring about an examination of the merits of the case, or only a renewed tossing of it from Court to Court, is, having regard to its previous history, a very obscure problem. But that is all their Lordships can do, except to order the appellant to pay the cost of this appeal.

Appeal dismissed.

Solicitor for appellant: Mr. *T. C. Summerhays.*
Solicitors for respondents: Messrs. *Barrow* and *Rogers.*

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

WILAYAT ALI KHAN (*Defendant*) *v.* UMARDARAZ ALI KHAN AND OTHERS (*Plaintiffs*).* [9th December, 1896].

Act No. VII of 1870 (*Court Fees Act*), *s.* 12—*Court fees—Question of deficiency of Court fees not raised in the Court of first instance—Practice—Estoppel.*

The plaintiffs, suing in respect of certain plots of land by mistake undervalued their claim with regard to the said land, and in consequence paid an insufficient Court fee on their plaint. This mistake was not discovered until the case had come in appeal before the High Court, and when discovered the deficiency was at once made good. *Held* that, no plea as to the deficiency in the Court fee having been raised, as it might have been, by the defendant before the decision of the suit in the Court of first instance, such plea could not be raised for the first time in appeal.

[R., 6 C.L.J. 351 = 12 C.W.N. 37 = 3 M.L.T. 33 (37).]
[See 19 A 169, *infra*, in this connection.]

[166] THE facts of this case were as follows:—

One Mansab Ali died in 1878. By his will, which was executed in the same year, Mansab Ali endowed a portion of his property for religious purposes, and he gave some of it to his brothers and some to his widow Musammat Mohib-un-nissa. The widow, on the death of Mansab Ali, took possession of some of the property in suit as mutawalli, and of some in her own right, and she also released certain property held on mortgage by Mansab Ali after receiving the mortgage-money. The plaintiffs, who were sons and daughters of brothers of Mansab Ali, sued the widow and one of the brothers of Mansab Ali to recover from them certain property which had not been disposed of by Mansab Ali and to which they alleged themselves to be entitled as heirs under the Muhammadan law. The suit was defended by Mohib-un-nissa, who pleaded, as to some of the property claimed, that it was endowed property, as to some, that it was hers under the will

* First Appeal, No. 252 of 1894, from a decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Meerut, dated the 27th August 1894.

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of Mansab Ali, and in any case that she, as an heir to Mansab Ali, was entitled at least to a share in such property.

The Court of first instance, when the suit was first heard, held, on the construction of the will, that there was no property of Mansab Ali which was not covered by the will, and in consequence no property which could be claimed by the plaintiffs, and dismissed the suit. On appeal, the High Court, differing from the Court below in its construction of the will, remanded the case for trial on the merits. On this remand the plaintiffs' suit was in part decreed and in part dismissed.

From this decree the defendant Wilayat Ali Khan appealed to the High Court. He pleaded (1) that the plaint was invalid by reason of a deficiency in the Court fee on the plaint which was not made good until after the expiry of the period of limitation, and (2) that a certain portion of the property in suit was *waqf* and therefore could not be made the subject of the plaintiffs' suit.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

[167] BANERJI and AIKMAN, JJ.—The plaintiffs in the suit out of which this appeal has arisen are the heirs of Mansab Ali, who died on the 10th of August 1878. On the 18th of June 1878 he made a will by which he devised certain property to his heirs; he made a *waqf* of certain other property; and died intestate as regards the rest. It was the property last mentioned, in which a share was claimed by the plaintiffs. The suit was dismissed by the Court of first instance, but, on appeal to this Court the decree of the lower Court was set aside, and the case was remanded, under s. 562 of the Code of Civil Procedure, for trial on the merits. It has been tried, and the Subordinate Judge has decreed a part of the claim. Both parties have appealed. This appeal has been preferred by the defendant. The original defendant was the widow of Mansab Ali, but, she having died during the pending of the suit, the present appellant was substituted for her as her legal representative.

The first objection raised in this appeal is that the suit was barred by limitation by reason of the plaint having been written on stamp paper of insufficient value, and the deficiency not having been made good until after the expiry of the period of limitation. The plaint was filed on the 13th of May 1890. It was discovered on the 9th of May 1894, that there was a deficiency in the amount of the Court fees payable for the plaint. The deficiency was of a very small amount, and arose out of a mistake which any one under the circumstances might naturally have made. The deficiency had reference to the valuation of the claim in respect of two pieces of land which were revenue-free, but in respect of which, in the patwari's papers, certain sums were entered as payable to Government. These sums were, by a natural mistake on the part of the plaintiffs, assumed by them to be revenue payable for the land, and on that mistaken assumption they valued the claim. As soon as the mistake was discovered they made good the amount of the deficiency. It is true that this was done after the expiry of the period of limitation for the institution of the suit; but we are of opinion that we should not for this reason be justified in allowing **[168]** the plea of limitation to be raised and in holding the claim to be barred. Under s. 12 of Act No. VII of 1870 the decision of the Court of first instance upon a question relating to valuation, not affecting the question of category is final. Had the objection as to valuation, which

has now heen raised, been taken before the decision of the suit by the Court of first instance in 1891, and had the decision of the Court upon that question been adverse to the defendant, that decision would have been final. This is a plea which might have been taken before the decision of the suit by the Court of first instance on the first occasion and before the remand by this Court. Under such circumstances, we must hold that the Court must be deemed to have decided the question adversely to the party who now seeks to raise it. We refuse to entertain an objection raised at this stage of the suit and nearly four years after filing of the plaint.

The next objection taken in the memorandum of appeal relates to the house No. 6, in which a school is held. It is contended that this house is a part of the *waqf* property under the will. The lower Court has held against the defendant on this point, and we are of opinion that its conclusion is right. It is true that the will has provided for the expenses of a school, but there is nothing to show that the building in which the school is held was made *waqf* property. Another item of property, which the defendant appellant urges is *waqf* property under the will, is item No. 9 of list B. *i.e.*, grove land No. 4509. The will declared *muafi* and resumed land adjoining the mosque aud *idgah* to be a part of the *waqf* property. It has been proved that there is a plot No. 560 which answers fully the description of the land referred to above. It is resumed *muafi* land, and a grove exists on it. In our opinion the land adjoining the mosque and *idgah* which was declared to be *waqf* did not consist of two plots, but was one plot of land on which a grove existed: such a plot is No. 560. The land No. 4509, does, it is true, contain a grove, but it is not resumed *muafi* land, and therefore it does not answer the description of the property [169] mentioned in the will. In our judgment the Court below has rightly decreed the claim in respect of these two properties. This disposes of the appeal, which we dismiss with costs.

Appeal dismissed.

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19 A. 169=17 A.W.N. (1897) 34.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

UMARDARAZ ALI KHAN AND OTHERS (*Plaintiffs*) *v.* WILAYAT ALI KHAN AND ANOTHER (*Defendants*).* [9th December, 1896.]

Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 120—Suit to recover from the widow of a deceased Muhammadan money realized by her on account of a debt due to the deceased—Muhammadan Law—Shias—Succession—Rights of widow.

Held, that a suit, brought by the other heirs to recover from the widow of a deceased Muhammadan a sum of money said to have been realized by her on account of a mortgage-debt due to her deceased husband, was a suit to which the limitation applicable was that prescribed by art. 120 of the second schedule to the Indian Limitation Act, 1877. *Mahomed Riasat Ali* v. *Hasin Banu* (1), *Sithamma* v. *Narayana* (2), and *Kundun Lal* v. *Bansidhar* (3), referred to.

Held, also, following *Mussumat Toonanjan* v. *Mussumat Mehndee Begum* (4), that the childless widow of a Shia Muhammadan, though she takes nothing out of her deceased husband's land, inherits a share of the buildings left by him.

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* First Appeal, No. 271 of 1894, from a decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Meerut, dated the 27th August 1894.

(1) 21 C. 157.
(2) 12 M. 487.
(3) 3 A. 170.
(4) N.W.P. H.C.R. (1868) 13=3 Agra H.C.R. 13.

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[F., 34 M. 511 (512)=20 M.L.J. 288 (291)=8 M.L.T. 4 (5)=6 Ind. Cas. 50 (51); R., 13 C.L.J. 239 (242)=15 C.W.N. 107 (110)=7 Ind. Cas. 704 (706); 2 Ind. Cas. 671 (673); 8 Ind. Cas. 999 (1010)=97 P. R. 1910=11 P.L.R. 1911=142 P.W.R. 1910.]

THIS appeal is connected with F. A. No. 252 of 1894, being an appeal by the plaintiffs from the same decree. The facts of the case are stated above at p. 166 in connection with that appeal.

Munshi *Ram Prasad*, for the appellants.

Pandit *Moti Lal Nehru* and Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is the plaintiffs' appeal in the suit out of which appeal No. 252, which we have just now decided, arose. The first plea taken in the memorandum of appeal is that the Court below has erred in holding the claim in respect of item No. 3 of list C attached to the plaint to be barred by limitation. This was an item of Rs. 530 realised from a mortgagor, by whom the amount was due to the deceased Mansab Ali. The **[170]** lower Court has held that this part of the claim is governed by art. 120 of sch. II of the Indian Limitation Act, 1877. It is contended that the article which is applicable to such a claim is art. 123, which provides a limitation of twelve years for a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate. It is contended that this is a claim for a distributive share of the property of the deceased. This contention is, in our judgment, untenable. We think that art. 123 refers to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them. This has been held in several cases, of which it is enough to refer to *Sithamma* v. *Narayana* (1). In a recent case decided by their Lordships of the Privy Council, *Mahomed Riasat Ali* v. *Hasin Banu* (2), which was a suit of a nature similar to the present, their Lordships refused to apply art. 123, and held the claim to be governed by art. 120.

The second plea raised on behalf of the appellants is that the Court below has wrongly held land No. 75 to be *waqf* property under the will. Mansab Ali by his will included amongst the *waqf* property a plot of land which he describes as the land of *Mukallam*. The Court below has held that plot No. 75 is proved to be the land Mansab Ali referred to in his will. The plot No. 75 is in the cultivation of one Jai Kishen, who was called as a witness in this case. He swore that his grandfather was *Mukallam*, and that the plot was known after the name of his grandfather. The plaintiffs have entirely failed to show that there is any other plot of land which would answer the description in the will, if plot No. 75 is not that land. As to this plot of land the conclusion of the lower Court was, in our opinion, right.

The third plea in the memorandum of appeal relates to shops 4, 7 and 8 specified in list B attached to the plaint. Those three shops are admittedly situated in the old Bazar of the city of Meerut. **[171]** Now under the will shops situated in the new Bazar were declared to be *waqf* property. On the face of the will, therefore, the shops in question are not the shops referred to in it. It was certainly open to the defendants to prove that

(1) 12 M. 487.

(2) 21 C. 157.

Mansab Ali owned no shop in the new Bazar, and, if they had given evidence to that effect, they might well have contended that the shops situated in the old Bazar were the shops which Mansab Ali declared to be *waqf*. In this case there is not a particle of evidence to show that Mansab Ali had no shops in the new Bazar. The learned counsel for the appellants states that he is instructed that Mansab Ali had shops in the new Bazar which would answer the description of the property mentioned in the will. Had the defendants been able to prove that Mansab Ali did not own any such shops, the conclusion of the Court below, that the word "new" as used in the will was a clerical mistake, might have been supported. But, in the absence of such evidence, we cannot hold that the shops in the old Bazar were the shops meant by the testator. This objection of the appellants must prevail, and the claim in respect of the shops 4, 7 and 8 must be decreed.

The last ground in the memorandum of appeal questions the correctness of the ruling of the lower Court, that the widow of Mansab Ali was entitled to a one-fourth share of the buildings left by her husband. Mansab Ali was a *Shia*. According to the best authority on the *Shia* law, a childless widow takes nothing out of her deceased husband's land, but she inherits a share of the buildings left by him. (Baillie's Digest of Moohummudan Law, Imameea Code, p 295). This view was adopted by this Court in *Mussumat Toonanjan* v. *Mussumat Mehndee Begum* (1). We, therefore, overrule the fourth plea of the appellants.

Objections under s. 561 of the Code of Civil Procedure have been taken by the respondents, of which the first only has been argued before us. That objection relates to item No. 2 in list C attached to the plaint. It was an item of Rs. 450 realized by the respondent on account of a mortgage-debt due to Mansab Ali. **[172]** The lower Court has held that the claim in respect of that item is governed by art. 120. The contention before us is that, when the amount of the mortgage-debt was realized by the widow of Mansab Ali, it became money received by her to the use of the plaintiff, and therefore, the claim in respect of such money was governed by art. 62 of the second schedule to Act No. XV of 1877. In support of his contention Mr. *Ghulam Mujtaba* cited the case of *Kundun Lal* v. *Bansidhar* (2). That case is entirely in favour of his contention, and we should have followed it had it not been for the ruling of the Privy Council in the case of *Mahomed Riasat Ali* v. *Hasin Banu* above referred to. In that case the plaintiff, as the widow of the deceased owner, claimed among other properties certain cash and deposit money received and appropriated by her husband's brother, but their Lordships held that for a suit of this description there was no article in the schedule which was clearly applicable, and therefore art. 120 governed the case. We are unable to distinguish that case from the present, and, following the ruling in that case, we disallow the objection under s. 561. We allow the appeal to the extent indicated above, that is to say, we decree the claim in respect of the shops No. 4, 7, and 8 in list B attached to the plaint. *Quoad ultra* the appeal is dismissed. The parties will pay and receive costs in proportion to their failure and success.

Decree modified.

(1) N.W.P. H.C.R. (1868) 13=3 Agra H.C.R. 13.

(2) 3 A. 170.

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19 A. 172 = 17 A.W.N. (1897) 35.

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APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAM SARAN SINGH AND OTHERS (*Defendants*) *v.* BIRJU SINGH (*Plaintiff*).* [12th December, 1896.]

Zamindar—Rights of zamindar in respect of waste lands—Wajib-ul-arz—*Provisions of* wajib-ul-arz *as to rights of pasturage.*

Held that a general provision contained in a *wajib-ul-arz* that village cattle might graze on the waste lands of the village could not be construed, in the absence of any definite covenant to that effect, as depriving the zamindar of his right to reclaim such waste lands.

[R., 31 C. 503 (P.C.) = 31 I.A. 75 = 8 C.W.N. 425 = 14 M.L.J. 152 = 8 Sar. P.C.J. 611; 34 M. 58 (60) = 20 M.L.J. 362 (364) = 7 M.L.T. 380 (381) = 1910 M.W.N. 75 (76) = 5 Ind. Cas. 853.]

[173] THE plaintiff in this case held a lease, dated the 19th of September 1893, from the Raja of Jaunpur of a certain plot of waste land appertaining to a village. On his attempting to bring under cultivation the land so leased, he was resisted by certain of the villagers, defendants to the suit, who alleged that they had a right of pasturage over the land, that the image of the tutelary deity of the village was placed thereon, and that the Holi fire also used to be burned upon it. The plaintiff sued for possession of the land leased to him, for the removal of the image of the village deity, and for damages.

The Court of first instance (Munsif of Azamgarh) found that, under the *wajib-ul-arz* of the village, the defendants had a right to graze their cattle on the waste land in suit, and accordingly dismissed the plaintiff's suit on that ground. The plaintiff appealed.

The lower appellate Court (Subordinate Judge of Azamgarh) found that, according to the *wajib-ul-arz*, it was provided that the residents of that village would continue to graze their cattle on uncultivated land; but held that this only gave them that right so long as the land remained waste land and did not preclude the zamindar from reclaiming the waste lands belonging to the village. It found also that the image of the village deity had only been recently placed upon the particular plot in question, and that the Holi fire had been burned thereon simply for the purposes of that suit. The Court accordingly decreed the claim of the plaintiff for an injunction restraining the defendants from interference with the plaintiff's rights in respect of the land in suit. The defendants appealed to the High Court.

Mr. *G. E. Foy*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BURKITT, J.—This is defendants' appeal. The facts briefly appear to be that the Raja of Jaunpur, who is zamindar of the lands which form the subject-matter of this appeal, recently gave a lease of them to the plaintiff. The plaintiff proceeded to reclaim those lands and bring them into cultivation, when he was obstructed **[174]** by some of the residents,

* Second Appeal, No. 588 of 1895, from a decree of Rai Sanwal Singh, Subordinate Judge of Azamgarh, dated the 7th March 1895, modifying a decree of Babu Chajju Mal, Munsif of Azamgarh, dated the 10th September 1894.

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tenants and others, in the village, who claim a right of pasture over the said lands. The first Court dismissed the claim, the second gave plaintiff a decree for possession, but without damages. In appeal it is urged that, under the terms of the *wajib-ul-arz*, the defendants had acquired a permanent and perpetual title to pasture their cattle on the lands in dispute. The lower appellate Court has come to the conclusion that the *wajib-ul-arz* did not grant any such right. The words in the *wajib-ul-arz* go no further than to provide that the village cattle may graze on waste land in the same manner as they were in the habit of grazing at the time of the preparation of the *wajib-ul-arz*. But that document contains no undertaking or covenant by the zamindar owner of the village not to reclaim or bring under cultivation any land which then was waste land. That, however, is what the defendants appellants ask by this appeal. They practically say that the owner of the village has no power to bring under cultivation any land which was waste land when the *wajib-ul-arz* was prepared. I can find no support for that contention in the *wajib-ul-arz*. It does no more than give effect to the almost universal custom of these Provinces, which permits village cattle to graze on waste land; but to go further, and to hold that that permission takes away from the zamindar the power to reclaim waste land is a serious inroad on the proprietary rights of the zamindar for which I know of no authority. I dismiss this appeal with costs.

Appeal dismissed.

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19 A. 174=17 A.W.N. (1897) 9.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

AMOLAK RAM AND ANOTHER (*Judgment-debtors*) *v.* LACHMI NARAIN AND OTHERS (*Decree-holders*).* [16th December, 1896.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *ss.* 86, 88, 89—*Execution of decree—Decree for sale on a mortgage—Interest after date fixed for payment—Civil Procedure Code, ss.* 209, 222.

In a suit upon a mortgage for the sale of the property mortgaged, the Court has no power to allow in the account under s. 86 of the Transfer of Property [175] Act, 1882, or in its declaration under that section, interest for a period beyond the date of payment which has to be fixed within six months from the date of the decree.

Sections 209 and 222 of the Code of Civil Procedure, 1882, do not affect the special provisions as to allowance of interest contained in the Transfer of Property Act, 1882.

In construing a decree, the terms of which are ambiguous, such construction must, if possible, be adopted as will make the decree a decree in accordance with law, and not a decree such as the Court making it had no power to pass.

[**Overruled**, 23 A. 181 (P.C.)=3 Bom. L.R. 51=5 C.W.N. 137=28 I.A. 35=7 Sar. P.C.J. 792; **Reversed**, 28 A. 223=3 C.L.J. 85=16 M.L.J. 160=1 M.L.T. 65 (P.C.); **Diss.**, 34 C. 766; **F.**, 19 A. 205 (207); 3 C.L.J. 188; **R**, 20 A. 397 (399); 21 A. 361; 34 C. 897=6 C.L.J. 186 (F.B.)=11 C.W.N. 942; 21 M. 364; 18 A. W.N. (1898) 164; 6 C.W.N. 766; 17 C.P.L.R. 164; 16 Ind. Cas. 374; 2 O.C. 37 (41); 3 O.C. 129 (153); **D.**, 12 C.P.L.R. 78 (80).]

IN this case Lachmi Narain and others obtained a decree, on the 2nd of July 1888, against Thakur Mukand Singh and others on a mortgage-deed. To that suit certain purchasers of a portion of the mortgage

* First Appeal, No. 84 of 1895 from an order of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 2nd May 1895.

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property, namely, Amolak Ram and Phul Chand, were made defendants. In due course an order under s. 89 of the Transfer of Property Act, 1882, was made. Subsequently to the making of that order Mukand Singh raised an objection to the decree-holders' claim to recover interest on the decretal amount for any period beyond the six months allowed by the decree for the payment of the money. Amolak Ram and Phul Chand also raised the same objection. But, inasmuch as Mukand Singh's objection was allowed by the Subordinate Judge and the amount recoverable in execution was reduced, the application of Amolak Ram was not prosecuted and was struck off on the 9th of July 1892. The decree-holders, however, appealed to the High Court and, pending that appeal, Mukand Singh came to terms with the decree-holders and agreed to pay interest to the date of realization, and this appeal was decreed by consent on the 1st of February 1894.

On the 25th of May 1894 the decree-holders applied for execution of their decree. Amolak Ram and Phul Chand thereupon objected, as on the previous occasion, that the decree-holders were only entitled to get interest on the amount decreed to them up to the date within six months from the date of the decree which was fixed by the decree for the payment of the decretal amount.

On the hearing of this objection, the decree-holders raised the point that the objectors were precluded by the dismissal of their previous objection from again raising this question as to interest. **[176]** The Court, however, over-ruled them on this point and proceeded to hear the objection of Amolak Ram on the merits. The Subordinate Judge of Aligarh held on a construction of the decree, in which construction he was aided by a comparison of the decree with the terms of the judgment on which it was based, that the decree did give the plaintiffs interest on the amount decreed from the date of the suit to the date of the realization of the decretal money. The Court of first instance accordingly dismissed the objection.

The defendants, Amolak Ram and Phul Chand, appealed to the High Court.

The Hon'ble Mr. *Colvin* and Munshi *Ram Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—Lala Lachmi Narain and others obtained a mortgage of certain immoveable property. On that mortgage they brought a suit for sale under s. 88 of the Transfer of Property Act, 1882. They obtained a decree under that section. The Court decreed Rs. 29,171-3 as the principal amount due with interest up to the date of suit, Rs. 2,873-6 for interest from the date of suit to the date of the decree, and Rs. 1,012 for interest from the date of the decree to the 2nd of January 1889, which was a date within six months of the date of the decree. It also decreed costs and gave interest on the costs until realization. The amount of the decree, apart from costs and interest on the costs, was Rs. 33,056. The question is as to whether the Court decreed interest on the mortgage money after the 2nd of January 1889, or not. That portion of the decree upon which this question turns has been variously translated. One translation is given by the Subordinate Judge in his judgment in this case. Another translation was made by an official of this Court; and a third translation has been made by Mr. Lyons, who is the head translator of this Court, on a dispute arising as to the correctness of the translation during the hearing of this appeal. The translation made by Mr. Lyons is as follows: "And it is

ordered that the plaintiffs' claim be decreed to the extent of Rs. 29,171-3, and the rest of the claim to the extent of [177] Rs. 11,697-7 be dismissed; that on the amount of the claim decreed the plaintiffs receive proportionate costs; that on the amount decreed from the date of suit, Rs. 2,873-6, and that, on the amount of costs from to-day up to the date of payment, the plaintiffs receive interest at the rate of Rs. 6 per cent. per annum." That portion of the decree was subsequent to the portion of the decree in which the actual amounts were decreed.

Now it is contended on behalf of the decree-holders that the decree gave them interest on the principal amount beyond the date of the expiration of the six months which the Court fixed as the time when the payment should be made. We must see what would have been a legal decree in this case. A decree for sale can only be made under the Transfer of Property Act, 1882. It is as well to bear that in mind. The decree which can be made in a case like this is that which is specified in s. 88 of that Act. A decree for sale according to s. 88 shall be to the effect mentioned in the first and second paragraphs of s. 86 of that Act—"and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same." In order to see what would be a decree to the effect mentioned in s. 86, we must look at s. 86. We find that by the first paragraph of s. 86 the Court shall make a decree ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree. It is obvious that the words of s. 88→"what is so found due to the plaintiff"—must mean the amount referred to in the first paragraph of s. 86, that is, either the amount found due by the account directed to be taken in that section or the amount which the Court at the time [178] of passing its decree declares to be due. It is also obvious that under s. 86 no future interest beyond a date within six months of the date of the decree can be entered in the account or declared by the Court; and from s. 88 it is obvious that the proceeds of the sale decreed under that section must be applied, after payment of the expenses of the sale, in payment of "what is so found due to the plaintiff," and that the balance, if any, must be paid to the defendant or other person entitled to receive the same. The section clearly shows that it is only the amount originally declared at the time of making the decree or found to be due under the account provided for by s. 86, which the Court can pay over to the plaintiff out of the proceeds of the sale, and that the Court has no power to allow in the account under s. 86 or in its declaration under that section interest beyond the date which has to be fixed within six months from the date of the decree. In certain events, in adjusting the amount to be paid to a mortgagee, certain additional costs are to be added under s. 94 of the Act to the mortgage money, but there is absolutely no provision that we are aware of for adding additional interest.

Now it appears to us that the granting of interest on the costs decreed was in contravention of s. 86. The power exercised by Courts to grant interest up to realization under the Code of Civil Procedure appears, in the case of decrees for sale, to be excluded by ss. 86 and 88 of the Transfer of

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Property Act. It would be well if Courts, whether of first instance or of appeal, in cases arising under the Transfer of Property Act, would read and consider the sections of that Act which contain the law on the subject which the Legislature in India has thought it necessary to enact We have no power as Judges in India to alter the Statute Law and we have no power to make decrees which are not in accordance with that Statute Law, when the Statute Law provides for the form of the decree to be made. It is not safe to assume that the law of the Transfer of Property Act is the law which was administered in the Courts of Chancery in England. In the present case, if we were to construe the decree as we are asked to **[179]** construe it on behalf of the decree-holders, we should be holding that the Judge who made the decree made a decree which was beyond his jurisdiction, and which was not contemplated by ss. 86 and 88 of the Transfer of Property Act. In our opinion, where it is possible to do so, we should put such a construction on the decree as would make the decree one in accordance with the law. It is true that, in granting interest on the costs, the decree goes beyond what the law allows, but in other respects we can construe the decree, and we do, as one fixing the amount due for principal and interest up to the 2nd of January 1889; and for that amount, *plus* the costs decreed and the interest wrongly decreed on those costs and any costs coming under s. 94 of the Act, the property can be sold.

After the decree for sale under s. 88 was made, default was made in payment of the amount due, and thereupon the Court under s. 89 of the Transfer of Property Act made an order for sale. The order is rather a confused one. It is quite clear that under s. 89 the Court had no power to increase the amount for which the property might be sold, except in case it allowed extra costs under s. 94. It wrongly states in the order the amount which had been found due; but s. 89 is specific, and, no matter what the order under that section was, the Court would be bound to apply the proceeds of the sale in the manner mentioned in s. 88. The decree-holders attempted to execute the decree and order for an amount which included interest on the principal amount, and also for interest subsequent to the 2nd of January 1889. The mortgagors objected that execution could not be had for interest on the principal in respect of the period subsequent to the date fixed, which was the 2nd of January 1889. The appellants in the case before us, who were purchasers before suit of portions of the mortgaged property, raised a similar objection. The Court held that the objection raised by the mortgagors was good. Subsequently, in an appeal to which these appellants were no parties, an arrangement was made between the mortgagors and the decree-holders by which future interest should **[180]** be payable. It is needless to observe that that arrangement and the decree in appeal which was passed in accordance with it did not bind the present appellants. Subsequently, on the decree-holders proceeding to obtain execution by sale, these applicants again objected that interest on the principal amount and interest after the 2nd of January 1889 could not be included in the sum for which the property could be sold, so far as they were concerned. The Subordinate Judge dismissed their objection, and from that order of dismissal this appeal has been brought.

In our opinion ss. 86, 88 and 89 are quite clear and leave no reason to doubt that the objection of these appellants was good in law. In coming to the above conclusion we have not overlooked the provisions of ss. 209 and 222 of the Code of Civil Procedure. In our opinion those sections cannot affect the special provisions of the Transfer of Property Act. We construe the decree on this particular point, as it may be

construed, as a lawful decree under s. 88, and not as an illegal decree, as it would be if the contention of the decree-holders was correct, and we hold that the property cannot be sold in respect of any interest after the 2nd of January 1889, except such interest as was wrongly decreed on costs. We allow this appeal with costs.

Appeal decreed.

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19 A. 180 = 17 A.W.N. (1897) 11.

APPELLATE CIVIL.

Before Sir John Edge., Kt., Chief Justice, and Mr. Justice Blair.

RAM LAL AND OTHERS (*Decree-holders*) *v.* TULSA KUAR AND OTHERS (*Judgment-debtors*).* [17th December, 1896.]

Act No. IV *of* 1882 (*Transfer of Property Act*), ss. 87, 89, 92, 93—*Redemption of a mortgage—Decree for redemption—Extension of time limited for payment of decretal amount—Execution of decree.*

In the case of a decree for redemption or for foreclosure under the Transfer of Property Act, 1882, both of which decree stand in this respect upon the same footing, no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown, whether the order under s. 87, in a suit for foreclosure, or the order under s. 93, in a suit for redemption, has been applied for or not. *Pooresh Nath Mojumdar* [181] v. *Ramjodu Mojumdar* (1) dissented from. *Kanara Kurup* v. *Govinda Kurup* (2) distinguished.

[Diss., 1 O.C. 91; U.B.R. (1897-1901) 582; Not F., 7 A.L.J. 953 (956) = 7 Ind. Cas. 50; R., 19 A. 205 (207); 36 C. 122 = 8 C.L.J. 547 = 1 Ind. Cas. 780 (783); 8 Ind. Cas. 592 (593) = 3 Bur. L.T. 2 = 2 N.L.R. 137 (143); 5 O.C. 82; D., 24 A. 479 (481).]

THIS was an appeal arising out of the dismissal of an application under s. 93 of the Transfer of Property Act, 1882, that a certain mortgage might be declared to be foreclosed.

In 1869 one Tulsa Kuar mortgaged, by a deed of conditional sale, certain immoveable property to Kirpa Ram and others. The deed provided that the property should be redeemed within three years and that, if it were not so redeemed, the mortgagees should get possession, and, after so obtaining possession, the profits were to be applied first in payment of the interest on the mortgage-debt and then in reduction of the principal. The term of the mortgage was twelve years. In 1872 the mortgagees got a decree for possession which they subsequently executed. Upon this, one Raj Kuar brought a suit for pre-emption against the mortgagees, and on the 22nd of September 1874 obtained a decree conditioned on her paying the mortgage money and interest. Afterwards, on the 3rd of October 1874, Raj Kuar sub-mortgaged her right as mortgagee under the pre-emption decree to Ishri Prasad, Ram Lal and others for Rs. 7,500. The money so secured was deposited to satisfy the pre-emption decree and possession was obtained on the 6th of November 1874. Tulsa Kuar, the original mortgagor, executed another mortgage in favour of Raj Kuar for Rs. 1,500. Ishri Prasad, Ram Lal and others, the sub-mortgagees, then sued for the recovery of their mortgage-debt and obtained a decree against Raj Kuar on the 28th of September 1888. After that Tulsa Kuar instituted a suit for redemption against Raj Kuar, to which, Ishri Prasad and

* First Appeal, No. 41 of 1896, from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 4th September 1895.

(1) 16 C. 246. (2) 16 M. 214.

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others, the sub-mortgagees, were made parties. Tulsa Kuar obtained a decree for redemption on the 20th of April 1889 on the condition that Rs. 9,149 should be paid within six months, otherwise the mortgage to be foreclosed. This decree was confirmed by the High Court on the 28th of April 1891. Tulsa Kuar did not deposit the mortgage money within the time specified. Meanwhile Ishri Prasad and others executed [182] their decree. They caused the rights of Raj Kuar as mortgagee to be sold and purchased them themselves on the 21st of September 1891. On the 20th of February 1893, Ishri Prasad, in execution of a decree of his own, brought to sale and purchased the mortgagor's rights of Tulsa Kuar, and, subsequently to that purchase, he deposited in Court the mortgage money, according to the decree for redemption obtained by Tulsa Kuar in 1889, *minus* his one-third share, and prayed for execution of the decree for redemption in his favour. On the 19th of March 1894 Ram Lal and others, the remaining mortgagees, applied for an order absolute for foreclosure of the mortgage under s. 93 of the Transfer of Property Act, 1882. This application was dismissed by the Subordinate Judge of Mainpuri. The applicants thereupon appealed to the High Court.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the appellants.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—In 1869, Musammat Tulsa Kuar executed a compound kind of mortgage, which provided that, if the mortgage money was not paid within three years, the mortgage should be one by conditional sale and the mortgagees should have possession. The mortgage money was not paid within three years and the mortgagees obtained possession. The mortgagor brought a suit for redemption under the Transfer of Property Act, 1882, and on the 20th of April 1889 obtained a decree for redemption under s. 92 of that Act. The decree fixed the 20th of October 1889 as the day on or before which payment was to be made, and, the mortgage being one by conditional sale, decreed, in the event of non-payment by the date fixed, that the mortgagor should be absolutely debarred of all right to redeem the property. As is usual in these cases, the amount was not paid on or before the 20th of October 1889, and no application by the mortgagor, or by any representative of the mortgagor's interest as mortgagor, was made under s. 93 to the Court to postpone the day fixed by the decree under s. 92 for payment until the [183] 14th of March 1894, when one of the mortgagees, who in the meantime had acquired by purchase the mortgagor's interest, paid the mortgage money into Court. On the 19th of March 1894, the other mortgagees or their representatives applied for an order under s. 93 of the Transfer of Property Act debarring the mortgagor, and all persons claiming through her, of all right to redeem the mortgaged property. That application of the 19th of March 1894 was dismissed, and from the order of dismissal this appeal has been brought.

It seems to have been assumed by the Court below that it was at liberty to do, without reference to the Transfer of Property Act, 1882, that which the Court of Chancery in England used to do in suits for foreclosure, namely, to extend the time within which the mortgage money might be paid; and the Court below further assumed that it had this power even in a case in which there was no cause shown for postponing the day for payment. The practice of the Court of Chancery in England

in the case of a suit for redemption differed materially in those respects from its practice in the case of a suit for foreclosure. In the case of a suit for redemption, it does not appear to have been, except possibly in a very exceptional case, the practice of the Court of Chancery in England to extend the time within which the decreed redemption money might be paid. The cases showing what the practice of the Court of Chancery was are collected at pp. 1104 and 1106 of Coote on Mortgages, 5th edition.

Whatever may have been, or may now be, the practice in England in suits for redemption or foreclosure of a mortgage, what we are concerned with in India is the law on this subject which the Indian Legislature, being a competent body to legislate in that respect, has enacted shall be followed by Courts in this country. That law is provided for us in the Transfer of Property Act, 1882 (Act No. IV of 1882). So far as the power of a Court to extend the time in a suit for redemption or in a suit for foreclosure in India is concerned, the power and jurisdiction of the Court are limited, in the case of foreclosure, by s. 87. **[184]** and, in the case of redemption, by s. 93 of the Transfer of Property Act, and in that respect the two suits are placed on exactly the same basis; in neither case has a Court, which is bound to obey the law of the Transfer of Property Act, 1882, power to extend the time for payment except on good cause shown.

Now, in this case, there was no good or other cause shown why the Court should postpone the date fixed by the decree which was passed under s. 92 of the Act for payment to the defendant. The Courts in India, where the Indian Legislature has made express provisions on the subject, have no power to arrogate to themselves the jurisdiction which was exercised by the High Court of Chancery in England. In our opinion the application of the mortgagees, respondents here, of the 19th of March 1894, for an order under s. 93 debarring the mortgagor, and any one claiming under her, of all right to redeem should have been granted.

It has been contended that—inasmuch as s. 93 of the Transfer of Property Act, 1882, enacts that, "on the passing of any order under this section, the plaintiff's right to redeem, and the security, shall, as regards the property affected by the order, both be extinguished; provided that the Court may, upon good cause shown and upon such terms, if any, as it thinks fit, from time to time, postpone the day fixed under s. 92 for payment to the defendant,"—the mortgagor or the purchaser of the equity of redemption had a right, until such order was made under s. 93, to come into Court at any time and make payment of the redemption money, and to do so without even having obtained an order on good cause shown postponing the day for payment. Now, if there was nothing else than the proviso to s. 93 to show that that contention was unsound, the proviso would meet the argument. But earlier in the section we find in the second paragraph, which is the paragraph which deals with what is to happen on default of payment, the words "if such payment is not so made." These words, in our opinion, must refer to a payment made in accordance with the decree passed under s. 92, and indicate **[185]** that, unless the Court makes an order under the proviso to s. 93, there is no right in the mortgagor in a suit for redemption to make the payment after the date fixed in the decree has passed. The order under s. 93 debarring the mortgagor of all right to redeem would be, when drawn up, a document of title in the hands of the mortgagees, as it would show that the right to redeem allowed by the decree under s. 92

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had lapsed and that no extension had been granted of the time within which payment might be made. The opening words of the second paragraph of s. 87, which relates to a suit for foreclosure, are the same as the opening words of the second paragraph of s. 93 which relates to redemption. In our opinion, no matter what the practice of the Court of Chancery in England may have been, the intention of the Indian Legislature, as expressed by it in the Transfer of Property Act, 1882, was that there should be no extension of time, except for good cause shown, whether the order under s. 87 in a suit for foreclosure, or the order under s. 93 in a suit for redemption, was applied for or not.

We cannot agree with the decision of the High Court at Calcutta in *Pooresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1), the provisions of the Transfer of Property Act being in our opinion clear in this matter. As to the case of *Kanara Kurup* v. *Govinda Kurup* (2), it is to be observed that there was no decree in that case, under s. 92, as to what should happen in case payment was not made within the time fixed.

We allow this appeal, and direct that an order be drawn up under s. 93 of the Transfer of Property Act debarring the mortgagor, and all those claiming under her, of all right to redeem the mortgaged property. The appellants will have the costs of this appeal and of the application in the Court below. Of course, the persons who paid the mortgage money into Court will be entitled to get it out, their application being necessarily dismissed.

Appeal decreed.

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19 A. 186=17 A.W.N. (1897) 12.

[186] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

KASHI PRASAD (*Judgment-debtor*) *v.* SHEO SAHAI (*Decree-holder*).*
[18th December, 1896.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *ss.* 88, 89, 94—*Execution of decree—Decree for sale—Agreement for payment by instalments with enhanced interest—Civil Procedure Code, s.* 257*A.*

A decree for sale under s. 88 of the Transfer of Property Act, 1882, can only be executed for the amount decreed or found on an account being taken to be due, and the order for sale cannot, except with regard to any additional costs which may be provided for by an order under s. 94, extend in any way the liablity of the judgment-debtor or his property under the decree. *Sita Ram* v. *Dasrath Das* (3) distinguished.

[R., 19 A. 205 (207); 28 A. 771=3 A.L.J. 585=A.W.N. (1906) 237=1 M.L.T. 247 (F.B.); 32 A. 259 (260)=7 A.L.J. 251 (253)=5 Ind. Cas. 295 (296); 1 Ind. Cas. 677 (679); 11 Ind. Cas. 528 (530)=14 O.C. 147 (150); D., 10 C.L.J. 91 (97).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

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* First Appeal, No. 130 of 1896, from a decree of Pandit Bansi Dhar, Subordinate Judge of Gorakhpur, dated the 17th February 1896.

(1) 16 C. 246. (2) 16 M. 214. (3) 5 A. 492.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—The respondent on the 7th of May 1891 obtained a decree for sale under s. 88 of the Transfer of Property Act, 1882, against the appellant here. Subsequently to the making of that decree, and after expiration of the time for payment limited by the decree, the respondent obtained an order under s. 89 of that Act. Later still, after the making of that order, the parties agreed that the appellant here might pay by instalments, part of the consideration for that agreement being an increase by about Rs. 2,000 of the decretal debt and certain provisions as to the payment of additional interest. The Court sanctioned the agreement under s. 257-A. of the Code of Civil Procedure. The respondent now seeks to have execution of the decree and the agreement, or rather to have execution for the amounts mentioned in the agreement and for the additional interest mentioned in the agreement. The Court below granted the application, and from that order this appeal has been brought.

Mr. *Roshan Lal*, for the respondent, has contended that an agreement of this kind which has been sanctioned by the Court [187] can be enforced by execution as if it were a decree, and in fact that it varies the decree. He has relied on *Ameer-un-nissa Khatoon* v. *Meer Mahomed Hossein* (1) and on *Sita Ram* v. *Dasrath Das* (2). The case in Calcutta decided nothing of the kind; in fact it left the question open to be decided subsequently whether the decree-holder could enforce his decree for anything not specifically decreed. The Full Bench case in this Court certainly supports to some extent Mr. *Roshan Lal's* argument. It decided that, where there was a sulahnamah relating to a decree which had been sanctioned under s. 257A of the Code of Civil Procedure, the decree might be executed in accordance with its provisions. In that case the sulahnamah imposed an additional burden on the judgment-debtor not imposed by the decree. We doubt if that view of the law would be considered a good one at the present day. Fortunately, it does not bind us in this case, for, although the decree in that case was one in enforcement of a hypothecation by sale, the decree was made in 1881, and consequently was not a decree for sale under the Transfer of Property Act, 1882.

Section 210 of the Code of Civil Procedure enables a Court after passing a decree for the payment of money, on the application of the judgment-debtor and with the consent of the decree-holder, to order the amount decreed to be paid by instalments on such terms, as to the payment of interest, attachment of the property or otherwise, as the Court thinks fit. Such an application must be made within six months of the date of the decree. By the same section it is enacted that, "save as is provided by that section and s. 206, no decree shall be altered at the request of the parties." That section does not apply to a decree for sale, which is not a decree for money, and which can only be made under the Transfer of Property Act, 1882, since that Act came into force. It is obvious that, where a decree for sale is made under s. 88 of the Transfer of Property Act, no subsequent agreement between the parties can increase the amount for which the property is to be sold in case default of payment is made. Under s. 88 the decree must direct that [188] the proceeds of the sale, after defraying thereout the expenses of the sale, shall be paid into Court "and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same." The words

(1) 2 C. L. R. 143. (2) 5 A. 492.

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"what is found due to the plaintiff" refer to what is found due in the account or by the declaration of the Court mentioned in s. 86. The order under s. 89 can only be an order that the property, or a sufficient part thereof, be sold and that the proceeds of the sale be dealt with as is mentioned in s. 88. There is no provision in s. 88 or s. 89 such as those contained in the proviso to s. 87, which is the section relating to suits for foreclosure, or in s. 93, which is the section relating to suits for redemption. We can only come to the conclusion that a decree for sale under s. 88 of the Transfer of Property Act can only be executed as provided by that Act, that is, for the amount decreed or found in account to be due, and that the order for sale cannot, except with regard to any additional costs which may be provided for by s. 94, extend in any way the liability of the judgment-debtor or his property under the decree. All that this decree-holder is entitled to under the order under s. 89 is to have his decree executed for the amount decreed and the expenses of the sale and for any additional costs which may be incurred under s. 94. He cannot have execution of the agreement by which time was given. As the application was one for execution of the agreement, we allow this appeal and dismiss the application with costs.

Appeal decreed.

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19 A. 188 = 17 A.W.N. (1897) 14.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

CHIDDO (*Plaintiff*) *v.* PIARI LAL AND ANOTHER (*Defendants*).*
[18th December, 1896.]

Civil Procedure Code, s. 310—Sale certificate—Title of auction-purchaser who has not obtained a sale certificate—Execution of decree.

Although the auction-purchaser at a sale held in execution of a decree may not obtain a full title until a certificate has been granted, this must not [189] be considered as necessarily destroying any lesser interest which arises by reason of general equitable principles *Dagdu* v. *Pancham Sing Gangaram* (1) and *Het Ram* v. *Baldeo* (2) approved.

[F., 2 Ind. Cas. 81 (82); R., 7 C.L.J. 1; 11 C.W.N. 495; 5 Ind. Cas. 263.]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Babu *Badri Das*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff for the redemption of a mortgage. The plaintiff succeeded in the Court of first instance, but on appeal the learned Subordinate Judge reversed the decree of the Munsif and dismissed plaintiff's suit. The plaintiff comes here in second appeal. It appears that, on the 27th of July 1877,

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* Second Appeal, No. 107 of 1896, from a decree of Maulvi Muhammad Mazhar Hasain Khan, Subordinate Judge of Mainpuri, dated the 3rd December 1894, reversing a decree of Babu Achal Behari, Munsif of Etah, dated the 25th September 1894.

(1) 17 B. 375.

(2) 14 A.W.N. (1894) 54.

Hiraman and Jauhari, the plaintiff's predecessors in title, executed a simple mortgage of a shop in favour of one Baldeo Das, the representative in title of the defendants-respondents The plaintiff's allegation was that, although the mortgage was a simple one, the mortgagors and mortgagee entered into an oral agreement whereby the mortgagee was put into possession of the property for a term of seventeen years, and it was covenanted that after the expiry of the seventeen years the property was to be restored to the mortgagors and the mortgage-debt considered to be discharged. The plaintiff alleged that the defendants, when called upon to vacate the shop after the expiry of the seventeen years, refused to deliver up possession, and hence he was obliged to sue to recover possession. The lower appellate Court has found that the plaintiff has failed to prove the allegation upon which he came into Court, and has not succeeded in showing that defendants are in the possession in virtue of the mortgage. It appears that, after the mortgage above referred to, Mathura Das and Jamna Das obtained a simple money decree against the plaintiff in this suit, in execution of which the plaintiff's equity of redemption in respect the property in dispute was brought to sale, and purchased by one Mohan. It is found that the defendants-respondents are the heirs of Mohan. Consequently, [190] as they are also the representatives of the mortgagees, they have, if the sale to Mohan was a good one, become full owners of the property. The plaintiff contends that, notwithstanding that sale of the equity of redemption, he is nevertheless entitled to maintain the present suit, because Mohan, the auction-purchaser, failed to obtain from the Court a certificate of sale. Reliance is placed upon s. 316 of the Code of Civil Procedure, which provides that, "so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before." It must be allowed that these words, the interpretation of which has caused considerable difficulty to the Court, lend some colour to the appellant's contention, but I am of opinion that it cannot prevail. It is not denied that the sale to Mohan was confirmed by the Court. Section 314 of the Code provides that no sale of immoveable property in execution of a decree shall become absolute until it is confirmed by a Court. Moreover, the date of the certificate referred to in s. 316 is not to be the date on which the certificate is drawn up, but the date upon which the sale is confirmed. It has further been held that, as it is the duty of the Court to grant a certificate, no limitation applies to an application for a sale certificate. It was held by the Privy Council that s. 259 of Act No. VIII of 1859, which corresponds to s. 316 of the present Code, did no more than create statutory evidence of the transfer in place of the old mode of transfer by a bill of sale. It is true that s. 259 differs somewhat from s. 316 of the present Code. By the former section the certificate, it is said, "shall be taken and deemed to be a valid transfer of the right, title and interest sold." But even under the present Act it has been held,—*vide Dagdu* v. *Pancham Sing Gangaram* (1),—that although the auction-purchaser may not obtain a full title until a certificate has been granted, this must not be considered as necessarily destroying any lesser interest which arises by reason of general equitable principles. This ruling was followed by this [191] Court in *Het Ram* v. *Baldeo* (2). As the plaintiff's equity of redemption

(1) 17 B. 375.

(2) 14 A. W. N. (1894) 54.

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was sold and that sale was confirmed, I hold that the mere fact of the auction-purchaser not having as yet obtained a sale certificate will not entitle the plaintiff to treat the sale as a nullity, and maintain the present suit. For the above reasons I dismiss this appeal with costs.

Appeal dismissed.

19 A. 191 = 17 A.W.N. (1897) 14.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

NAKCHEDI RAM (*Plaintiff*) *v.* RAM CHARITAR RAI AND OTHERS (*Defendants*).* [18th December, 1896.]

Act No. IV of 1882 (Transfer of Property Act), s. 68 (c)—Usufructuary mortgage — Dispossession of mortgagee by a trespasser—Suit for recovery of the mortgage money.

The words "any other person" in the concluding portion of clause (c) of s. 68 of the Transfer of Property Act mean "any other person having a title." The disturbance of the mortgagee's possession by a trespasser will not confer upon the mortgagee a right to sue the mortgagor for the mortgage money. *Gopalasami* v. *Arunachella* (1), followed.

THE plaintiff-appellant in this case being a usufructuary mortgagee sued his mortgagors and other defendants for the recovery of the mortgage money. The facts of the case are briefly as follows :—

The defendants Nos. 1 to 4 executed a mortgage deed in favour of the plaintiff's father on the 20th of June 1885, under which 6 bighas 10 biswas, 19 dhurs of land cultivated by tenants were mortgaged. The defendant No. 5 was the vendee of the property of the defendant No. 1 under the document, dated the 2nd of July 1889. The defendants Nos. 6 and 7, as stated by the plaintiff, alleged themselves to be the mortgagees of a portion of the mortgaged lands. The plaintiff complained that possession was not delivered to him and that he had sued several tenants, but the suits were dismissed by the Revenue Court. The plaintiff sued [192] for possession and for a certain amount of interest, and, in default of possession, for payment of the mortgage-money.

The defendant No. 1 pleaded that he had sold his property and had no further connection with it. The defendants Nos. 2 to 5 pleaded that they had done nothing contrary to the terms of the mortgage deed, that the plaintiff had all along been collecting the rent of the mortgaged land and that toey had executed no mortgage in favour of the defendants Nos. 6 and 7. The defendant No. 6 did not appear. Defendant No. 7 pleaded that he was a prior mortgagee of part of the lands in question in the suit and that he could not be dispossessed until the amount of his mortgage was paid off.

The Court of first instance decreed the claim in part as against the defendants Nos. 6 and 7, but dismissed the claim for the realization of the mortgage money from the mortgagors.

The plaintiff appealed. The lower appellate Court (Additional Subordinate Judge of Ghazipur) dismissed the appeal, holding that there had

* Second Appeal, No. 13 of 1896, from a decree of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 29th August 1895, confirming a decree of Maulvi Muhammad Abdul Ghafur, Munsif of Muhammadabad, dated the 29th May 1895.

(1) 15 M. 304.

been no obstruction on the part of the mortgagors, who had done what they could to put the plaintiff-mortgagee in possession. That Court also found that the persons alleged to be prior mortgagees had no concern with the property and were not in fact prior mortgagees, and that the plaintiff had no cause of action against his mortgagors.

The plaintiff appealed to the High Court.

Mr. *W. Wallach*, for the appellant.

Munshi *Jwala Prasad* and Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BANERJI, J.—The plaintiff is a usufructuary mortgagee from the respondents of certain lands in the cultivation of tenants. The plaintiff sued some of the tenants for recovery of rent in a Court of Revenue. The tenants pleaded payment to defendants Nos. 6 and 7, who alleged themselves to be prior mortgagees of the land. They succeeded, and the suit for rent was dismissed. Thereupon the present suit was brought by the plaintiff, against his mortgagors, for possession of the mortgaged land and, in the [193] alternative, for recovery of the mortgage money. The lower appellate Court found that the mortgagors had done all they could to put the mortgagee into possession, and had not interfered with his possession, that the persons who alleged themselves to be prior mortgagees had no concern with the property and were not in fact prior mortgagees, and that the plaintiff had no cause of action against his mortgagors. On this ground the lower appellate Court has dismissed the claim against the mortgagors. It is contended here that the plaintiff is entitled to a decree for the mortgage money under clauses (*b*) and (*c*) of s. 68 of Act No. IV of 1882. Clause (*b*) has no application, as upon the finding of the Court below the mortgagee has not been deprived of the mortgaged property by or in consequence of the wrongful act or default of the mortgagor. Clause (*c*) also is, in my opinion, of no avail to the plaintiff. The mortgagors did not fail to deliver possession to the plaintiff. It is urged that they failed to secure possession without disturbance by any person other than the mortgagors. As held by the Madras High Court in *Gopalasami* v. *Arunachella* (1), the words "any other person" in the concluding portion of clause (*c*) must be held to mean any other person having a title. If a trespasser disturbs the possession of the mortgagee, that certainly cannot confer any right on him to ask the mortgagor to pay the mortgage money. In this case the tenants of the mortgaged property, who had to pay rent to the mortgagee, wrongfully refused to do so, and, if any one disturbed the possession of the mortgagee, it was the persons who falsely alleged themselves to be prior mortgagees, and not the mortgagors. Surely the mortgagor cannot be held responsible for the acts of others with whom he is not in collusion or who have no title to the property mortgaged by the mortgagor. The suit has in my judgment been properly dismissed. I dismiss this appeal with costs.

Appeal dismissed.

(1) 15 M. 304.

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19 A. 194=17 A.W.N. (1897) 16.

19 A. 194=17 A.W.N. (1897) 16.

[194] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SOHAN LAL (*Judgment-debtor*) *v.* HARDEO SAHAI (*Decree-holder*).*

[22nd December, 1896.]

Execution of decree—Civil Procedure Code, s. 396—Powers of Court executing a decree for partition.

Held, that a Court has no power under s. 396 of the Code of Civil Procedure to order its amin to cause a wall to be built separating portions of property of which partition has been decreed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, Pandit *Baldeo Ram Dave* and Babu *Devendro Nath Ohdedar*, for the appellant.

Mr. *Dwarka Nath Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—Hardeo Sahai brought a suit for partition of houses and shops against Sohan Lal. A decree for partition was made. By direction of the Court the plaintiff prepared two lots. The defendant was allowed to select which of these two lots he would take. The defendant selected one lot; the plaintiff took the other. The amin put the parties in possession of their lots. Thereupon, it appears to us, the suit terminated. There was the decree, and there was execution complete. Afterwards the plaintiff came into Court and asked the Court to direct the amin to build a wall between his lot and the defendant's lot. The Court directed the amin to build a wall. The wall was built. The defendant objected to the jurisdiction of the Court to make any such order, and to the wall as having encroached on his land and as having excluded him from a portion of the land allotted to him. The Court dismissed the objection, and from that order of dismissal this appeal has been brought.

For the defendant-appellant it has been contended that the Court had no longer jurisdiction after making its decree and order allotting the portion selected by the defendant to him and the portion left to the plaintiff. He also contended that, even if the jurisdiction of the Court was not then determined, the Court has [195] no jurisdiction to direct a wall to be built, and that its order in that respect was in any event *ultra vires*.

On behalf of the plaintiff-respondent it has been contended that the Court has power under s. 396 of the Code of Civil Procedure to order a wall to be built, and reliance is placed upon the third paragraph of s. 396. It is contended that the "bounds" therein mentioned would include the building of a wall.

We are not aware that the Court has any power in a partition suit to direct an officer of the Court to have a wall built in carrying out the partition. There is nothing in s. 396 to suggest that a Court has any such authority. The "metes and bounds" mentioned in the third paragraph

* First Appeal, No. 131 of 1896, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 8th February 1896.

of s. 396 are merely the measurements and the limits of the shares which may be mentioned in the commissioners' report. "Bounds" there do not mean a wall to be built. If that was the meaning of the words of that section, the wall would have to be built in the report, and when the commissioners differed two walls would have to be built, each in a separate report. It would be inconvenient, if not dangerous to the rights of the parties, that a Court should have power to order its officer to have a wall built in a partition suit. Suppose the officer made a mistake and built a wall on the defendant's land instead of on the plaintiff's, what remedy would there be? What could the defendant do with the wall? He could not cart it away and put it upon anyone else's land, and the materials would be an obstruction on his own land. He would have no action against the plaintiff, as the wall was not built by the plaintiff, but by the Court Amin under the orders of the Court. The defendant might complain that he did not want the wall and did not see why a wall should be built on his land for the amusement of the plaintiff. He might very reasonably say that, if the plaintiff wanted a wall built between them, the plaintiff was at liberty to build a wall on his own land, so long as he did not interfere with any rights or other easement which the defendant had obtained on partition. It is much safer to leave the person who can be answerable in a suit for trespass, or interference with an easement, to build a wall [196] at his own risk than for the Court to instruct its Amin to commit what may be an act of trespass.

We allow the objection to this extent that we hold that the Court had no authority to order the Amin to build the wall and that its order in that respect was *ultra vires*: to this extent we allow this appeal with costs.

Appeal decreed in part.

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19 A. 196 = 17 A.W.N. (1897) 18.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

CHUNNA LAL (*Plaintiff*) *v.* ANANDI LAL AND OTHERS (*Defendants*).* [22nd December, 1896.]

Mortgage – Sale of portion of mortgaged property under a decree not on the mortgage— Mortgage not thereby extinguished, but mortgagee bound to take into account the full value of the property so brought to sale.

When a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree. *Sumera Kuar* v. *Bhagwant Singh* (1) followed, *Ahmad Wali* v. *Bakar Husain* (2), and *Ballam Das* v. *Amar Raj* (3) referred to.

[**Not F.** 26 B. 88 = 3 Bom. L.R. 628; 8 C L.J. 92 = 12 C.W.N. 745; **R.**, 20 A. 23; 24 M. 96 (111); 11 C.L J. 639 (645) = 15 C.W.N. 800 (804) = 6 Ind. Cas. 842 (845); 12 Ind. Cas. 130 (134) = 10 M.L.T. 240 (246) = (1911) 2 M.W.N. 342 (347); **Cons.**, 22 A. 284 = 20 A.W.N. 69.]

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* Second Appeal, No. 977 of 1895, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 10th May 1895, confirming a decree of Babu Bhawani Chandra Chakravati, Munsif of Sambhal, dated the 4th March 1895.

(1) 15 A.W.N. (1895) 1. (2) 3 A.W.N. (1883) 61. (3) 12 A. 537.

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THE facts of this case sufficiently appear from the judgment of BANERJI, J.

Mr. *Amir-ud-din*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI, J.—This was a suit for sale under a mortgage which comprised two items of property, namely, a piece of homestead land and a shop. The mortgagee held a simple decree for money against the mortgagor, in execution of which he caused the land and a two-thirds share in the shop to be sold by auction subject to his mortgage. He himself purchased the land, and the share in the shop was purchased by the defendant No. 5, who subsequently sold it to the defendants Nos. 3 and 4. The remaining one-third [197] share was sold afterwards to the second defendant by the first defendant, the mogrtgaor.

In the present suit the plaintiff mortgagee has made an apportionment of the mortgage money with reference to what he alleges to be the value of the two items of property mortgaged to him, and, after making a deduction of what according to him was chargeable on the property purchased by him, has claimed the balance and has prayed for the sale of the mortgaged property for realization of the balance.

Both the Courts below have dismissed the suit on the ground that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage had the effect of discharging the whole mortgage. They have relied on several rulings, of which I need only refer to *Ahmad Wali* v. *Bakar Husain* (1) and *Ballam Das* v. *Amar Raj* (2).

There can be no doubt that a mortgagee who purchases a portion of the mortgaged property cannot be allowed to throw the whole burden of the mortgage debt on the remainder of the property. The whole of the property mortgaged being liable for the debt, the liability of each portion of it is proportionate to its value; and ordinarily the persons who purchase the different portions of the property are *inter se* liable in proportion to the part purchased by each of them. Where, however, the mortgagee himself purchases at auction a portion of the mortgaged property which is sold subject to his mortgage, the case becomes different. Such purchase has in some instances the effect of discharging the whole of the mortgage debt, but I am unable to hold that it has that effect in every case, however insignificant the portion purchased may be, and whatever value may have been paid for it. If two properties, one of very small value and the other of large value, be mortgaged to secure re-payment of one debt, and the value of the property of small value be less than the amount of the mortgage, the purchase of that property by the mortgagee cannot be held to satisfy the mortgage in full The reason is obvious. Had such property not [198] been purchased by the mortgagee and were it to be sold in satisfaction of the mortgage debt, only that portion of the mortgage amount would be realized by the sale as would be represented by the value of the property; and not the whole of mortgage debt. If, for example, that property is worth Rs. 5, that amount only can be realized by the sale of it, and the mortgage money can be satisfied to the extent of Rs. 5 only. The purchase of such property by the mortgagee cannot make any difference so far as the question of the satisfaction of the mortgage debt is concerned. Where, on the other hand, the portion of the mortgaged property purchased by the mortgagee is of a value higher than the amount of the mortgage,

(1) 3 A. W. N. (1883) 61.

(2) 12 A. 537.

and the difference between that value and the price paid by the mortgagee is equal to or exceeds the amount of the mortgage, the purchase has the effect of fully discharging the mortgage. For in such a case the mortgagee cannot in equity be allowed to benefit by his purchase, and, whilst retaining in his own hands so much of the actual value of the property as is represented by the amount of the mortgage, to realise that amount by a sale of the remainder of the mortgaged property. If, however, the mortgagee has paid for the property its full value, that is, the value which it would have fetched had it been sold as unincumbered property, the mortgagor or any other person holding the remainder of the mortgaged property has not at all been damnified, and the property other than that purchased by the mortgagee must be held liable for a proportionate part of the mortgage money. Similarly, if the property purchased by the mortgagee is of a value smaller than the amount of the mortgage and the mortgagee has paid for it its full value, the remainder of the mortgaged property must contribute the proportion of the mortgage debt chargeable on it. If, in the case of such property, the price paid by the mortgagee is less than the full value, the difference must be held to discharge the mortgage *pro tanto*. It is true that, when property is sold by auction subject to a mortgage, the price ordinarily paid for it is less than its real value by the amount of the mortgage, as the purchaser renders himself liable to discharge the mortgage debt. **[199]** The extent of his liability, however, cannot be greater than the amount for which the property could have been sold had it not been sold subject to the mortgage, for, as I have said above, it is to the extent of that amount only that the mortgage would have been discharged by the sale. To hold that every purchase by the mortgagee of a portion of the mortgaged property discharges the mortgage in full would lead to iniquitous results. If, as I have pointed out above, the property purchased by the mortgagee was of the value of Rs. 5 only, and only Rs. 5 out of the mortgage money could possibly be realized by the sale of that property, it cannot by any stretch of reasoning be said that, by reason of the purchase of that property by the mortgagee, the whole of the mortgage debt exceeding Rs. 5 has been discharged. In the case of *Ballam Das* v. *Amar Raj* and another (1), the value of the property sold was more than the amount of the two decrees held by the mortgagee purchaser. That case is therefore consistent with what I have said above. In *Ahmad Wali* v. *Bakar Husain* (2), the proposition was laid down somewhat broadly if the value of the property sold was less than the amount of the mortgage debt, but we have no reason to assume that such was the case. The view which I have taken of the question was adopted and acted upon in *Sumera Kuar* v. *Bhagwant Singh* (3).

The Courts below have, in my judgment, dismissed the suit on insufficient grounds. The plaintiff stated that the value of the property purchased by him satisfied the mortgage to the extent of Rs. 49 only out of the principal, while the defendant averred that it was much more. These questions ought to have been gone into.

I allow the appeal, and, setting aside the decrees below, remand the case under s 562 of the Code of Civil Procedure to the Court of first instance with directions to readmit it under its original number in the register, and try it on the merits in advertence to the above remarks. Costs to abide the result.

Appeal decreed and cause remanded.

(1) 12 All. 537. (2) 3 A. W. N. (1883) 61. (3) 15 A. W. N. (1895) 1.

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REVISIONAL CRIMINAL.

19 A. 200=17 A.W.N. (1897) 23.

19 A.200=17 A.W.N. (1897) 23.

[200] REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF BARKAT.*

[6th January, 1897.]

Criminal Procedure Code, s. 342—*Perjury—False statement made by a convict in an affidavit in support of an application for revision of the order under which he was convicted.*

Held that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently that, if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein. *Queen-Empress* v. *Subhayya* (1) referred to.

[F., 28 A. 331=3 A.L.J. 98 (100)=A.W.N. (1906) 42=3 Cr. L.J. 225; R., 3 L.B.R. 265 (271); D., 4 Ind. Cas. 160=12 O.C. 308 (312).]

THE facts of this case sufficiently appear from the order of BLAIR, J.

Maulvi *Muhammad Ishaq*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

ORDER.

BLAIR, J.—This is a petition for the revision of an order of the Sessions Judge of Ghazipur, directing the prosecution of the applicant for an offence under s. 193 of the Indian Penal Code. The applicant had been put upon his trial before a Magistrate of the first class for an offence constituted by s. 323 of the Indian Penal Code. He had been convicted and sentenced to pay a fine of Rs. 25, or, in default of such payment, to be imprisoned for three months. Application was made by him to the Sessions Judge to revise this sentence and conviction. This application was to some extent based upon the allegation that the Magistrate, who tried the case, had refused to summon witnesses whom the applicant desired to call in his defence. That allegation in the petition was supported by an affidavit sworn by the applicant. The Sessions Judge found that the allegations of that affidavit were false to the knowledge of its maker, and therefore made the order now sought to be revised.

Mr. *Muhammad Ishaq* for the applicant contends that such an order is bad in law, inasmuch as the applicant, who made the [201] affidavit, occupied at the time of such making the status of an accused person. The object, he contended, of the application and the affidavit were to obtain a reversal or modification of the conviction and sentence. It is not disputed that the applicant was incapable in law of being examined, otherwise than under the circumstances and restrictions set forth in s. 342 of the Code of Criminal Procedure, upon the original hearing of the case against him. He could not have been called as a witness, either by the prosecution to establish their case, or by himself in his own defence. It is argued that the reason of such disqualification extends to proceedings outside the original trial which may be taken for the purpose of reversing or modifying its result. I confess, I myself am unable to see why the reasons for which the Legislature excluded an accused person from giving

* Criminal Revision No. 664 of 1896.

(1) 12 M. 451.

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evidence upon an original trial should not operate with equal force to preclude his competency as a witness in the appeal from that trial, and I am referred to a case *Queen-Empress* v. *Subhayya* (1) in which the High Court at Madras so held.

Munshi *Ram Prasad*, Government Pleader, calls attention to the not unusual practice of supporting applications for transfers of cases against accused persons being supported by affidavits made by such persons, but he does not cite any authority or even suggest any practice by which, either in matters of appeals or applications for revision, affidavits have been received made by the person who has been convicted and sentenced upon the original trial.

For my own part, I have no doubt that the Legislature intended to protect an accused person from the ordeal of examination as a witness and to render him incapable, therefore, of being punished for the making of false statements upon oath, or otherwise, so long as his case is *sub judice*. I accede to the contention that there is no substantial difference between the position of a person accused and convicted, supporting by his own evidence a criminal appeal, and a case of an accused person desiring to defend himself by his oath in an original criminal trial. Still less am I able to draw [202] any distinction in this respect between the position of a petitioner in appeal and a petitioner in revision. The object is the same, to revise or modify the action of the Court below, and every reason, which would render it not desirable for a petitioner in appeal to be a competent and compellable witness, applies with equal force in revisional proceedings. Following, therefore, in principle the satisfactory ruling cited above, I grant this petition in revision and set aside the order of the District Judge by which it is sought by criminal proceedings to inflict legal penalties for the taking of a false oath under circumstances which render the person so to be charged incompetent to be put upon his oath at all.

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19 A. 202 = 17 A.W.N. (1897) 24.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

DAVID HAY (*Plaintiff*) v. RAZI-UD-DIN AND OTHERS (*Defendants*).*
[7th January, 1897.]

Act No. IV of 1882 (*Transfer of Property Act*), ss. 92 93—*Mortgage—Redemption—Decretal money not paid within the time limited—Second suit for redemption barred—Civil Procedure Code*, s 13—Res judicata.

Held that a mortgagor, whether under a simple or a usufructuary mortgage, who has obtained a decree for redemption and allows such decree to lapse by reason of his not paying in the decretal amount within the time limited for payment by the decree, cannot subsequently bring a second suit for redemption of the mortgage in respect of which such infructuous decree was obtained.

Sheikh Golam Hoosein v. *Musumat Alla Rukhee Beebee* (2) and *Maloji* v. *Sagaji* (3) followed; *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (4) referred to; *Muhammad Samiuddin Khan* v *Mannu Lal* (5); *Sami Achari* v.

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* Second Appeal, No. 947 of 1894, from a decree of H. B. Finlay, Esq., District Judge of Shahjahanpur, dated the 14th May 1894, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 4th September 1893.

(1) 12 M. 451. (2) N. W. P. H. C. R. (1871) 62. (3) 13 B. 567.
(4) 10 B. 461. (5) 11 A. 386.

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19 A. 202 = 17 A.W.N. (1897) 24.

Somasundram Achari (1); *Periandi* v. *Angappa* (2) and *Ramunni* v. *Brahma Dattan* (3) dissented from.

[**Overruled**. 24 A. 44 (**F.B.**) = 21 A.W.N. 194 : **Appr.**, 25 M. 300 (**F.B.**) ; 6 O.C. 367 ; **R.**, 12 Ind. Cas. 993 (1003) = 14 O.C. 257 (282) ; 3 O.C. 371 (380) ; 43 P.R. 1907 = 169 P.L.R. 1908 = 101 P.W.R. 1907 ; 93 P.R. 1908 = 164 P.L.R. 1908 = 133 P.W.R. 1908 ; **D.**, 21 A. 251 (260).]

THE facts of this case sufficiently appear from the judgment of the Court.

[203] Pandit *Sundar Lal*, for the appellant.

Babu *Satya Chandar Mukerji*, for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—In 1876 one Muhammad Husain mortgaged with possession a five-biswa share in a village named Sajauli to one Bahauddin. The terms of the mortgage were that the period should be for six years; that the money advanced, namely Rs. 1,000, might be repaid on the expiry of six years; and that, on repayment of that money together with any arrears of rent due by tenants at that time, the mortgagor should have redemption. The mortgage was usufructuary only so far as interest was concerned, the usufruct being taken instead of interest. We mention the fact, although we do not think that the principle which must guide us in this case would be affected by the fact of the mortgage being wholly or partially usufructuary. Muhammad Husain brought a suit for redemption after the expiration of six years and obtained a decree for redemption in February 1884. The decree did not comply with s. 92 of the Transfer of Property Act in that it did not specify what should take place in case the mortgage money was not paid within the period limited in that respect. The mortgage money was not paid either then or at all. Under that decree the mortgagee did not apply for an order under s. 93 of the Transfer of Property Act. The plaintiff in this suit, having a decree for money against Muhammad Husain, brought Muhammad Husain's interest in the mortgaged premises to sale, and at the auction sale purchased that interest. That was subsequently to the decree for redemption. The plaintiff has now brought a suit to redeem the mortgage of 1876. The first Court decreed the claim. The District Judge in appeal dismissed the suit, holding that the suit was barred by s. 13 of the Code of Civil Procedure. The plaintiff has brought this appeal.

Pandit *Sundar Lal* has contended on behalf of the appellant that in a suit for redemption, when the decree does not provide for the event of the redemption money not being paid within the time limited, the mortgagor or his assignee, as soon as the decree for redemption becomes time-barred by reason of limitation, is [204] entitled to bring a fresh suit for redemption. It is contended that, in cases where the mortgage is usufructuary, a decree in a suit for redemption which does not provide what shall be done in the event of the money not being paid is merely of the character of a declaratory decree and would not preclude a second suit, and that argument was supported by certain authorities. The earliest of those authorities is *Sami Achari* v. *Somasundram Achari* (1). That case was followed in *Periandi* v. *Angappa* (2). Those cases, if good law, would entirely support Pandit Sundar Lal's contention. It appears to us that, if those cases are good law, a mortgagor is only limited as to the number

(1) 6 M. 119. (2) 7 M. 423. (3) 15 M. 366.

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of suits which he may bring to redeem the same mortgage by the length of his life or by the sixty years provided by the Limitation Act. Those cases were followed apparently in *Ramunni* v. *Brahma Dattan* (1). It appears to us that the view of the law to be found in those cases is not supported by the law as administered in such matters in England, or by the law as enacted in the Code of Civil Procedure, or the Transfer of Property Act. No doubt the Transfer of Property Act was passed after the two first cases had arisen and been decided. Pandit *Sundar Lal* also relied upon the decision of this Court in *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (2). It appears to us that the decision in that case was contrary to the decision of the Full Bench of this Court, and further that the decision was wrong, and also that the lesson to be learnt from the Transfer of Property Act is that such a suit as this could not be maintained. In our opinion the decision of the Full Bench in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (3), was not affected by the Transfer of Property Act, and is in harmony with that Act and is perfectly sound law. This question has been considered by the High Court at Bombay in *Maloji* v. *Sagaji* (4), and if we my say so, we entirely agree with the view of the law on this point expressed in that case. The precise point does not appear to have been decided by their Lordships of the Privy Council in *Hari* [205] *Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (5), but there is nothing in the judgment of their Lordships in that case to encourage the opinion that, where a decree for redemption has been obtained, the mortgagor can bring a second suit for redemption. In our opinion it was the intention of the Legislature, as expressed in ss. 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. We further think that the allowance of a second suit for redemption would be to go contrary to the principle of s. 244 of the Code of Civil Procedure, and that the fact that a mortgagor has failed to comply with his decree for redemption within time cannot give him a fresh cause of action. His original cause of action for redemption, it appears to us, was extinguished. It also appears to us that s. 13 of the Code of Civil Procedure would preclude a second suit upon the same cause of action. We dismiss this appeal with costs. [Which will include fees on the higher scale].(6)

Appeal dismissed.

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19 A. 206 = 17 A.W.N. (1897) 47.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

RAJA RAM SINGHJI (*Decree-holder*) *v.* CHUNNI LAL (*Objector*).*

[11th February, 1897.]

Execution of decree—Decree for sale on a mortgage—Order absolute for sale - Act No. IV of 1882 (Transfer of Property Act), s. 89—Civil Procedure Code ss. 291. 310 A,

Sections 291 and 310 A. of the Code of Civil Procedure, 1882, will apply to a sale held in virtue of an order absolute for sale passed under s. 89 of the

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* First Appeal, No. 214 of 1896, from an order of Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 20th April 1896.

(1) 15 M. 366. (2) 11 A. 386. (3) N.W.P.H.C.R. (1871) 62.
(4) 18 B. 567. (5) 10 B. 461.
(6) Words in rectangular brackets form a portion of the judgment though not given in I.L.R.

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Transfer of Property Act, 1882, although no power is given under that Act to postpone the operation of an order under s. 89.

[Diss., 25 C. 703; F. 20 A. 354 (356); Appr., 25 M. 244 (F.B.) : 1 O.C. 193 (197); R., 28 A. 28 = A.W.N. (1905) 168; 25 B. 104; 31 C. 373 : 31 C. 863 = 8 C.W.N. 684; 25 M. 300; 7 C.L.J. 1 (29).]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *T. Conlan* and *D. N. Banerji*, for the appellant.

Babu *Jogindro Nath Chaudri*, Pandit *Sundar Lal*, and Pandit *Baldeo Ram Dave*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—The Maharaja of Bhurtpur brought a suit for sale under s. 88 of the Transfer of Property Act, 1882. The mortgage included several villages, and we infer [206] from the judgment and decree in the case that various amounts were charged upon the various villages as the liabilities of the particular villages. The Maharaja obtained a decree for sale under s. 88. The decree specified the amount for which each village was liable. After that decree had been obtained, one Chunni Lal obtained from the representative of the mortgagor a mortgage with possession of three of the villages. The Maharaja of Bhurtpur put his decree in execution, and obtained an order for the sale of the three villages, in question. That order was made under s. 89 of the Transfer of Property Act. It is true that the order did not say that it was an order absolute, but the order under s. 89 of the Transfer of Property Act is an order for sale in execution, as was held by the Full Bench of this Court. Afterwards Chunni Lal put in a petition asking that the mortgagee should be directed to receive from him the amount decreed against these particular villages and be ordered to abstain from bringing the villages to sale, but did not tender to the mortgagee or bring into Court the amount decreed against these particular villages. We have asked under what section that application was made. It could not have been made under s. 89 of the Transfer of Property Act. The day fixed for payment had passed and s. 89 unlike ss. 87 and 93 of the same Act, gives the Court no power to extend the time for payment on good cause shown. The Subordinate Judge, however, made an order in the terms of the prayer which had the effect of postponing the sale, and from that order this appeal has been brought.

We are told by the vakil for Chunni Lal, but it is not admitted on behalf of the mortgagee, and we do not know if it is the case or not, that after the order was made the amount decreed against these villages was paid into Court. We need not consider that question. S. 89 provides what is to happen in case the amount is paid on or before the day for payment, and as to what is to happen "if such payment is not so made." If such payment is not so made, the plaintiff can apply for an order for sale, and the Court shall then pass an order that such property, or a [207] sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in s. 88, and "thereupon the defendant's right to redeem and the security shall both be extinguished." It is quite clear that the Court had no power under s. 89 of the Transfer of Property Act, 1882, to extend the time within which payment of the debt and costs might be made. The Legislature must intentionally have omitted to give that power in s. 89 which it had expressly given in ss. 87 and 93. We have had to consider this group of sections in the following cases:—*Amolak*

Ram v. *Lachmi Narain*; *Ram Lal* v. *Tulsa Kuar*, and *Kashi Prasad* v. *Sheo Sahai* (1).

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It is contended by Mr. Baldeo Ram for Chunni Lal that s. 291 of the Code of Civil Procedure, 1882, applied in this case and enabled Chunni Lal to have the sale stopped upon payment into Court of the debt and costs. It is hardly necessary for us to decide whether thst section would apply or not, as at the time when the order under appeal was made the debt and costs had not been paid into Court or to the mortgagee But, although what we are about to say is under the circumstances *obiter*, it is better that we should, for the guidance of Subordinate Courts in these Provinces, express our opinion as to the application of s. 291 of the Code of Civil Procedure, 1882, to a case in which under s. 89 of the Transfer of Property Act, 1882, an order absolute for sale has been made.

It is clear that, when such an order for sale has been made under s. 89, the defendant's right to redeem is by that section extinguished. The Transfer of Property Act, 1882 (Act No. IV of 1882), received the assent of the Governor-General on the 17th of February 1882, and came into force on the 1st of July in the same year. Act No. XIV of 1882 (the Code of Civil Procedure, 1882) received the assent of the Governor-General on the 17th of March 1882. and came into force on the 1st of June in the same year. The only procedure provided by the Legislature for the conducting of sales under decrees of Civil Courts is that which [208] is contained in the Code of Civil Procedure, and, although it may appear an anomaly that a Code which deals merely with procedure should in effect in a certain event give not only a right to redeem, but actual redemption, to a mortgagor whose right to redeem had been extinguished by the express enactment of the Legislature dealing with decrees for sale, and although in such cases s. 89 of Act No. IV of 1882 and s. 291 of Act No. XIV of 1882 are in conflict, it appears to us that we would be bound to hold that s. 291 of Act No. XIV of 1882 must be taken to have modified in that respect s. 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs had been paid into the Court that ordered the sale. It may be that s. 310-A of Act No. XIV of 1882 and the sections of that Act under which the execution of a decree is transferred from the Civil Court to the Collector further modify the concluding provisions of s. 89 of Act No. IV of 1882. In our view of the law Chunni Lal, being a mortgagee, although his title arose subsequently to the decree for sale, could have availed himself of any right which his mortgagor had after the making of the decree and of the order for sale, and could have paid into Court the amount payable under the decree for sale and any costs which the Court might by an order under s. 94 of Act No. IV of 1882 add to the mortgage-money, and thus stop the sale; but he did not adopt that course. The course which he adopted was one which might result in the indefinite postponement of the satisfaction of the decretal debt, and it is to be remembered that the Court not having the power to impose terms as a condition of postponing the day appointed for payment, as it might if the case were one to which s. 87 or s. 93 of Act No. IV of 1882 applied, could not protect the mortgagee decree-holder from loss by making it a condition of a postponement that Chunni Lal should pay interest on the decretal amount.

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19 A. 174, 180, and 186.

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[209] We allow this appeal with costs, and, setting aside the order under appeal, we dismiss the application of Chunni Lal with costs. This decision will not preclude Chunni Lal from availing himself of such rights as he may have under the Code of Civil Procedure.

Appeal decreed.

19 A. 205 = 17 A.W.N. (1897) 47.

19 A. 209 (P.C.) = 24 I.A. 49 = 7 Sar. P.C.J. 123.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris and Sir R. Couch.

[On petition from the High Court at Allahabad.]

LALTA PRASAD AND OTHERS (*Petitioners*) *v.* SHEIKH AZIZ-UD-DIN AND OTHERS (*Objectors*).* [21st November, 1896.]

Alleged want of notice to respondent—Appeal heard ex parte *—Practice.*

There is no rule, among those made by the High Court under the authority of law, that the respondent in an appeal to the Queen in Council shall receive formal notice of the transmission of the record of the appeal, of the pendency whereof he has had notice.

The mere allegation that the respondents in this appeal had, in consequence of their having had no express notice that the appeal had been set down for hearing, allowed the hearing of the appeal to take place *ex parte* was not considered sufficient to entitle them to a re-hearing thereof.

THIS was a petition filed on the 28th May 1896 for the rehearing of an appeal heard by the Judicial Committee in 1895, according to whose opinion by order in Council (5th August 1895) the appeal was allowed, the decree of the High Court (1st March 1891) was reversed, and it was directed that judgment for the appellants should be entered.

The petition alleged that the hearing had been *ex parte*; that no notice had been received by the respondents, or their agents, of the transmission of the record to the office of the Privy Council; and that no notice had been given to them that the appeal had been set down for hearing, of which they first heard on the 29th August 1895. Had they known beforehand, they would have appeared in support of the High Court's judgment.

[210] Mr. *Sydney Hastings*, for the petitioners, relied on affidavits, affirmed and attested at Bareilly on the 18th December 1895, by two brothers, respondents in the appeal. They stated that the first notice which they had of the appeal having gone to England was through a report of it in an Indian newspaper published on August 20th, 1895. They knew that the appeal was pending, and were not, according to the rules, entitled to have every step formally notified to them. But, as the facts were, an order was made by the Judicial Committee calling on the respondents to appear on the 22nd March 1895, and, afterwards, a confirmatory order was issued; but neither of those orders reached the respondents.

The case of *Mussumat Ranee Surnomoyee* v. *Shooshee Mokhee Burmonia* (1) was distinguishable: that was a case of negligence of the party not appearing. Here, the respondents, according to the affidavits, would have appeared had they known that the hearing was coming on.

(1) 12 M.I.A. 244 (254).

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PRIVY COUNCIL.

19 A. 209 (P.C.) = 24 I.A. 49 = 7 Sar. P.C.J. 123.

It was submitted that the appellant should have given notice to the respondent.

[Their Lordships referred to the rules in force in the High Court made under the Code of Civil Procedure. They also heard a statement in Court, from the Deputy Registrar, to the effect that the letters sent from England, acknowledging the transmission of the records, contained intimation that the appellants should proceed with the appeal within six months, and that the practice was for the Registrar of the High Court to let the parties know this. In every case there was a period, more or less long, during which the record was being prepared, and with this preparation the Registrar of the High Court could not go on without the parties on both sides, or their representatives, being informed with a view to their presence. The vakils, on either side, in the High Court, could inspect the record.]

Counsel for the petitioners continued. It was no part of the case that the parties had not, by their vakil, inspected the record. But the present contention was that the peremptory order made [211] and issued by this Committee on the 24th March was meant to reach the respondents. It had not reached them. They, therefore, might have supposed that the date of the hearing was not yet, and had not been fixed. The real ground of this application was that, this case having been heard *ex parte*, there was evidence that the respondents did not receive, as it was meant that they should receive, intimation of the day of the hearing. From the issue of the order to appear on the 22nd March, and the confirmatory order following it, there was ground for assuming that notice was intended to be given.

Mr. *Herbert Cowell*, for the objectors, was not heard.

OPINION.

Their Lordships intimated that, in their opinion, the petitioners had sufficient notice. No formal notice was required by the rules of the High Court of the transmission of the appeal. The petition was dismissed with costs.

Solicitor for the petitioners: Mr. *R. M. Turnbull.*

Solicitors for the objectors: Messrs. *Ranken Ford, Ford and Chester.*

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19 A. 211 = 17 A.W.N. (1897) 49.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

PHUL CHAND (*Defendant*) *v.* AKBAR YAR KHAN AND ANOTHER (*Plaintiffs*).* [19th December, 1896.]

Muhammadan law—Waqf—Illusory dedication—Fateha ceremony—Custom as a guide to interpreting the intention of a waqif.

In determining whether a disposition of property made by a Muhammadan is or is not a valid *waqf* the intention of the *waqif* may be interpreted by reference to custom prevailing at the time the *waqf* was made; and, if there is found to

* Second Appeal, No. 820 of 1893, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 2nd May 1893, reversing a decree of Babu Girraj Kishore Dat, Munsif, Haveli, Bareilly, dated the 22nd September 1892.

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19 A. 211 = 17 A.W.N. (1897) 49.

be a substantial dedication of the property dealt with to charitable uses, that dedication will constitute a valid *waqf*. *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) and *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2) referred to.

[R., 6 A.L.J. 115 (128); 15 Ind. Cas. 36 (38); **Doubted**, 33 A. 400 (411)=8 A.L.J. 162 (173)=9 Ind. Cas. 753.]

[212] THIS was a suit for a declaration that certain property which the father of the plaintiffs had mortgaged to the defendant, and for the sale of which the defendant had obtained a decree, was *waqf* property. The plaintiffs alleged that their ancestor, Basharat Khan, had dedicated the property in suit for the performance of certain ceremonies known as *fateha* and *kadam sharif*.

The defendant pleaded, *inter alia*, that the dedication of the property for the purposes alleged was an illusory dedication, inasmuch as the ceremonies in question involved no substantial expenditure, and that the so-called *waqf* was merely a pretext for an attempt to prevent the property from being alienated.

The Court of first instance (Munsif of Bareilly) found as to the principal issue in the case that the proportion of the income of the so-called endowed villages which would be expended on the ceremonies of *fateha* and *kadam sharif* was very small compared with the total income, and that the descendants of Basharat Khan had up to the present never treated the property as endowed property, and it dismissed the plaintiffs' suit.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Bareilly), finding that the document relied upon by the plaintiffs did operate to create a valid *waqf*, decreed the appeal and the plaintiffs' suit.

The defendant vendee appealed to the High Court, and, on the appeal coming on for hearing on the 18th of November 1895, certain issues, which are stated in the judgment of the Court, were referred under s. 566 of the Code of Civil Procedure.

Mr. *Amir-ud-din*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

BLAIR and BANERJI, JJ.—In this second appeal the Court below has returned findings in answer to the questions put by us in a remand order framed under s. 566 of the Code of Civil Procedure. The first question we asked was :—

What was the income of the whole property dealt with by Basharat Khan in the deed of 1781 at the date of the document ?

[213] The finding in reply is :—That the income of the whole property average Rs. 850 per annum at the date of the disposition.

The second was :—What was the amount of expenditure required for the expenses connected with the *fateha*, also those connected with the *kadam sharif*, having regard to the means and position in life of the maker of that deed ?

The finding on that point is :—That such expenditure would amount to Rs. 500 per annum.

The third and fourth issues are as follows :—

(1) 17 C. 498. (2) 22 I.A. 76.

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Does the ceremony of the *fateha* involve necessarily and essentially any distribution of alms and kindred charity among the poor? Do the ceremonies and expenses connected with the *kadam sharif* necessarily and essentially involve the distribution of alms or kindred charity among the poor?

The finding is that "under the Muhammadan ecclesiastical law it is not binding to distribute alms or to make any kindred charity in connection with *fateha* and *kadam sharif*; but, according to the custom which prevails in the country, the distribution of sweetmeats and other eatables to the poor and other visitors has become an integral part of the ceremony connected with *fateha*. The *ziarat* of *kadam sharif* when held alone by itself does not necessarily involve the distribution of alms or kindred charity."

On these findings we are asked by Mr. *Amir-ud-din* to decree this appeal. He contends that the document which we have to construe must be interpreted by express Muhammadan law. He alleges correctly that the contention between himself and Mr. *Abdul Majid* for the respondent was conducted on this basis, and the memorandum of appeal put forward one basis, and one only, that on the plain construction of the document the case set up was that, under the Muhammadan law, the *fateha* and *kadam sharif* both necessarily involved charitable expenditure. Mr *Amir-ud-din* asked us on this ground to decline to bring to bear on the interpretation of the document any finding of custom.

He suggests also, and in this respect we are unable to follow him, that the finding of custom by the lower Court does not extend [214] to the period at which the alleged *waqf* was made. That we have a right to interpret the intention of a *waqif* by reference to the custom prevailing at the time when the *waqf* was made we have no doubt We have the express authority of the Privy Council in the case of *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) for using such custom to discover the intention of a grantor. Their Lordships say:—"If indeed it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor." We have the same case, which was also referred to in *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (2), as an authority for the proposition that, according to Muhammadan law, no gift is good as a *waqf* unless there is a substantial dedication of the property to charitable uses at some period of time; and that pronouncement must be taken as an authority for the converse proposition, that, when there is a substantial dedication of the property to charitable uses, the document making such dedication is a good *waqf*. We have findings as to the expenditure upon charitable uses to the effect that something like Rs. 500 annually is spent upon them, and we have the finding as to custom by the light of which we can reasonably conclude that the grantor intended the income of his property to be spent in accordance with what is found to be the custom.

We hold, therefore, that the document providing a substantial and not illusory expenditure out of the settled property is a good *waqf* according to the doctrine of Muhammadan law. We dismiss the appeal with costs.

Appeal dismissed.

(1) 17 C. 498 (511). (2) 22 I.A. 76.

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FULL BENCH.

19 A. 215 (F.B.)= 17 A.W.N. (1897) 53.

19 A. 215 (F.B.)=17 A.W.N. (1897) 53.

[215] FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

SUBA SINGH AND OTHERS (*Plaintiffs*) *v.* SARAFRAZ KUNWAR AND OTHERS (*Defendants*).* [23rd December, 1896.]

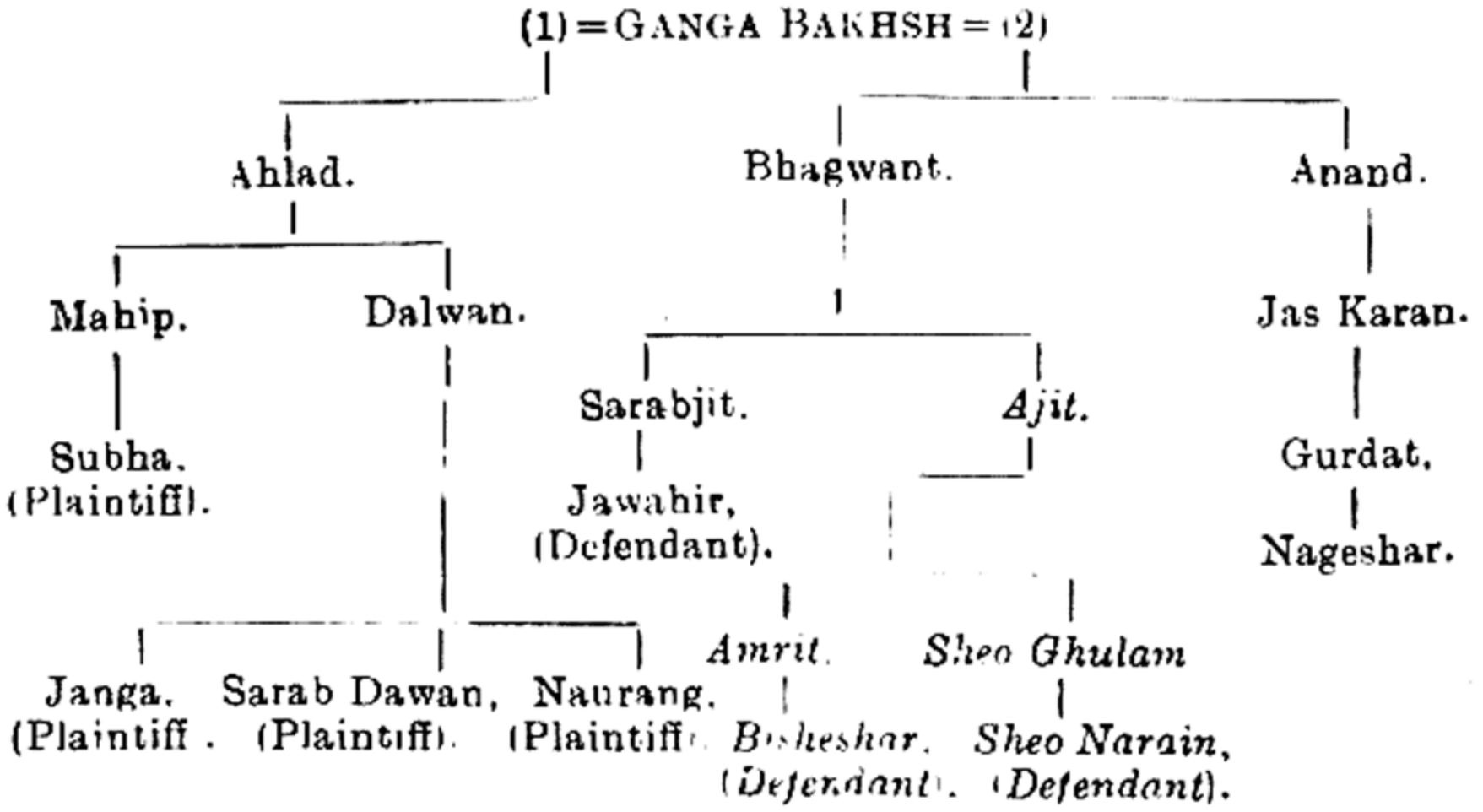
Hindu Law—Mitakshara—Succession—Whole blood and half blood—Distinction between whole blood and half blood not confined to brothers and their sons.

The distinction of whole blood and half blood applies, according to the rule of succession of the Mitakshara, founded on propinquity of blood, to sapinda relations other than the brother and his sons. *Sumal* v. *Amra* (1) not followed.

[**Not F.**, 24 B. 317 ; **F.**, 13 M.L.T. 445 (448)=(1913) M.W.N. 448 (450) ; **Appr.**, 6 C. L.J. 190 (204) ; **R.**, 24 A. 128 (131) ; 20 M. 342 (347) ; 33 M. 439 (444)=20 M. L.J. 275=7 M.L.T. 203 (206)=5 Ind. Cas. 280 (282) ; **D.**, 32 A. 541 (544)=7 A.L. J. 560 (564)= 6 Ind. Cas. 364 (365).]

THIS was a reference to a Full Bench. The facts out of which the question referred arose are fully stated in the following order of Burkitt, J., in which Blair, J., concurred.

BURKITT, J.—The dispute between the parties in this case is as to their respective rights to succeed to the property left by one Nageshar. The subjoined genealogical table shows the relationship between the members of the family.



All the persons mentioned in this table are descendants of a common ancestor, one Ganga Bakhsh, who was great-great-grandfather of Nageshar.

[216] Ganga Bakhsh had three sons, from one of whom (Anand) Nageshar was descended. Anand's line has now failed. Consequently the person entitled to Nageshar's property has to be sought in the lines of Ganga Bakhsh's other two sons Ahlad and Bhagwant. Ahlad's line is now represented by the four plaintiffs Subha, Janga, Sarab Dawan, and Naurang. Of Bhagwant's line the only person now left in the same degree of descent from the common ancestor as the four persons last mentioned is the defendant Jawahir who is grandson of Bhagwant, as the plaintiffs are grandsons of Ahlad. One Kaulban, a brother of Jawahir, who

* First Appeal, No. 153 of 1892, from a decree of Babu Brij Pal Das, Subordinate Judge of Gorakbpur, dated the 25th May 1892.

(1) 6 B. 394.

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also was impleaded as defendant, died childless since this appeal was instituted. I have, therefore, omitted him from the genealogy. Two others of the defendants of Ganga Bakhsh, namely Bisheshar and Sheo Narain, have also been made defendants. But as they are one degree more remote in descent from the common ancestor than the plaintiffs and Jawahir, and as the important question in this appeal does not affect them, I have put their names *in italics* in the table.

Now, as the deceased Nageshar was not a member of a joint undivided family, the plaintiffs and the defendant Jawahir, being in the same degree of descent from the common ancestor, would under the ordinary Hindu Law be entitled to succeed to Nageshar's property, each taking an equal share *per capita*. But it is alleged (and on the evidence we have no doubt that the allegation is true), that the common ancestor Ganga Bakhsh had two wives, that his sons Bhagwant and Anand were born of one of those wives, while Ablad was the son of the other. As, then, the property in dispute is that which was of Nageshar and as the defendant Jawahir descends from the same wife of Ganga Bakhsh as Nageshar, it is contended that the plaintiffs, who descend from the other wife of Ganga Bakhsh, are excluded by Jawahir, they being only of the half blood. Now, this distinction of the half blood does under the Mitakshara in the Benares School obtain in the case of brothers. There can be no doubt that brothers of the whole blood do exclude brothers of the half blood. Also, in the [217] case of nephews, if there be no brothers, those of the full blood exclude those of the half blood. But, even in the case of brothers and of nephews, the distinction is not carried very far, for it is admitted that a brother of the half blood would exclude a nephew of the full blood. And, in the present case, it is admitted that, if the plaintiffs were even one degree nearer the common ancestor than Jawahir, they would exclude him, notwithstanding that they are of the half blood. This is a point which should not be left out of sight in considering the question which is raised in this case. For the plaintiffs it is contended that in cases governed by the Mitakshara the preference of the whole blood over the half blood is limited to the case of brothers and nephews. The defendant Jawahir, on the other hand, contends that that perference extends all through the Gotraja Sapindas down to the most remote.

The lower Court is of opinion that the principle of the exclusion of the half blood is not restricted to brothers and their sons, and has given Jawahir a decree for the whole of the property left by Nageshar. Hence this appeal.

On this question both Mr. Mayne (paragraph 529, 4th Edition), and West and Buhler (paragraph 125, 3rd Edition) are of opinion that the distinction between the whole blood and the half blood does not extend to the more distant relationships, *i.e.*, to the descendants of the grandfather and of remoter ascendants. But the only authority cited by those learned commentators—(and indeed the only case on the subject in the reports)—is the one case of *Samat* v. *Amra* (1). In that case it was held that, as the plaintiffs though of the half blood were one degree nearer to the common ancestor than some of the defendants and two degrees nearer than others, they were not excluded by the defendants. For the respondent Jawahir it was argued by Mr. *Conlan* that the case of *Samat* v. *Amra* really does not affect the question inasmuch as, as

(1) 6 B. 394.

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already stated, it is admitted in the present case that, if either of the parties whether of the whole or the half blood were one degree nearer to the [218] common ancestor, that party would take in preference to the other. But on a close examination that case appears to me to have more weight than Mr. *Conlan* would attribute to it. In the Mayukha brothers of the half blood have a much lower place in the line of succession than in the Mitakshara. According to the latter, half brothers come in next after full brothers, and are preferred to nephews of the full blood, while in the Mayukha half brothers are postponed not merely to full brothers, but also to full brother's sons, to the paternal grandmother and to the sister, and only come in along with the paternal grandfather. Thus, according to the table on page 205 of the Vyavastha Chandrika (translation by Shama Charan Sarkar, 1878) while half brothers are No. 12 in the order of succession in the Benares School, they are relegated to No. 15 in the Mahratta School. From the judgment in the case of *Samat* v. *Amra* (1) it is clear that this most important variation between the two schools was present to the minds of the learned Judges who decided that case. Nevertheless they held that "neither the Mitakshara nor the Mayukha makes any distinction between persons of the whole blood and persons of the half blood except in the case of brothers and sons of brothers." So whatever authority there is favours the appellant's contention.

For the appellant it was argued by Pandit *Moti Lal* that the Bombay decision is right and that the lower Court had incorrectly decided the matter in issue on the ground of propinquity, the respondent being nearer of kin to Nag-shar through his remote female ancestor. He contended that the rule as to half and full brothers first appears in the Mitakshara, is not to be found in Yajnavalkya and was founded on the text from Manu "to the nearest Sapinda the inheritance belongs," but urged that the propinquity theory is not recognised after the third degree. He admitted that, where no order of succession is laid down in the Mitakshara, general principles might be applied, but contended that as to the succession of Gotraja Sapindas it lays down an exhaustive line. And he further pointed out that, where there was room for [219] doubt, the Mitakshara was particular to specify the order of the succession, *e.g.*, in placing the mother before the father, in the distinction between the classes of daughters, and in this case of half and full brothers. From this it was contended that had the author of the Mitakshara desired to indicate any distinction between gentiles of the whole and of the half blood, he no doubt would have done so and that the Mitakshara, though perhaps not exhaustive on every matter, always expresses any distinction which was to be drawn between two competing heirs of the same class. And also on the authority of *Bhya Ram Singh* v. *Bhya Ugar Singh* (2) it was contended that, as the spiritual advantages which the appellants and the respondents could confer on the propositus would be equal, they were equally entitled to the inheritance.

For the respondent it was contended by Mr. *Conlan* that the policy of the Mitakshara is that the order of succession is to be determined by propinquity to the propositus as shown by the text from Manu,—"to the nearest Sapinda the inheritance belongs." The text, he argued, shows that propinquity as furnishing a rule of succession is not confined to Sapindas only, but extends to Samanodaks also, and that propinquity springs from the mother, the greatest propinquity being between those who

(1) 6 B. 394.

(2) 13 M.I.A. 373.

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are descended from a common mother. The learned counsel further added that the Mitakshara rule of succession is based on consanguinity and not on any religious considerations of spiritual benefits, therein differing from the Dayabhaga, and finally contended that the true construction of the Mitakshara was that the preference of the whole over the half blood extended throughout the whole line of gentile succession.

The question thus raised, and most ably argued before us, is an interesting and not an unimportant point in the Hindu Law of succession. I think it ought to be laid for decision before a larger number of Judges. If my learned brother consent, I would refer the following question for the consideration and a determination of a Full Bench, namely,—"Does the distinction between the whole [220] blood and the half blood, observed in the case of the brothers and their sons, extend to the descendants of the grand-father and of remoter ascendants; and, if so, how far?"

Pandit *Madan Mohan Malaviya* (with whom Pandit *Moti Lal*), for the appellants, contended that in cases governed by the Mitakshara the preference of the whole blood is limited to brothers and their sons. He referred to the following authorities:—Manu, Chap. IX, ss. 186 and 187, Sacred Books of the East, Vol. XXV, p. 336; Yajnavalkya, Chap. 2, ss. 135 and 136, Mandlik, p. 220; Mitakshara, Chap. 1, s. 4, v. 5, and Chap. II, s. 5; Smriti Chandrika, Chap. XI, s. 4, vv. 25 and 26, Madras edition, p. 204; Mayuka, Chap. IV, s. 8, vv. 14—16, Mandlik p. 80; Dayabhaga, pp. 466 and 467; Tagore Law Lectures, 1880, (Sarvadhikari), pp. 427, 466 and 467, 576, 577, 628, 647; Commentaries on Hindu Law, J. N. Bhattacharji, (Siromani) 2nd Edition, p. 507; *Bhola Nath Roy* v. *Rakhal Dass Mukherji* (1); Macnaghten's Vyavahar Adhyay of the Mitakshara, p. 361; Vyavastha Chandrika (Shyama Charan Sarkar), Vol. 1, p. 205; Viramitrodaya (Golap Chandra Sarkar), p. 195, para. 2; *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2); West and Bhuler, p. 628; Mandlik's Hindu Law, pp 360, 361; Vyavastha Darpan (Shyama Charan Sarkar), Preface, page ix: Hindu Law, Grady, Introduction, p. xlvii; Vivada Chintamani by P.K. Tagore, Preface, p. xxvi; *Janki* v. *Nand Ram* (3) *Muttusami* v. *Muttukumarasami* (4).

Pandit *Sundar Lal* (with whom were Mr. *T. Conlan*, and Maulvi *Ghulam Mujtaba*) for the respondents, contended that the guiding principle under the Mitakshara was not benefit derived from offering general oblations, but nearness of propinquity. The enumeration of heirs in the Mitakshara was not exhaustive. He relied on the following authorities:—Mitakshara, Chap. ii, s. 3, vv. 3, 4 and 5; *Lallubhai Bapubhai* v. *Mankuvarbai* (5); West and Buhler, pp. 119, 120, 122, 125; *Babu Lal* v. *Nanku* [221] *Ram* (6); *Umaid Bahadur* v. *Udoi Chand* alias *Munmun* (7); *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (8); *Lulloobhoy Bapoobhoy* v. *Cassibai* (9); *Ramappa Udayan* v. *Arumugath Udayan* (10); *Nallanna* v. *Ponnal* (11); *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (12); *Muttusami* v. *Muttukumarasami* (4); Viramitrodaya, pp. 154, 158, 185 *et seqq*; Stokes' Hindu Law Books, pp. 442, 789; Tagore Law Lectures, 1880 (Sarvadhikari), p. 581; *ib.*, pp. 566, 575, 625, 647; Saraswativilas, p. 114, Madras edition; Tagore Law Lectures, 1883

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(1) 11 C. 69. (2) 13 M. I.A. 373 (392). (3) 11 A.194 (202).
(4) 16 M. 23 (30). (5) 2 B. 388 (423). (6) 22 C. 339 (343).
(7) 6 C. 119 (124). (8) 19 B. 631 (634). (9) 7 I.A. 212=5 B. 110.
(10) 17 M. 182. (11) 14 M. 149. (12) 17 M. 316 (326).

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(Jolly), pp. 168, 171, 208; Mandlik's Hindu Law, p. 82; Mayne's Hindu Law, ss. 468, 581, 5th edition; *Gridhari Lall Roy* v. *The Bengal Government* (1); *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2); *Thakoor Jeebnath Singh* v. *The Court of Wards* (3); *Ratnasubbu Chetti* v. *Ponnappa Chetti* (4).

Pandit *Madan Mohan Malaviya* in reply referred to:—Viramitrodaya, pp. 155, 191, 193; Vishnu Smriti—Sacred Books of the East, Vol. VII, p. 68; Manu, Chap. IX. v. 104—Sacred Books of the East, Vol. XXV, p. 345; Mandlik's Manu Sanhita, p. 1168; Yajnavalkya, v. 127: Mitakshara, Chap. 2, s. 5, v. 1, and s. 2, v. 6; Tagore Law Lectures 1880 (Sarvadhikari), pp. 574, 866; Mandlik's Hindu Law, p. 360: West and Buhler, p. 114.

The following judgments were delivered:—

JUDGMENT.

KNOX, J.—The question which has been referred to us for decision is thus set out in the referring order of the 26th of February 1895.

"Does the destinction between the whole blood and the half blood observed in the case of brothers and their sons extend to the descendants of the grandfathers and of remoter ascendants; and, if so, how far?"

[222] The distinction referred to is a preferential right to succeed to the inheritance of property left by a deceased member of the family, that member being at the time of his death not a member of a joint undivided family, but separate and apart from the disputants.

In the case before us the property in dispute is the property of one Nageshar. The appellants and respondents both derive their title to the present claim from their descent from one Ganga Baksh, the common ancestor alike of Nageshar deceased, of the present appellants, and of the present respondents.

Nageshar was the great-great-grandson of Ganga Bakhsh by Ganga Bakhsh's son Anand. The appellants are great-grandsons of the same Ganga Bakhsh through another son Ahlad.

The respondent Jawahir is also great-grandson of Ganga Bakhsh by a son Bhagwant.

The question we have to decide is whether Jawahir is entitled to exclude all the descendants of Ahlad from inheritance to the property of the deceased Nageshar.

So far as remoteness of relationship from Nageshar is concerned, Jawahir and the appellants stand on a common basis; but Jawahir, who claims preference, rests his claim on the fact that Bhagwant, his grand-father, and Anand, the great-grandfather of Nageshar, were sons of Ganga Bakhsh by one and the same mother. The appellants' grandfather, while also son of Ganga Bakhsh, was his son by another wife. He claims on this ground to have more particles of the common ancestor of himself and Nageshar than the appellants can be deemed to have, and therefore to be so far nearer of kin as to exclude the appellants.

The family is one subject to that School of Hindu Law known as the Mitakshara School, and the guiding principle in that School is by the learned advocate who appears for Jawahir laid down to be, not the amount of spiritual benefit which according to Hindu theology will accrue to the deceased from the funeral oblations offered by the rival claimants,

(1) 12 M.I.A. 448.
(2) 2 B.L.R. (F.B.) 28.
(3) 15 B.L.R. 190.
(4) 5 M. 69.

but nearness of blood to the deceased as evinced by the possession of greater or smaller [223] quantity of corporeal particles common to the claimant and the deceased.

To narrow the dispute down to a point. Is the word सपिण्ड as used in the Mitakshara to be interpreted as though the latter half of this Sanskrit compound word related only to particles of common materiality, or to the cake which a Hindu presents at stated intervals to his deceased ancestors?

The portion of the Mitakshara which bears on the question is the chapter which relates to Inheritance and Partition, the दाय विभाग प्रकरणम्, and our particular attention was directed to the passages which are to be found at page 203 of the Yajnavalkya Smriti by the late Babu Shastri Moghe, 3rd Edition, Bombay, 1892. A translation of this passage will be found at pp. 353—358 of the Mitakshara translated by Sir W. H. Macnaghten and H. T. Colebrooke (Calcutta Edition, 1870). This translation is on the whole accurate, (at any rate for the purposes of this appeal its accuracy was not challenged by counsel on either side), with one important exception, namely, the translation attached at p. 356, line 2, to the word सपिण्ड *sapinda*. With this translation I propose to deal later. The passage runs as follows:—

3. "Besides, the father is a common parent to other sons, but the mother is not so; and, since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text—'To the nearest *sapinda* the inheritance next belongs.'

4. "Nor is the claim in virtue of propinquity restricted to (*sapindas*) kinsmen allied by funeral oblations; but on the contrary it appears from this very text (S. 3) that the rule of propinquity is effectual, without any exception, in the case of (*samanodacas*) kindred connected by libations of water, as well as other relatives, when they appear to have a claim to the succession.

5. "Therefore, since the mother is the nearest of the two parents, it is most fit that she should take the estate. But on failure of her the father is successor to the property."

This passage lays down that the claim to inheritance is guided by propinquity, not only in the case of *sapindas* but also in that of [224] *samanodacas*, and that, in the case of brothers, "such as are of the whole blood take the inheritance in the first instance under the text before cited—'To the nearest *sapinda* the inheritance next belongs'—since those of the half blood are remote through the difference of their mothers." According to the Mitakshara, then, there is no room left for doubt that—

(i) to the nearest *sapinda* the inheritance belongs,—

(ii) a brother of the full blood is nearer than a brother of the half blood,—

(iii) that this principle of propinquity, whatever it may be, is to be found in, and is to govern the right to, succession in the case of relations so remote as *samanodacas*.

If propinquity depends, as the learned advocate for Jawahir contends, upon community of particles of the body of an ancestor, there can be no question that Jawahir's right to inherit prevails over that of the appellants and to their exclusion.

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As authorities for such being the meaning of the word *sapinda* we were referred to *Lallubhai Bapubhai* v. *Mankuvarbai* (1). See specially page 423, where a passage from the Achara Kanda of the Mitakshara is given, which not only specially enunciates the doctrine that "the person is called a *sapinda* (who has particles) of the body (of some ancestor, &c.,) in common (with him)" but also adds that "therefore one ought to know that, wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent." From this the learned Chief Justice Sir M.R. Westropp goes on to point out that "this shows that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted *sapinda-ship*, and adopted, in lieu of it, the theory that *sapinda-ship* is based upon community of corporeal particles, or in other words, upon consanguinity, and that be maintained that there is such a community between the wives of collaterals." This meaning of the word *sapinda* and the proposition that the meaning is the same throughout the Mitakshara, **[225]** whether it occurs in the Achara Kanda or in the Dayavibhag, is fully endorsed and accepted by their Lordships of the Privy Council in *Lallubhai Bapubhai* v. *Cassibai* (2) and they declare themselves "prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the Law of the Mitakshara, as interpreted and accepted in Western India, the preferential right to inherit in the classes of *sapindas* is to be determined by family relationship or the community of corporeal particles; and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these lists was adopted."

It is, however, pointed out to us that in *Samat* v. *Amra* (3) Sir M. R. Westropp and Mr. Justice Pinhey held that, as there was not any special provision in the Mitakshara or the Mayukha in respect of persons of the half blood other than brothers and their sons, the general rule applies that the nearest *sapinda* succeeds. But this view must be read in the light of the facts of the case with which they were dealing. That was a case in which the competing candidates were descendants of different and not the same degree.

So far as Western India is concerned the interpretation to be put upon the word *sapinda* must be considered as finally determined by the ruling of their Lordships above quoted, and it only remains to be seen if there is any reason or authority for holding that the same word is to receive in Northern India any other interpretation. It is clear that this interpretation of the word *sapinda* divorces it *in toto* from the meaning assigned to it by Colebrooke in the passage given at page 356 in the translation of the Mitakshara above alluded to. The Calcutta High Court have no doubt in the matter. A Full Bench of that Court in *Umaid Bahadur* v. *Udoi Chand* alias *Munmun* (4), and much more recently a Division Bench in *Babu Lal* v. *Nanku Ram* (5) (Norris and Banerji, JJ.) unhesitatingly **[226]** aver that Colebrooke's translation is inaccurate, and refuse to follow it, accepting in its stead the meaning given to it by Sir M. R. Westropp and their Lordships of the Privy Council in the cases above cited.

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(1) 2 B. 388. (2) 5 B. 110, (118, 121). (3) 6 B. 394.
(4) 6 C. 119. (5) 22 C. 339.

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19 A. 218 (F.B.) = 17 A.W.N. (1897) 53.

In Madras the same view is apparently entertained in *Nallanna* v. *Ponnal* (1), *Ramappa Udayan* v. *Arumugath Udayan* (2), and in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (3).

The learned vakil for the appellants in a very careful and learned argument, for which we are much indebted to him, laboured hard to get rid of these precedents by falling back upon the Viramitrodaya. Prefacing his remarks by a citation from *Girdhari Lall Roy* v. *The Bengal Government* (4) in which the Lords of the Privy Council have formulated the doctrine that the Viramitrodaya is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, he drew our attention to the arguments by which the learned author Mitra Misra first lays down that propinquity by benefit is consistent with reason, and by means of it claims to reconcile all conflicting texts with regard to the order of succession. He adopts what may be, and has been somewhere, termed the common-sense view that the Mitakshara rule would make all the world kin and cannot therefore be accepted. Preference to inherit according to him must and does depend upon the superior efficacy of oblations offered, and not upon any question of the presence in greater or smaller measure of corporeal particles of a common ancestor.

It would be interesting, but in no way profitable, to follow up this discussion, as the matter is really concluded by the view which has been adopted by their Lordships of the Privy Council, a view we cannot depart from, unless something far stronger be brought before us than what is after all only the dictum of a text-book, of great authority undoubtedly, but a dictum against the Mitakshara, [227] and one not supported by any proof of custom or authority in its favor.

There is, moreover, great force in the view taken by the eminent and learned writer Dr. J. Jolly in his Tagore Law Lectures, 1883, p. 168, where he points out that "the right of representation has originated in the patriarchal family system, and it is that system which really lies at the bottom both of the Roman and of the Indian Law of Inheritance. No doubt the Indian rules on inheritance are closely connected with the rules relating to the offering of funeral oblations as well. This is a common characteristic of all early systems of inheritance. But the theory that a spiritual bargain regarding the oblation of the customary offerings to the deceased by the taker of the inheritance is the real basis of the whole Indian Law of Inheritance is a mistake which has arisen in the early period of the administration of Hindu Law from a too exclusive study of the writers of the Bengal School and from certain terms often recurring in Colebrooke's translation of Indian law books, notably from the term 'connected by funeral oblations,' the English equivalent chosen by Colebrooke for the well-known Sanskrit term *sapinda*. This theory has now been given up so far that a difference of doctrine in this respect between the Bengal writers and those of other Schools has been recognized." This view coincides with my experience, so far as it goes, of the course and current of Hindu Law, especially on the law of inheritance. In patriarchal times when all was one common family there would be practically no distinction between the right to inherit of whole and half blood relations. Manu has no such subtle distinction. It is not until priestly interference predominates that the natural rule is trammelled and confused by questions of religious efficacy.

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(1) 14 M. 149. (2) 17 M. 182. (3) 17 M. 316. (4) 12 M. I. A. 448.

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I see no reason to put upon the Mitakshara any construction other than what has been put upon it by their Lordships of the Privy Council in *Gridhari Lall Roy* v. *The Bengal Government* (1), and, read in this light, we must hold that the distinction [228] between the whole blood and the half blood observed in the case of brothers and their sons extends to the descendants of the grand-father, it may be, to the fourteenth degree, certainly to the case referred to us. With remoter ascendants the case before us is in no way concerned, and we, therefore, decline to give any answer upon this part of the question.

BANERJI, J.—I also would answer in the affirmative that portion of the question referred to us which directly bears on the present case.

The facts are so fully set forth in the order of reference that it is unnecessary to recapitulate them except briefly. Nageshwar, whose property is the subject matter of the suit, was a separated Hindu governed by the Mitakshara law. The inheritance to his estate is claimed on the one hand by Jawahir, who is the grandson of Bhagwant, the uterine brother of Nageshwar's great grandfather Anand; it is claimed on the other hand by the plaintiffs, the grandsons of Anand's half brother Ahlad; and it is contended on behalf of Jawahir that he has a preferential right over the plaintiffs by reason of his being the descendant of a brother of the whole blood of Anand. This contention raises the question referred to us, namely, whether the preference of the whole blood is limited to the case of brothers and their sons or extends to remoter agnates.

The question is not covered by the authority of any decided case so far as these Provinces are concerned, and has, therefore, to be answered with reference to the texts of Hindu Law. It is conceded that the Mitakshara recognizes the distinction of whole blood and half blood in the case of brothers and their sons and gives the preference to the former over the latter. But it is urged that there is no authority in the Mitakshara for carrying this distinction further. That the enumeration of heirs as given in the Mitakshara is not exhaustive, but illustrative only, is no longer open to question. As regards some heirs the Mitakshara mentions them by name. As regards others it lays down rules for determining who they are. We have, therefore, to consider what those rules are and [229] what is the guiding principle which underlies them. That principle is founded on the text of Manu:—"To the nearest *sapinda* the inheritance next belongs." (Chapter IX, v. 187.) The whole question thus turns on the meaning attributed by the author of the Mitakshara to the term *sapinda*, and on the test which he prescribes for determining the degree of nearness among *sapindas*.

It has been held in the cases to which my brother Knox has referred that Colebrooke's rendering of the word *sapinda* as "kinsmen by funeral oblations" is incorrect and that Vijnanesvara meant by it persons connected by particles of the same body. Whatever may have been the signification attached to the word *sapinda* by the early sages, there cannot be any doubt that Vijnanesvara used it in the sense mentioned above. In the Achar Kanda of the Mitakshara he defines the term *sapinda*, and states that the "*sapinda* relationship arises between two people through their being connected by particles of one body." And he adds that "one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body

(1) 12 M. I. A. 448.

either immediately or by descent." (West and Buhler's Digest of Hindu Law, pp. 120 and 121.) He then combats the theory that the *sapinda* relationship is founded upon the connection arising from the presentation of exequial cakes and declares that "the father and the other descendants are six *sapindas*; and the son and the other descendants are six; and the man himself is the seventh." (Sarbadikari's Tagore Law Lectures, pp. 603 and 604.) No definition of the word *sapinda* is, it is true, given in the chapter of the Mitakshara relating to inheritance, but, as pointed out in *Lallubhai Bapubhai* v. *Mankuvarbai* (1), there is no reason to assume that the same word was used in different senses in the same work by the same author. I may observe that in the very able argument which was addressed to us in this case it was not disputed that Vijnanesvara used the word *sapinda* as denoting persons descended from a common ancestor.

[230] The next question we have to consider is—what is the test of determining nearness among *sapindas* as conferring priority of right to inherit? Is it affinity, that is, the possession of the largest number of corporeal particles, or the ability to confer the highest amount of spiritual benefit by the presentation of funeral oblations? The latter is no doubt the test according to the Dayabhaga School, but the Mitaksbara has nowhere adopted it. The rule of propinquity is the guiding principle according to the Mitakshara School. In determining the order of succession among the two parents the Mitakshara says:—

"Besides, the father is a common parent to other sons, but the mother is not so, and, since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text —'To the nearest *sapinda* the inheritance next belongs,' (Chapter II, section iii, v. 3).

"Nor is the claim in virtue of propinquity restricted to *sapindas*, but on the contrary it appears from this very text that the rule of propinquity is effectual, without any exception, in the case of *samanodacas*, as well as other relatives, when they appear to have a claim to the succession, (v. 4).

"Therefore, since the mother is nearest of the two parents, it is most fit that she should take the estate. But, on failure of her, the father is successor to the property, (v. 5)."

Again, dealing with brothers of the whole blood and the half blood, the author says, in section iv, v. 5:—

"Among brothers, such as are of the whole blood take the inheritance in the first instance under the text before cited—'To the nearest *sapinda* the inheritance next belongs'—since those of the half blood are remote through the difference of the mothers."

The passages quoted above leave no room for doubt that propinquity determines the order of succession, and that the rule of propinquity applies not only to *sapindas* but to *samanodacas* and all other relatives also. This rule was adopted by Visesvara Bhatta, the author of the Madana Parijata **[231]** and the Subodhini, and by Balam Bhutta, two of the commentators on the Mitakshara regarded as "great authorities" in the Benares School (Sarbadhikari's Tagore Law Lectures, pp. 411, 439 and 484).

The learned vakil for the appellants, whilst conceding that the right to inherit is founded on propinquity, contended that the test of preference

(1) 2 B. 388 (427).

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was the competency to confer spiritual benefit, and in support of that contention he referred to several passages in the Viramitrodaya, which is recognised as an undoubted authority in the Benares School. No doubt there are passages in that work which favour the appellants' contention, notably one at p. 158 of Golap Chandra Sarkar's Translation where the author says :—"Hence it is indicated that he alone is entitled to get the estate on whom the estate being devolved conduces to the greatest amount of spiritual benefit of the deceased owner, and that proximity in this way is to be accepted as a general rule and reasonable." But there are other passages where the author lays down the rule that "where the question concerning the order (of succession) arises, there propinquity determines the order" (p. 186), and that "greatness of propinquity is alone the criterion of succession" (p. 194). Upon a careful consideration of the Viramitrodaya it appears that the rule of propinquity is, according to Mitra Misra, the rule of preferable succession, and that the capacity to confer spiritual benefit is, as Dr. Jolly, remarks, (Tagore Law Lectures, 1883, p. 209), referred to as an additional reason for the right to succeed. According to the ruling of their Lordships of the Privy Council in *Girdhari Lall Roy* v. *The Bengal Government* (1), the Viramitrodaya is "receivable as an exposition of what may have been left doubtful by the Mitakshara," but, where the Mitakshara itself is clear and its meaning and intention are not open to doubt, the Viramitrodaya cannot be accepted in preference to the Mitaksahra. As I have shown above, the Mitakshara enjoins in very distinct terms, in chapter II, section iii, v. 4, that for the purpose of determining the order of succession among **[232]** relatives of all descriptions, including *samanodacas*, the rule of propinquity is to be applied "without any exception." It may be that where two *sapindas* stand, with reference to propinquity, in the same degree of nearness to the propositus, the capacity to confer the highest amount of spiritual benefit should be applied as a test to determine the order of priority. But, where the degrees of propinquity are different, the rule of religious efficacy has according to the Mitakshara no application. There can be no doubt that, among *sapindas* of the same degree of descent from a common ancestor, those who are descended from the same mother as the propositus are nearer in propinquity than those descended from a different mother. Such *sapindas*, therefore, have the preferable right to inherit according to the text of Manu—"To the nearest *sapinda* the inheritance next belonges." The Mitakshara, it is true, gives the preference to a *sapinda*, who offers funeral cakes, over a *samanodaca*, who offers libations of water only; but, as Mr. Mayne points out, (Hindu Law and Usage, s. 468, 5th Edition, p. 581) "the distinction is stated, not as evidencing different degrees of religious merit, but as marking different degrees of propinquity." I may also observe that in the case of *samanodacas* it is not possible to apply the test of religious efficacy.

For the above reasons, I am of opinion that the distinction of whole blood and half blood applies, according to the rule of succession of the Mitakshara, founded on nearness of propinquity, to *sapinda* relations other than the brother and his sons. As supporting a contrary view the learned vakil for the appellant relied on the case of *Samat* v *Amra* (2) which is the only reported case which has some bearing on the present question. The learned Judges who decided that case expressed the opinion that "neither the Mitakshara nor the Mayukha takes any

(1) 12 M.I.A. 448.

(2) 6 B. 394.

distinction between persons of the whole blood and persons of the half blood, except in the cases of brothers and sons of brothers." With great [233] deference it seems to me that the learned Judges have overlooked the fact that the enumeration of heirs given in the Mitakshara is not exhaustive, a fact now definitely settled by their Lordships of the Privy Council, and of the rule of the Mitakshara, propounded in v. 4, s. iii of the second chapter, that the succession of all relations, "without any exception," is regulated by the rule of nearness of propinquity, that is, the possession of the largest number of particles of one body. The distinction was extended by Visesvar Bhatta to the case of paternal uncles. In his Madana Parijata he states that "among paternal uncles the succession of uterine and half blood uncles should be regulated in the same manner as in the case of brothers" (Sarbadhikari's Tagore Law Lectures, p. 440). So that the limitation which the learned Judges impose on the distinction between whole blood and half blood relations on what they consider to be the authority of the Mitakshara was not recognized by one of the commentators on the Mitakshara itself whose eminence as an authority in the Benares School is generally recognized. Srikrishna Tarkalankar extended the distinction, in the Bengal School, to the grandson of a brother. I am, therefore, unable to hold that the distinction does not extend beyond brothers and their sons, and I agree in the answer which my learned brother Knox would give to the reference.

AIKMAN, J.—I concur in the answer which my learned brothers Knox and Banerji propose to give to the reference. The dispute, in the case out of which this reference has arisen, was as regards the succession to the property of one Nageshwar, a separated Hindu, who died without issue and without leaving any near relations. Nageshwar's great-grandfather had a full-brother named Bhagwant and a half-brother named Ahlad. The dispute in this case is between the grandsons of the half-brother Ahlad and the grandson of the full-brother Bhagwant. In paragraph 529 of his work on Hindu Law Mayne says that priority on the ground of full blood is limited to the cases of brothers and their issue. Similarly West and Bühler at page 125 of their work on Hindu [234] Law say :—"The distinction between the whole blood and the half blood observed in the case of brothers and their sons does not extend to the descendants of the grandfather and remote ancestors." If this proposition is correct, the answer to the reference should be in the negative. But the only authority which these authors give for the proposition they lay down is a case decided by the Bombay High Court, *Samat* v. *Amra* (1). It is true that the learned Judges who decided that case observed that the Mitakshara does not make any distinction between persons of the whole blood and persons of the half blood except in the case of brothers and sons of brothers, and further on they say that there is no special provision in the Mitakshara in respect of persons of the half blood other than brothers and their sons. If they mean by this that the Mitakshara has not specially referred to cases of the half blood other than those of brothers and their sons, the learned Judges are right, but, if the meaning was that the author of the Mitakshara restricted the distinction between the whole and the half blood to the case of brothers and their issue, I cannot concur with them. The cases given in paragraphs 5, 6 and 7 of s. 4 of chapter II of the Mitakshara are merely illustrative

(1) 6 B. 394.

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and not exhaustive. The reason which the author of the Mitakshara gives for the preference of brothers of the whole blood to brothers of the half blood is the text of Manu, who says :—"To the nearest *sapinda* the inheritance next belongs." Had the learned Judges who decided the Bombay case considered the effect of paragraph 4 in the preceding section of the Mitakshara, they would have seen that it was never the intention of the author to restrict the application of this rule to brothers and their sons, for in that paragraph the author distinctly says that the rule of propinquity extends without any exception to the case of relatives even so distant as *samanodacas*. This case is governed by the law of the Mitakshara, and, as that is in my opinion quite clear on the point referred, I concur in the proposed answer to the reference.

[235] [The appeal being sent back to the Bench which had made the reference was, in accordance with the opinion of the Full Bench, dismissed on the 4th of January, 1897.]

Appeal dismissed.

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19 A. 235 = 17 A.W.N. (1897) 38.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

RANI KANNO DAI (*Judgment-debtor*) *v.* B. J. LACY (*Decree-holder*).*

[9th January, 1897.]

Execution of decree*—*Decree for money*—*Application for receiver of rents of immoveable property of a deceased Hindu in the hands of his widow*—*Hindu law*—*Hindu widow.

Held, that a Court executing a simple money decree obtained against a sonless separated Hindu was not competent to appoint a receiver of the rents, accruing since his decease, of the judgment-debtor's immoveable property, then in the hands of his widow as her widow's estate, such rents not being assets of the deceased, but the personal moveable property of the widow, and this even if the decree-holder had not, as in fact he had, agreed for consideration not to execute his decree against the moveable property of the widow.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *D. N. Banerji* and Babu *Satish Chandra Banerji*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—This is an appeal from an order passed by the Subordinate Judge of Agra in execution of a decree for money. The applicant for execution describes himself as Mr. B. J. Lacy, son of Dr. J. C. Lacy, Englishman, occupation service, resident of Agra Cantonments, decree-holder. It is rather difficult from the record to ascertain who the real parties are. One of the papers is headed—"Dr. J. Lacy, decree-holder." Another paper is signed—"A. Lacy, attorney of the Revd. B. Lacy;" and Mr. A. Lacy describes himself as the decree-holder's brother. These proceedings in execution recall to the mind of any Judge who has **[236]** sat in this Court in recent years the sad story of the ruin of Bishambar Nath of Agra. However, in this case, we have got to see what are

* First Appeal, No. 199 of 1896, from a decree of Syed Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 10th July 1896.

the rights in law to which the Revd. B. Lacy is entitled; and we have also got to see that he gets nothing further than the law entitles him to. He applied for attachment, and he followed that up immediately by an application for the appointment of a receiver of the rents and profits of the property which he proposed to sell in execution of a decree for money. He apparently conceived that a judgment-creditor executing his decree for money was entitled to be placed in the position, at the expense of the judgment-debtor, of a mortgagee in possession. The application was made against the widow of Bishambar Nath. Bishambar Nath was a sonless separated Hindu, and the lady was, as his widow, entitled to a widow's estate in her husband's property; of course, subject to such rights as the law gave to other persons against the property of her late husband. On the 18th of July, 1895, a compromise was effected between Bishambar Nath's widow and the execution creditor. She produced as a consideration for the compromise, and delivered to the creditor, a promissory note or hundi of the value of Rs. 8,000, and on his side he undertook not to execute the decree against the moveable property of the widow or any immoveable property that might be acquired by her, but he was left at liberty to execute his decree against the immoveable property which had been of Bishambar Nath in his lifetime. In violation of that agre-ment, and indeed, it appears to us, in contravention of law, the Revd. B. Lacy now seeks to execute his decree by a species of sequestration of the lady's personal estate. There can be no doubt, as we conceive the law to be in this country, that this lady, as the widow of a separated and sonless Hindu, became, in virtue of her widow's estate, entitled upon the death of her husband to the rents which might accrue from the immoveable property. Those rents, if already received by her and put into her pocket, could not be treated in law as assets of her husband. They were her assets in virtue of her widow's estate. It can make no difference if the rents which accrued due after her husband's death [237] had not been actually put into her pocket. She was entitled to them, not as representative of her late husband, but in right of her widow's estate; and what the Revd. B. Lacy now seeks to do is, having obtained the advantage of the compromise, and having obtained the hundi for Rs. 8,000, to seize, in violation of that agreement, this lady's own personal estate and to deprive her of all means of subsistence, and possibly put it out of her power to contest any such proceeding on his part. The lady objected; and the Revd. B. Lacy, through his attorney, A. Lacy, set up a case, in his reply of the 10th of July 1896, that he ought not to be bound in equity or in law by the compromise. What may be the views as to equity and good conscience of the Revd. B. Lacy, or his attorney A. Lacy, may be inferred from the facts which we have stated and from the reply which the Revd. B. Lacy, through his attorney, filed in this matter on the 10th of July 1896. The Revd. B. Lacy alleges, through his attorney A. Lacy, that A. Lacy, who appears to be his brother, was compelled by undue influence and pressure exercised upon him to give his consent to the compromise in respect of the Rs. 8,000. It apparently did not strike the Revd. B. Lacy, or his attorney A. Lacy, that equity and good conscience would expect of him, if he sought to avoid the compromise, to make restitution of the Rs. 8,000, or such portion of it as had got into his pocket. This is only another sad phase of this sad story. The Subordinate Judge made an order, the effect of which was that the Revd. B. Lacy might sequestrate the private and personal income of this lady derived from the estate in right of her title as a

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Hindu widow. In making that order the Subordinate Judge was wrong, and we set aside the order in that respect and allow the objection in that respect. The Revd. B. Lacy is enti led to execute his decree by obtaining a sale of the immoveable property left by Bishambar Nath, or so much of it as will satisfy his decree and the costs of sale. Let us hope that, when the property is about to be put up for sale, permission to the decree-holder or any one on his behalf to bid may not be given.

We allow this appeal with costs.

Appeal decreed.

19 A. 238 = 17 A.W N. (1897) 39.

[238] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

DEBI BAKHSH SINGH AND ANOTHER (*Defendants*) *v.* TIRBHAWAN SINGH AND OTHERS (*Plaintiffs.*)* [11th January, 1897.]

Regulation No. XI of 1825, *s.* 4—*Alluvion—Title to land acquired by gradual accretion —Limitation.*

Clause 1 of s. 4 of Regulation XI of 1825 does not depend for its operation on the capability of identification of the accreted lands. Whether the accreted lands are capable of identification or not, the clause applies where the lands have been gained by gradual accession by the recession of a river.

In the case of gradual accretions the ordinary rule of acquisition by prescription does not apply, but each accretion as it occurs comes under the same title as that upon the land to which it is made is held.

[**Not F.**, 36 P.R. 1898; **R**, 14 C.P.L.R 97 (100); **D.**, 28 A. 256 = 2 A.L.J. 821 = A.W.N. (1905) 271; 66 P.R. 1901 = 171 P L.R. 1901.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—This case really turns upon the construction of cl. 1 of s. 4 of Regulation XI of 1825. It appears that the Rapti flowed at one time between the land of the plaintiffs and the land of the defendants; that over a series of years it gradually encroached upon the land of the plaintiffs and threw up correspondingly land which became alluvion and adjoined the defendants' land, and that this went on gradually contracting the area of the plaintiffs' land, which was submerged and subsequently re-appeared adjoining the lands of the defendants. The parties during that course of years seem to have had no doubt of the application, as we read it, of cl. 1 of s. 4 of Regulation XI of 1825, for, as the land appeared on the defendants' side of the river, they obtained possession of it, cultivated it and treated it as their land. That in our opinion they were entitled to do by reason of cl. 1 of s. 4. That land became by gradual accession from the recession of the river Rapti an increment to the tenure of the defendants. So matters continued

* Second Appeal, No. 978 of 1894, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 29th May 1894, modifying a decree of Syed Siraj-ud-din, Subordinate Judge of Gorakhpur, dated 29th May 1893.

until 1893, when the Rapti suddenly altered its course, and cut off from the defendants' side the lands which had gradually accreted in the manner [239] we have described and left them on the plaintiffs' side of the river. The plaintiffs brought their suit for possession, not only of the land which had accreted in the manner described to the defendants, and of which they had obtained possession more than twelve years before suit and had hitherto maintained possession, but also of the land which had accreted to the defendants, and of which they had obtained possession within twelve years of the suit. In our opinion limitation in this case has nothing to do with the question, except in so far as it would strengthen the title to those portions of the lands of which the defendants have had possession for more than twelve years before suit. In our view of the case the title to all the land which accreted in the way we have described vested on the gradual accretion in the defendants upon the same title as that upon which they held their original lands. The Subordinate Judge dismissed the suit. The District Judge on appeal by the plaintiffs confirmed the decree of the Subordinate Judge, dismissing the suit so far as it related to accreted lands of which the defendants had been in possession for twelve years and gave the plaintiffs a decree for the whole of the accreted lands of which the defendants had not had twelve years possession before suit. His view of the law was that, when lands were capable of being identified, although they might gradually have accreted, cl. 1 of s. 4 of the Regulation did not apply. That view was apparently based upon a misconception of the judgment of their Lordships of the Privy Council in the case of *Felix Lopez* v. *Maddan Thakoor* (1). The Judge failed to notice that in the case which was before their Lordships of the Privy Council there had been no gradual accretion at all. The village of Lopez the plaintiff was entirely submerged, remained under water for a considerable period, and on its re-appearance was promptly seized upon by the defendants. It comes to this, that, if the view of the District Judge were correct, and the correctness of that view has been vigorously upheld by Mr. *Ram Prasad* in this Court on behalf of the respondents, cl. 1 of s. 4 of Regulation XI of 1825 could only apply to [240] infinitesimal accretions caused by the recession of a river. So long as lands were capable of identification by lines drawn from one place which had not been submerged to another, cl. 1 could never apply according to that view; and indeed, on that view of the construction of cl. 1 of s. 4, it is difficult to understand what would have been the necessity of enacting cl. 2. We must put a natural construction upon cl. 1, and we hold that, whether the accreted lands are capable of identification or not, the clause applies where the lands have been gained by gradual accession by the recession of the river. It does seem rather hard in this case that lands undoubtedly belonging to these plaintiffs should, by the perverse course which the river Rapti chose to take, become vested in the defendants, but we have to apply the law as we find it. It was unfortunate for the plaintiffs that the river was not as accommodating to them as to the defendants, but suddenly altered its course. We set aside the decree of the lower appellate Court, and restore the decree of the first Court with costs in all Courts, and dismiss the respondents' objections with costs.

Appeal decreed.

(1) 5 B.L.R. 521.

19 A. 240=17 A.W.N. (1897) 40.

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19 A. 240=17 A.W.N. (1897) 40.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

CHUNNI LAL AND ANOTHER (*Plaintiffs*) *v.* AJUDHIA PRASAD AND OTHERS (*Defendants.*)* [12th January, 1897.]

Act No. VII of 1870 (*Court Fees Act*), *s.* 10, *cl. ii—Court fees—Suit insufficiently valued—Order for payment of additional Court fees—Power of Court to enlarge time for payment.*

Held that it is competent to a Court which has made an order under s. 10, cl. ii, of Act No. VII of 1870 for the payment of an additional Court fee to enlarge, either before or after its expiration, the time limitedf or the payment of such additional fee. *Budri Narain* v. *Mussammat Sheo Koer* (1) and *Bhugwandas Bagla* v. *Haji Abu Ahmad* (2) referred to.

[F., 2 Ind. Cas. 1 (2); R., 29 A. 749=4 A.L.J. 636=A.W.N. (1907) 253; 9 M.L.J. 348; 4 O.C. 103; 78 P.R. 1909=144 P.L.R. 1909=129 P.W.R. 1909=3 Ind. Cas. 605.]

THE plaintiffs in this case sued to recover possession of certain zamindari property and some houses, which latter they valued for the purposes of this suit at Rs. 1,400. One of the defendants to the suit in his written statement objected that the houses in [241] question were undervalued, and that in consequence the plaint was not sufficiently stamped and ought to be rejected. The Subordinate Judge thereupon himself inspected the houses, and having recorded his opinion that the proper value was Rs. 2,100, ordered the deficiency in the Court fee to be made good within four days from the date of the order, which was made on the 23rd of November 1894. On the 28th of November the plaintiffs came into Court and asked for an extension of the period fixed for payment of the additional Court fee by one day, on the ground that, the treasury having closed, they could not obtain the requisite stamps on that day. The Subordinate Judge, apparently being of opinion that the time limited had not expired, granted the plaintiffs the time they asked for, and on the following day the deficiency was made good.

When the suit came on for hearing, the objection as to deficiency of Court fee was again raised by the defendants, and it was contended that the payment made under the order last mentioned was made too late. The Subordinate Judge accepted this contention, stating that he had been misled as to the time when the period limited for making good the deficiency in the court-fee expired. The Subordinate Judge held that the plaint should be rejected under s. 54 (*b*) of the Code of Civil Procedure, and passed orders accordingly.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the appellants.

The respondents were not represented.

JUDGMENT.

KNOX and BURKITT, JJ.—This is an appeal from an order rejecting a plaint purporting to have been passed under s. 54, cl. (*b*) of the Code of Civil Procedure. The plaintiff sued for possession of certain lands and

* First Appeal, No. 33 of 1895, from a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 4th December 1894.

(1) 17 I.A. 1. (2) 16 B. 263.

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houses. One of the defendants in the written statement filed by him set out that the relief sought had been undervalued. In course of time the Court proceeded to determine the question thus raised by inspection of the house property in dispute. It came to the conclusion that the property [242] had been undervalued, and fixed what it deemed a correct value, and directed that the plaintiff should within four days supply the deficient Court fee stamps. This order was passed on the 23rd of November 1894. On the 26th of November, that is, before the four days granted had expired, the plaintiff brought a portion of the deficient Court fees into Court, and asked permission to withdraw his claim to a portion of the house property with leave to sue again for the portion thus omitted. The Court very properly refused to grant the petition under s. 373 of the Code until the Court fee duty still deficient had been paid in. The order just recited was passed on the 28th of November. The plaintiff then said that the treasury was closed and he could not put in a Court fee stamp, but he tendered a sum of money equivalent to the deficiency of the Court fees. The Court, being under the erroneous impression, as it says in its order, that the four days granted under the order of the 23rd had not expired, allowed the plaintiff one day more within which to make good the deficiency, and on the 29th the deficiency was paid in Court fees stamps within the period thus enlarged. The defendant objected to the receipt of the deficient Court fees on the 29th on the ground that the time granted had already expired. The Court on the 4th of December allowed the contention raised by the defendant to prevail, and, thinking the case fell within s. 54, cl. (*b*), and that it had no option but to reject the plaint, so rejected it.

Neither cl. (*a*) nor (*b*) of s. 54 of the Code had any reference to the case before the Court. The plaintiff had not been required by the Court to correct the valuation, and had not refused to make any correction: cl. (*a*) therefore does not apply. The relief sought had not been properly valued, so cl. (*b*) could have no application. The order rejecting the plaint, therefore, was in any case wrong.

The law under which the Court could have acted and ought to have acted was cl. ii of s. 10 of Act No. VII of 1870. That section provides that, when a Court finds after investigation that the value placed on property in dispute has been insufficient, it shall require the plaintiff to pay so much additional fees as would [243] have been payable on a correct valuation, and cl. ii provides that the suit shall be stayed till the additional fees be paid. If the additional fees be not paid within such time as the Court shall fix, the suit shall be dismissed. The order which the Court, therefore, should have passed was not an order rejecting the plaint, but an order dismissing the suit.

The contention which the defendant raised was precisely similar to that which was raised in reference to an extension of time which had been asked for, but was refused by the High Court of Calcutta, on an application under s. 549 of the Code of Civil Procedure. The words in that section setting forth the consequences of not furnishing security within a fixed time are almost identical with the words used in s. 10, cl. ii, of Act No. VII of 1870. The case in question is *Budri Narain* v. *Mussammat Sheo Koer* (1). The Privy Council held that an application to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered

(1) 17 I.A. 1 (3)

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to be furnished, and that the Court may thereupon enlarge the time according to any necessity which may arise when it is just and proper that such an extension should be given; but, if ultimately the order is not complied with and the security not furnished, the appeal may be dismissed.

The words used in s. 10, cl. ii, of Act No. VII of 1870, that the "suit shall be dismissed," are no stronger and not more imperative than the words "the Court shall reject the appeal" in section 549 of the Code. We have no doubt that the interpretation put by their Lordships on the words in s. 549 of the Code of Civil Procedure should be applied to the words in s. 10 of Act VII of 1870. We note that in the case of *Bhugwandas Bagla* v. *Haji Abu Ahmad* (1) the construction put by their Lordships on s. 549 was held to be applicable to the words "the plaint shall be rejected" in s. 54 of the Code. We hold that the order passed on the 28th of November in this case, granting the extension of one day, **[244]** was a valid order and under the circumstances a reasonable order.

We, therefore, decree the appeal, and set aside the order of the Court below with costs, and we direct the record to be returned to the lower Court which will dispose of the case according to law.

Appeal decreed and cause remanded.

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19 A. 244 = 17 A.W.M. (1897) 43

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SRI RAMAN LALJI MAHARAJ (*Defendant*) *v.* GOPAL LALJI MAHARAJ (*Plaintiff*).* [12th January, 1897.]

Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 61—Limitation—Suit for money payable to the plaintiff for money paid for the defendant.

Under an award two persons were made liable each for the payment of a moiety of the expenses of certain temples which were held jointly. One of the persons so made liable, alleging that he had paid more than his share of the expenses, sued the other for the balance in excess of the moiety which he was bound to pay under the award. *Held* that the suit was governed by art. 61 of the second schedule to the Indian Limitation Act, 1877, and that, although the taking of accounts might be necessary, the suit was not a suit for an account to which art. 120 of the same schedule might apply. *Rohan* v. *Jwala Prasad* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pundit *Sundar Lal* and Munshi *Kalindi Prasad*, for the appellant.

The Hon'ble Mr. *Colvin* and Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The parties to this appeal and the defendants Nos. 2 and 3 in the Court below are joint owners of certain temples in Muttra and Gokal. Disputes having arisen between them in regard to the temple property, those disputes were referred to arbitration, and on the

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* First Appeal, No. 12 of 1895, from a decree of Maulvi Abdul Rahman, Subordinate Judge of Agra, dated the 5th December 1894.

(1) 16 B. 263.

(2) 16 A. 333.

15th of March 1888, an award was made by the arbitrators which defined the rights of the parties. **[245]** With the exception of three temples, which remained the joint property of the parties, all other property was divided. As regards those temples the award provided that the expenses connected with them and the income arising from them should be borne and received in equal moieties; the defendant No. 1, appellant here, being liable for and entitled to one moiety. The suit out of which this appeal has arisen was brought by the respondent on the 27th of April 1893, on the allegation that a sum of Rs. 4,000 was due to him by the defendant No. 1 on account of a debt which the said defendant was liable to discharge under the award. The plaintiff further alleged that he had advanced on account of the expenses of the temples Rs. 24,100-1-9; that the first defendant had paid Rs. 4,232-11-3 only: that a moiety of those amounts was payable by the said defendant; that the plaintiff had thus paid more than the half which under the award he was bound to pay: and that he was entitled to obtain a sum of Rs. 9,933-11-3 on that account from the defendant. He further alleged that, according to the practice of the temples, in addition to the expenses of the temples, the kitchen expenses of the parties (*Tapeli*) and the expenses of keeping pigeons were payable as expenses connected with the temples. He prayed for a decree for the recovery of the amounts mentioned above, which, together with interest, amounted to Rs. 20,641-2-6, after an adjustment of the accounts of the temples, and he also prayed for a declaration that the kitchen and pigeon expenses were a part of the temple expenses, and should be defrayed equally by the parties. As for the item of Rs. 4,000 mentioned above, the claim has been dismissed, and we have not to consider the propriety of the decree as regards that item. As for the other items, the defendant No. 1, appellant here, contended that a great portion of the claim was barred by limitation, and that the amount which the plaintiff alleged he had paid on account of temple expenses included large sums which represented the personal expenses of the plaintiff and were not debitable to the temple funds. The amount of those expenses was stated by the defendant to be Rs. 15,387-8. The Court below allowed the defendant's pleas as regards four of the **[246]** items objected to by the defendant, amounting to Rs. 5,819-13-3. It overruled the plea of limitation and made a decree in favour of the plaintiff for Rs. 7,023-12-6. As regards the second prayer contained in the plaint it held that the personal kitchen expenses of the parties were not to form a part of the temple expenses, and it made a decree, with reference to that prayer, to the effect that the pigeon expenses and temple *bhog* expenses should be paid, and food for servants, devotees and visitors should be supplied by the temples. The defendant who has preferred this appeal contends, in the first place, that the Court below has erred in holding that no portion of the claim is barred by limitation. The Subordinate Judge seems to have been of opinion that the suit was one for compensation for breach of a contract, the contract being the award made on the 15th March 1888. Although the Subordinate Judge does not refer to article 116 of the second schedule to Act No. XV of 1877, he evidently was of opinion that that article applied, and that, if that article did not apply, no other article in the schedule was clearly applicable, and consequently the suit was governed by article 120, which provides the same period of limitation as article 116, namely, six years. It was contended on behalf of the appellant that the suit was one for money payable to the plaintiff for money paid for the defendant and was governed by article 61 of the schedule. On the other hand, the

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learned counsel for the respondent argued that the suit was one for an account, and, there being no article in the schedule which specially governed a suit for an account of this nature, article 120 was applicable. We are of opinion that this suit cannot be regarded as a suit for an account. It is true that in the plaint the plaintiff prays for a decree for money on settlement of accounts, and further adds that, if on an adjustment of accounts, a larger amount than that mentioned in the plaint be found payable to the plaintiff, a decree be passed in his favour for such larger sum. The mere fact, however, of the plaintiff asking for a settlement of accounts would not make the suit a suit for an account, unless the main object of the suit was to obtain an account. A suit for an account implies an obligation on [247] the part of the defendant to account to the plaintiff for moneys received or spent on the plaintiff's behalf. Upon the allegation made by the plaintiff no such obligation attached to the defendant in this case, nor was it the main object of the plaintiff to have an account adjusted. The gist of the claim appears from the eighth paragraph of the plaint. What the plaintiff stated in that paragraph was that both he and the defendant No. 1 were liable in equal moieties for all the temple expenses, and that he had paid a sum far in excess of the moiety for which he was liable, and he sued to recover from the defendant the money which the plaintiff said he had paid in lieu of the defendant for what was payable by the defendant. It is true that for the purpose of granting the relief sought by the plaintiff it would be necessary to examine accounts, but that would not in our opinion render the suit one for an account. We think that the suit was one contemplated by article 61 of the second schedule to Act No. XV of 1877, and was a suit for which three years' limitation is provided in that article. Our view on this point is supported by the principle of the ruling of the Full Bench in *Rohan* v. *Jwala Prasad* (1). The learned counsel for the respondent has not attempted to support the opinion of the Subordinate Judge that article 116 would apply to this suit. We think that that article has no application to this case.

[The rest of the judgment, being occupied with a discussion of the facts of the case, is not reported—ED.]

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19 A. 247 = 17 A.W.N. (1897) 29.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

BEHARI LAL (*Defendant*) *v.* JAGNANDAN SINGH (*Plaintiff*).*

[3rd January, 1897.]

Execution of decree—Surety after passing of decree—Mode of realization of security—Civil Procedure Code, s. 253—Jurisdiction.

Where after the passing of a decree for arrears of rent a friend of the judgment-debtor entered into a security bond whereby he rendered himself personally liable and hypothecated a share in certain zamindari property to [248] secure the due performance of the decree, it was *held* that the obligation created by such security bond could not be enforced by a Court of Revenue by the sale of the hypothecated property.

[F., 11 O.C. 342; R., 19 C.P.L.R. 104; D., 7 O.C. 210.]

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* Second Appeal, No. 1056 of 1894, from a decree of Kunwar Jwala Prasad, Officiating District Judge of Azamgarh, dated the 14th June 1894, reversing a decree of Baboo Sanwal Singh, Subordinate Judge of Azamgarh, dated the 13th October 1893.

(1) 16 A. 333.

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APPELLATE CIVIL.
19 A. 247 = 17 A.W.N. (1897) 29.

THIS appeal arose out of a suit for cancelment of a sale held by a Court of Revenue under the following circumstances :—

One Behari Lal Sahu obtained a decree for arrears of rent against Datta Singh and Ganga Singh. After that decree had been obtained, Jagnandan Singh and Balgobind Misr executed a security bond whereby they undertook jointly and severally to satisfy the decree of Behari Lal, and also hypothecated certain zamindari property as security. The decretal amount not having been paid, the decree-holder applied to a Court of Revenue in execution of his decree for the sale of the property hypothecated under the above-mentioned security bond ; which property, after certain objections having been made by the sureties and disallowed by the Court, was sold. The surety Jagnandan Singh thereupon brought a suit to have the sale set aside.

The Court of first instance dismissed the suit, holding that by reason of s. 312 of the Code of Civil Procedure such a suit did not lie.

The plaintiff appealed, and the lower appellate Court decreed the appeal and set aside the sale The defendant-judgment-creditor appealed to the High Court.

Gobind Prasad and *Kalindi Prasad*, for the appellant.

Baldeo Ram, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—The Court of Revenue had no jurisdiction to sell the plaintiff's property. It is true he was a surety ; but he was was not a surety to whom s. 253 of the Code of Civil Procedure applied, as he became a surety after the passing of the decree. The Court of Revenue in our opinion was without jurisdiction. We dismiss this appeal with costs.

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19 A. 249 = 17 A.W.N. (1897) 50.

[249] MISCELLANEOUS CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

QUEEN-EMPRESS v. MATA PRASAD AND OTHERS.*

[14th January, 1897.]

Criminal Procedure Code, ss. 526, 192—Transfer of criminal case by the High Court to the Court of a District Magistrate—Interpretation of order—Practice.

When a criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate to the Court of a District Magistrate, if it is intended that the District Magistrate shall have power to transfer the case to a subordinate Court, that intention will be expressed in the order of the High Court. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself ; but, when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply section 192 of the Code of Criminal Procedure and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it.

PROSECUTIONS were instituted against Mata Prasad and others in the Court of a Magistrate subordinate to the District Magistrate of Mirzapur.

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* Criminal Miscellaneous No. 4 of 1897.

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MISCELLANEOUS CRIMINAL.

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On application to the High Court these cases were, by order of Blair, J., transferred to the Court of the District Magistrate of Allahabad. That order of transfer was worded in a general manner, and contained no direction that the District Magistrate should himself try the cases so transferred. The District Magistrate of Allahabad being unable, owing to press of work, to try the said cases himself, made them over, under the provisions of s. 192 of the Code of Criminal Procedure, to the Joint Magistrate. There being some doubt under the circumstances whether it was intended that the District Magistrate of Allahabad should try the cases transferred to him himself, or whether he had power to act under s. 192 of the Code of Criminal Procedure, an application was made by the Public Prosecutor for an order transferring the said cases specifically to the Court of the Joint Magistrate of Allahabad. This application being laid before a Bench the following orders were passed thereon :—

[250] The Public Prosecutor (Mr. *E. Chamier*) in support of the application.

JUDGMENT.

EDGE, C. J.—This is an application for the transfer of certain cases pending in the Court of the District Magistrate of Allahabad to a Court subordinate to him. The cases in question were transferred by the order of this Court from an Assistant Magistrate subordinate to the District Magistrate of Mirzapur to the Court of the District Magistrate of Allahabad without any further direction being given in the order. Personally, I have always understood that, when the High Court made an order of transfer in a criminal case to the Court of a District Magistrate, it gives by that order full power to the Court of the District Magistrate to which the transfer was made to exercise the same jurisdiction precisely as the Magistrate of that Court could have exercised if the case had been instituted in his Court unless the contrary was expressed in the order of this Court. Cases may arise in which it is desirable that the case should be tried by the Magistrate of the District and not by a subordinate. In those cases, of course, if the High Court directs that the case is to be tried in the Court of the District Magistrate, the District Magistrate must try the case and cannot transfer it. Those cases are of rare occurrence, and it appears to me that it is highly undesirable to limit the discretion of the District Magistrate in the distribution of the work in his district, whether originally instituted in his district or transferred to his Court. The District Magistrate must know better than the High Court can what Magistrates of competent jurisdiction are most available for inquiry into any particular case. Speaking personally, I should have had no doubt that the District Magistrate of Allahabad was competent to make the order of transfer which he made in this case. When he took seizin of the case, it appears to me that the same power and jurisdiction devolved on him which he should have had if the case had been originally instituted in his Court and he had taken cognizance of it. Part of that power would have been to order the transfer of the case to any competent Court subordinate to his Court. It has been my practice, since I sat in this Court first, to include in my **[251]** order words expressing that the District Magistrate, unless I otherwise intended, has power to transfer the case transferred to his Court to any Court subordinate to him that was competent. If I happened not to put those words in, I did not intend to limit what I conceive to be the powers of the District Magistrate to whose Court I transferred

the case. But, when I made an order intending that on the transfer the case should be tried in a particular Court and not transferred, I have specially expressed in my order that the case should be tried by the particular Court to which I was transferring it. However, as there may be a difference of opinion on the question as to the meaning of an order drawn up as this order was in a case in which the transfer is from a Court subordinate to a District Magistrate to a District Magistrate's Court, the practice which we are prepared to follow in future will be that in such cases, if we intend that the District Magistrate should have power to transfer the case to a subordinate Court, that intention will be expressed in our order. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself; but, when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply s. 192 of the Code of Criminal Procedure and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it.

In the present case, as there has been a misunderstanding of the nature of the order, and to avoid any question in future as to the jurisdiction, we order notice to go to the respondents to show cause why the cases against them should not be transferred from the Court of the District Magistrate to the Court of Mr. Dupernex, the Joint Magistrate of Allahabad, and to his successor in that Court in case Mr. Dupernex ceases to be Joint Magistrate of Allahabad.

[252] BLAIR, J.—I assent to the order that notice go. The order for transfer was couched by me in the most general terms under the impression, which I still entertain, that an order so expressed transferred the case to the full and unlimited jurisdiction of the District Magistrate to whose Court it was transferred. Nothing was placed before me at the hearing of the case which would have led me to make a transfer of a more special and limited kind. But I think it of the highest importance that the practice of the Court in these matters should be uniform. I think the suggestion of the Chief Justice as to the course to be followed in future will save doubt and difficulty hereafter. I assent to the order proposed.

BURKITT, J.—I am of opinion that this application is quite unnecessary, but nevertheless I do not dissent from the order proposed, and to secure uniformity of practice in the Court I am willing in future to adopt the procedure suggested by the learned Chief Justice, though I confess I am unable to appreciate fully the distinction sought to be drawn between a case pending on the file of a District Magistrate and one on the file of a subordinate Magistrate in the matter of transfer to another district. I would add that, both as a Judge of this Court and formerly as a District Magistrate, I was always under the impression, and acted upon that impression, that when a criminal case was transferred by the High Court from any Court in one district to another district, that transfer in no way limited the jurisdiction of the District Magistrate to whom the case was transferred to act under the provisions of s. 192 of the Code of Criminal Procedure. That opinion I still entertain, but, as I have already said, I am willing in future to adopt the practice suggested by the learned Chief Justice.

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BY THE COURT.—Notice will go to the repondents in the manner indicated.

[On return of the notice, no cause being shown, an order was made on the 9th of February, 1897, transferring the cases in question to the Court of the Joint Magistrate of Allahabad.]

19 A. 249 = 17 A.W.N. (1897) 50.

19 A. 253 (F.B.) = 17 A.W.N. (1897) 60.

[253] FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Burkitt and Mr. Justice Aikman.

LACHMI NARAIN (*Plaintiff*) *v.* H. C. MARTINDELL (*Defendant*).*
[15th January, 1897.]

Act No. XII of 1881 (*North-Western Provinces Rent Act*), *ss.* 170, 181 (*b*)—*Execution of decree—Attachments—Objection—Objection dismissed for want of prosecution—Suit to set aside sale—Limitation.*

The limitation provided by s. 181, clause (*b*), of Act No. XII of 1881 is none the less operative because the order under s. 179 of the Act, in consequence of which a suit has been brought in a Civil Court, may be an order made not on the merits but in default of prosecution of his objection by the objector. *Sardhari Lal* v. *Ambika Pershad* (1), *Khub Lal* v. *Ram Lochun Koer* (2), *Kaminee Debia v. Issur Chunder Roy Chowdhry* (3), and *Sadut Ali* v. *Ram Dhone Misser* (4) referred to. *Kallu Mal* v. *Brown* (5) discussed.

[R., 8 A.L.J. 626 (629) = 10 Ind. Cas. 401 (402); 6 C.L.J. 362 (364); 11 O. C. 180; 5 Ind. Cas. 890 (891) = 28 P.R. 1910 = 63 P.L.R. 1910 = 19 P.W.R. 1910.]

THE facts of this case are fully stated in the judgment of the Court.
Munshi *Madho Prasad*, for the appellant.
Mr. *A. E. Ryves*, for the respondent.

JUDGMENT.

KNOX, BURKITT, and AIKMAN, JJ.—The defendant, who is respondent to this second appeal, held a decree obtained from a Rent Court against one Parmeshri Das. The decree was dated the 5th of November 1891. In execution of that decree a grove was attached and put up for sale. Sometime after attachment, the appellant, Sahu Lachmi Narain put in an objection before the Rent Court executing the decree and claimed that the grove which had been attached was his own. The objection is not before us, but it has not been shown to us that the Rent Court did not, as it was bound to do, examine the objector or his agent. We assume, therefore, that the Rent Court did act according to law, and we know from the record that the 18th of November was fixed for the disposal of the objection. On the 18th of November the parties appeared. The objector stated that he had not had sufficient [254] time to produce certain evidence which he wished to produce. He asked for an adjournment, and this case was adjourned until the 28th of November, with the warning that if he did not then produce his evidence, his claim would be dismissed. He did not appear on the 28th. The Court waited till the 29th, and again till

* Second Appeal, No. 82 of 1896, from an order of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 15th November 1895, confirming an order of Babu Girraj Kishore Dat, Munsif of Haveli, Bareilly, dated the 29th May 1895.

(1) 15 I.A. 123. (2) 17 C. 260. (3) 22 W.R. 39.
(4) 12 C.L.R. 43. (5) 3 A. 504.

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the 30th, and then on the 30th, as he did not appear, his claim was rejected for want of prosecution. On the 23rd of January 1895, the present suit was instituted by the appellant, asking that the auction-sale which had taken place in the interim might be declared ineffective and inoperative. Both the lower Courts have dismissed the suit as barred by the limitation rule set out in clause (*b*) of s. 181 of the Rent Act. The plaintiff now in second appeal urges that the Courts below were wrong in holding the suit to be barred by limitation. He contends that there was no adjudication upon his claim under s. 179 of the Rent Act, and that, therefore, limitation cannot be deemed to run from the date of the order of the 30th November, 1893. In support of his contention, he cites the case of *Kallu Mal* v. *Brown* (1).

The point raised by this contention is one which in our opinion is fully covered by the precedent *Sardhari Lal* v. *Ambika Pershad* (2). In that case their Lordships of the Privy Council remarked that they did not know what had taken place before the Subordinate Judge who made the order, but they go on to observe that, whatever may have happened, "there was an order rejecting the claim brought. It was an order within the jurisdiction of the Court that made it." Their Lordships go on to point out:—"It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought." The same remarks apply here. For cases like the present, s. 181, clause (*b*) of the North-Western Provinces Rent Act, No. XII of 1881, **[255]** supplies the limitation rule and clearly requires that a suit brought in the civil court to set aside an order passed against an objector must be brought by that objector within one year from the date of the order if he seeks to establish his right to the property claimed by him in the Rent Court. Again we have the cases *Khub Lal* v. *Ram Lochun Koer* (3), *Kaminee Debia* v. *Issur Chunder Roy Chowdhry* (4), and *Sadut Ali* v. *Ram Dhone Misser* (5). These two latter cases are directly in point.

As regards the case cited on behalf of the appellant, the facts do not appear to be very fully stated. If it were the intention of the learned Judges who decided that case to lay down that, when an opportunity has been given to an objector to establish his claim and he fails to do so and his objection is thereupon disallowed, he can still bring the same claim after the expiry of the year prescribed by article 11, schedule ii, of the Indian Limitation Act, we should find ourselves unable to follow their decision.

In the present case the claimant came forward asserting his right. The burden of proof was upon him. He was given full opportunity of substantiating his right, but he failed to do so. The order passed was clearly an order adjudicating upon his claim within the meaning of s. 179 of the North-Western Provinces Rent Act, and was an adjudication by a competent Court upon such materials as were before it, and to it as such the limitation rule laid down in clause (*b*) of s. 181 clearly applies. The suit was properly held to be barred. We dismiss this appeal with costs.

Appeal dismissed.

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(1) 3 A. 504.
(2) 15 I. A. 123.
(3) 17 C. 260.
(4) 22 W. R. 39.
(5) 12 C.L.R. 43

1897
JAN. 19.

APPELLATE CIVIL.

19 A. 256=17 A.W.N. (1897) 31.

19 A. 256=17 A.W.N. (1897) 31.

[256] APPELLATE CIVIL.

Before Sir John Edge. Kt., Chief Justice. and Mr. Justice Knox.

ABDUS SALAM AND OTHERS (*Judgment-Debtors*) *v.* WILAYAT ALI KHAN (*Decree-Holder*).*

[19th January, 1897.]

Pre-emption—Decreed pre-emptive price paid into Court by pre-emptor—Subsequent partial withdrawal by a creditor of the decree-holder of the money so paid in.

The holder of a decree for pre-emption paid the decreed pre-emptive price into Court. A creditor of the decree-holder applied for attachment of the money so paid in, and ultimately was allowed by the Court to withdraw a portion of it. After the decree for pre-emption had been confirmed in appeal, the pre-emptor applied for possession, of the pre-empted property. *Held*, that the decree-holder was entitled to obtain possession, and that it was not competent to the Court to pay out to anyone but the person entitled to it under the decree for pre-emption any portion of the pre-emptive price, so long as the decree for pre-emption was not modified or reversed in appeal.

[F., 21 P R. 1902=179 P.L R. 1901; R., 113 P.L.R. 1902=76 P.R. 1902; 93 P.R. 1902.]

THE respondent to this appeal, Hakim Wilayat Ali Khan, obtained a decree for pre-emption, conditional on his paying into Court on or before the 24th of February, 1890, the sum of Rs. 5,290. On the 21st of January, 1890, the decree-holder paid the whole of this amount into Court. The defendant vendee appealed to the High Court. That appeal was decided on the 23rd of May 1892. The High Court substantially affirmed the decree of the Court below. The wording of the High Court's decree was as follows:—"It is ordered and decreed that this appeal be dismissed, that the decree of the Additional Judge of Moradabad be confirmed with this proviso, that upon the aforesaid plaintiff respondent paying into Court the sum of Rs. 5,290, the purchase money, and Rs. 1-9-8, the amount of proportionate costs, aggregating Rs. 5,291-9-8, on or before thirty days from the 23rd of May 1892, being the date of the decree of this Court, he do obtain possession of the property in suit as detailed and specified in the decree of the lower Court, and that the appellants aforesaid and the other defendant in the suit do pay the aforesaid plaintiff respondent the sum of Rs. 285-11-9, the costs recoverable by him in the lower Courts. And it is further ordered that if the [257] aforesaid plaintiff respondent fails to pay the said sum of Rs. 5,291-9-8 within the time as hereinbefore mentioned, his suit shall stand dismissed, and he shall have to pay the aforesaid defendant appellant the sum of Rs. 365-3, the amount of costs incurred by them in this Court and in the lower Court." The decree-holder did not pay in the additional sum of Rs. 1-9-8, but he claimed to set it off against the costs awarded to him. Whilst the appeal was pending in the High Court, one Shadi Ram, who held a decree against Wilayat Ali Khan for Rs. 1243-15-10, applied for execution of his decree by attachment of that amount out of the sum of Rs. 5,290 which had been paid in by the pre-emptor for payment to the vendee. The District Judge, without giving any notice of this application to Wilayat Ali Khan, ordered the amount to be paid to Shadi Ram out of the said deposit. Notice of Shadi Ram's application was given to the vendee, but he made no objections to the application being granted. When Wilayat

* Appeal No. 5 of 1895, under section 10 of the Letters Patent.

Ali Khan applied for possession in execution of his decree, he was met by two objections on the part of vendee, (1) that the pre-emptor had not paid in the balance of Rs. 1-9-8, and (2) that the pre-emption money having been diminished by the sum drawn out by Shadi Ram was no longer sufficient.

The District Judge held that the decree-holder had failed to comply with the terms of the decree of the High Court, and dismissed his application for execution. The decree-holder appealed to the High Court.

This appeal coming before a single Judge was decreed on the ground that the decree-holder had complied with the decree for pre-emption as soon as he had paid in the pre-emption price, and that the subsequent action of the lower Court in paying out a portion of it to Shadi Ram ought not to prejudice the right of the decree-holder to possession. As for the question of the non-payment of the sum of Rs. 1-9-8, the single Judge held with reference to *Ishri* v. *Gopal Saran* (1) that the decree-holder was entitled to set off the amount against the costs payable to him.

[258] From the judgment of the single Judge, the judgment-debtors objectors appealed under s. 10 of the Letters Patent.

Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C.J., and KNOX, J.—The plaintiff in pre-emption paid into Court the amount to satisfy the pre-emptive price and costs, but he appealed to the High Court against the amount decreed. An ingenious creditor of the plaintiff presented an application for the attachment of part of the money paid into Court, and extraordinary to say, he found a Judge who made an order on his application allowing it. Thereupon the amount which he claimed, amounting to Rs. 1,243, was paid out of Court, neither the defendants nor the plaintiff consenting. The plaintiff's appeal was dismissed. He thereupon demanded possession. He was met with the objection that there was not enough money in Court to pay the decretal amount. That was quite true, but it was not the plaintiff's fault. He had complied with the law. It was the fault of the Judge who allowed any one except the defendant in the suit to draw any part of the money out of Court. The plaintiff appealed to this Court, and our brother Aikman, rightly holding that the plaintiff had complied with the decree in pre-emption, held that he was entitled to possession. There cannot be any doubt about it. Whether the unfortunate vendor or vendee, as the case may be, defendant in the pre-emption suit, has now any remedy to get this Rs. 1,243, to which he was lawfully entitled, we need not say. Money paid into Court in a suit cannot be taken out of Court by a creditor of the man who pays it in so long as the suit is pending, or unless the result is that the person who paid it in is held entitled to withdraw the money or some part of it, and then the creditor of the person who paid it in can only have execution against so much of that money as his judgment-debtor would be entitled to take out of Court. Money paid into Court by plaintiff in pre-emption to be paid over in a certain event to the defendant in the suit is in custody of the Court until the result of the litigation is known. We dismiss this appeal with costs.

Appeal dismissed.

(1) 6 A. 351.

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APPEL-
LATE
CIVIL.

19 A. 256=
17 A.W.N.
(1897) 31.

[259] [A similar decision was given in Letters Patent Appeal, No. 23 of 1895, decided on the 20th January 1897, the judgment in which was as follows:—

EDGE, C.J., and KNOX, J.—The decree for pre-emption was complied with by the plaintiffs by depositing in Court the amount decreed. Unless that amount was reduced subsequently on appeal, it could only be paid out to the persons who were entitled to it under the decree for pre-emption, and neither the plaintiffs nor any one else could withdraw a single anna of it unless the pre-emptive price were decreased by the order of the appellate Court. We dismiss this appeal with costs.]

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19 A. 259=17 A.W.N. (1897) 43.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

YARO (*Defendant*) *v.* SANA-ULLAH (*Plaintiff*).*

[21st January, 1897.]

Easement—Light and air—Injunction or damages—Act No. 1 of 1877 (Specific Relief Act), s. 54.

It was not intended by s. 54 of the Specific Relief Act, 1877, that a man should not have an injunction granted to him unless his property would otherwise be practically destroyed if the injunction were not granted.

Where the plaintiff had for over twenty years carried on the business of manufacturing a particular kind of cloth in a certain house, and the defendant built in the neighbourhood of that house in such a manner as to render the plaintiff's house practically useless for the purposes of his manufacture, it was *held* that the plaintiff was entitled to an injunction and not merely to damages. *Aynsley* v. *Glover* (1) and *Holland* v. *Worley* (2) followed. *Dhunjbhoy Cowasji Umrigar* v. *Lisboa* (3) and *Ghanasham Nilkant Nadkarni* v *Moroba Ram Chandra Pai* (4) referred to,

[R., 3 N.L.R. 114 (122),]

THE plaintiff was a weaver carrying on his business in the city of Benares. The defendant owned a house separated from the plaintiff's work-room by a narrow lane. The defendant proceeded to rebuild the wall of his house which was opposite to the plaintiff's house, and built it nearer to the plaintiff's windows than it had been before, whereby, according to the plaintiff, the light coming to the windows of the plaintiff's work-room was intercepted and the plaintiff's business was interfered with. The plaintiff accordingly sued for the demolition of the new wall which had been built by the defendant.

[260] The defendant denied that the plaintiff had acquired any easement of light in respect of his work-room, and denied that he had built the wall in dispute nearer to the plaintiff's house than it was formerly, or that it in any way interfered with the access of light to the plaintiff's windows.

The lower appellate Court (Additional Munsif of Benares) found that the defendant had built his new wall closer to the plaintiff's house than the old one was, but that such action had not interfered with the plaintiff's light, and dismissed the suit.

The plaintiff appealed. The lower appellate Court (Subordinate Judge of Benares) found that the plaintiff had acquired an easement of light,

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* Appeal No. 13 of 1896, under s. 10 of the Letters Patent.

(1) L. R. 18 Eq. 444.
( ) 13 B. 252.
(2) L.R. 26 Ch. D. 578 (585).
(4) 18 B. 474.

which was materially interfered with by the defendant's new wall, and made a decree in favour of the plaintiff for the demolition of the defendant's wall.

The defendant appealed to the High Court and his appeal, coming before a single Judge of the Court, was dismissed. The defendant thereupon appealed under s. 10 of the Letters Patent.

Babu *Satya Chandar Mukerji*, for the appellant.

Mr. *Amir-ud-din*, for the respondent.

JUDGMENT.

EDGE, C.J., and KNOX, J.—This was a suit for an injunction. The plaintiff had been entitled to light and air to the full extent of his window for over twenty years. He carried on the business of a manufacturer of kincob at Benares. The defendant proceeded to build a wall which would have the effect practically of reducing the plaintiff's light to such an extent that he could not carry on his business. The lower appellate Court granted an injunction. It is said in appeal here that the lower appellate Court had no jurisdiction to grant an injunction because it could have awarded damages; and the decision in *Dhunjibhoy Cowasji Umrigar* v. *Lisboa* (1) and *Ghanasham Nilkant Nadkarni* v. *Moroba Ram Chandra Pai* (2) were relied on. In our opinion the rule of law in such cases was correctly laid down by Sir George Jessel in *Aynsley* v. *Glover* (3) and by the late Mr. Justice Pearson in *Holland* v. [261] *Worley* (4). In our opinion it was never intended by the Legislature that a man should not get an injunction unless his property would be practically destroyed if the injunction were not granted. Here there was substantial injury and wrongful injury to the plaintiff's rights. The plaintiff was entitled to the injunction which he got. We dismiss this appeal with costs.

Appeal dismissed.

1897 JAN. 21.

APPELLATE CIVIL.

19 A. 259
17 A.W.N.
(1897) 43

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19 A. 261 (F.B.)=17 A.W.N. (1897) 45.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Banerji, and Mr. Justice Aikman.

SRI KISHEN LAL (*Defendant*) *v.* ATMA RAM (*Plaintiff*).*

[22nd January, 1897.]

Principal and agent—Lambardar and co-sharer—Lambardar collecting rents for co-sharer—Suit by pre-emptor to recover profits accruing between the date of his decree and the time when he obtained mutation of names.

Held that a pre-emptor who had obtained a decree for pre-emption in respect of a share in a pure zamindari village could not successfully maintain a suit against the judgment-debtor co-sharer for the profits of the pre-empted share accruing between the date of the original decree and the date of his obtaining mutation of names, such profits having been collected by the lambardar but not paid over to the judgment-debtor; inasmuch as neither could the lambardar be considered as an agent of the co-sharer, whose possession of the profits was the possession of his principal, nor was there any obligation on the co-sharer to collect the profits and hold them to the use of the plaintiff.

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* Appeal No. 35 of 1895, under s. 10 of the Letters Patent.

(1) 13 B. 252.
(2) 18 B. 474.
(3) L. R. 18 Eq. 444.
(4) L. R. 26 Ch. D. 578 (595).

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JAN. 22.

FULL BENCH.

19 A. 261 (F.B.) = 17 A.W.N. (1897) 45.

IN this case Atma Ram, the plaintiff, brought a suit for pre-emption of certain property of which Sri Kishen the defendant was the vendee. The suit was decreed, and the decree became final in December 1891, when the case was decided by the appellate Court. The plaintiff had, however, in March 1890 deposited in Court the pre-emptive price according to the decree of the Court of first instance.

The suit, out of which this appeal has arisen, was brought by the pre-emptor Atma Ram to recover from the vendee profits of [262] the pre-empted property from the time when he paid in the pre-emption price down to the date of his actually getting mutation of names in his favour on the 10th of May 1882.

The Court of first instance (Munsif of Phaphund) dismissed the suit, finding that the profits claimed had never been received by the vendee, but that they had remained in the hands of the lambardar, from whom the plaintiff might, if he had chosen to take the necessary steps, have recovered them.

The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Mainpuri) dismissed the appeal and confirmed the decree of the Munsif.

From this decree the plaintiff appealed to the High Court. The appeal came before a single Judge, who, on the finding that so long as the pre-emptor had not got mutation of names in his favour the vendee alone could realize the profits, and that the vendee was in default in allowing those profits to remain in the hands of his agent the lambardar, decreed the appeal.

From the judgment of the single Judge the defendant-vendee appealed under s. 10 of the Letters Patent.

Babu *Satya Chandar Mukerji*, for the appellant.

Babu *Bans Gopal*, for the respondent.

JUDGMENT.

EDGE, C.J.—This was a suit to recover money, which, it was alleged by the plaintiff, the defendant ought to have received from a lambardar. The facts are simple. The plaintiff in this suit was a co sharer in a village in which the custom of pre-emption prevailed. The village was a pure zamindari village. Another co-sharer sold a fractional share in the village to the defendant to this suit, who is the appellant in this appeal. Thereupon the present plaintiff brought a suit for pre-emption against the present defendant-appellant, and on the 4th of March, 1890, obtained a decree for pre-emption conditional on his paying within one month into Court the decreed pre-emptive price and certain costs. On the 14th of March, 1890, the present plaintiff paid the decretal amount into the Court. The present defendant appealed against the decree for pre-emption. His appeal was dismissed in December, [263] 1891, and there was no further appeal. On the 10th of May, 1892, the present plaintiff obtained mutation of names in respect of the share which he had pre-empted, and on the 12th of September, 1893, he instituted the present suit for the profits of the share between the 14th of March 1890 and the 10th of May 1892.

The profits of the pre-empted share had been received in due course by the lambardar of the village and had not been paid over either to the plaintiff or the defendant, and neither of them had brought any suit against the lambardar for profits.

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JAN. 22.

FULL BENCH.

19 A. 261 (F.B.) = 17 A.W.N. (1897) 45.

The plaintiff says that the defendant was under an obligation, on the facts stated, to realize from the lambardar by suit or otherwise the share of the profits in respect of the pre-empted share, and he claims to recover that share from the defendant by this suit.

The suit was dismissed by the first Court. The plaintiff's appeal was dismissed by the Court of first appeal. He then brought an appeal to this Court from the decree of the Court of first appeal. His appeal was decided by a Judge sitting singly. The Judge decreed the appeal, holding that the defendant was the only person who could have compelled the lambardar to pay the profits. The learned Judge was also of opinion that the lambardar was in law the agent for the defendant and that the defendant was liable because he allowed the profits to remain in the pocket of his agent.

In my opinion a lambardar is for some purposes the agent of the co-sharers, but it is quite clear to me that he is not an agent of the same kind as an ordinary agent appointed to collect rents. In the case of such an ordinary agent appointed to collect rents, the person who appoints him would be liable for any wrongful acts done in the course of his employment, but that is not the position between a co-sharer and a lambardar. In my opinion it is not correct to say that rents received by a lambardar and not paid out by him in the distribution of profits are held by him under circumstances which would make a co-sharer liable for any misfeasance of the lambardar in the disposition of the rents. It is somewhat difficult to express, but what I mean is that the lambardar is not such an [264] agent for the co-sharers as would make it true in law to say that the rents received by him were in the hands of the co-sharers.

On the other point, as to whether this defendant could or could not have compelled the lambardar to pay over to him the profits of his share, I express no opinion. I think it safer to reserve my consideration of that question until it actually arises and has to be determined, and I do not think it is necessary to determine it in this case, for this reason, that it appears to me immaterial whether this defendant was or was not the only person who could have compelled the lambardar to pay over to him the profits of the share. The defendant had not received any of the profits of the share. The share was not represented by lands in the possession of the defendant out of which he could have made a profit: it merely was represented by a fractional share in a zamindari village. No question of mesne profits could arise; and, in order to hold that the defendant was liable under the circumstances, it would be necessary to show that there was, either by statute law or by contract or by general principles of jurisprudence, an obligation cast upon the defendant to collect these profits from the lambardar and to hold them for the plaintiff. The statute law, so far as I am aware, imposes no such obligation. The statute law enables a plaintiff, as in this case, to avail himself to the full of the decree which he has obtained, but it does not compel a defendant to act as trustee or as an agent for the plaintiff while the plaintiff is sleeping over his rights under the decree. There is no question of any contract between the parties out of which an obligation could arise, and, upon general principles, as the only possession of the property which the defendant could have had was the receipt of the profits which the defendant did not receive, and, as I am unaware that the unsuccessful defendant in a suit is obliged to act as the agent for the successful plaintiff to collect what the plaintiff may be entitled to collect himself, I cannot see where any obligation arose.

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I would allow this appeal, and, setting aside the decree of this Court, I would dismiss the appeal to this Court, with costs of this appeal and of the appeal to this Court, and restore and affirm the decree of the Court of first appeal.

[265] KNOX, J.—I concur in what the learned Chief Justice has just said that the defendant in this case is not liable. The plaintiff got his decree in March, 1890, which he could at once have enforced, and under which he could have taken possession. He did not do so, and he seeks to make the defendant vendee liable on the ground that the defendant was in possession and had the opportunity of realizing the profits. As a matter of fact, it has been found that the defendant received no profits at all, and I doubt whether he could in any case have recovered them from the lambardar. In any case I hold that he was not liable. I would allow this appeal, and concur in the order proposed.

BANERJI, J.—I am entirely of the same opinion as the learned Chief Justice and have nothing to add.

AIKMAN, J.—I concur with the learned Chief Justice in thinking that this appeal should be allowed. It seems to me that what led the learned Judge who decided the appeal to this Court to adopt the view which he took was the impression in his mind, as set forth in his judgment, that the defendant alone could compel the lambardar to pay to him the profits for which the plaintiff sues. If this view were correct, much could be said in support of the learned Judge's decision. But it seems to me to be a mistake to say that the defendant in this case was the only one who could compel the lambardar, in whose hands the profits were, to pay them. It is extremely doubtful whether he could have compelled the lambardar to pay. My own view is that a suit by the defendant-vendee whilst the decree dispossessing him was in force would certainly have failed. But, in any case, I would hold that the plaintiff could have recovered the profits from the lambardar had he taken the proper steps. By the force of the decree which the plaintiff had obtained, and by his payment into Court of the purchase-money on the 14th of March 1890, his title to the possession of the property, so far as the first Court was concerned, became from the date of payment absolute. It is true that the defendant vendee did file an appeal against the decree in the pre-emption suit, but that fact alone would not have prevented the successful plaintiff from **[266]** obtaining possession. The suit is to recover profits for the period which elapsed between the date on which the plaintiff paid the pre-emptive price into Court and the date on which he got his name recorded in the revenue papers. It is true that, until he got his name recorded in the revenue papers, he could not have maintained a suit in a Court of Revenue for the profits, but I cannot see that there was anything to prevent him suing the lambardar in a Civil Court to recover these profits. The tenure of the vendee after the pre-emptor had paid the money into Court was, it must be admitted, of a most precarious nature, as he might any day have been ousted by the decree-holder. Under these circumstances, I fail to see that he was under any obligation to take steps to realize from the lambardar the profits of the share, which had ceased to be his; and, as I have said above, my opinion is that the lambardar might have successfully resisted any attempt by him to realize these profits. The lambardar was not an agent for Sri Kishen, the defendant, personally, but was only an agent for him whilst he was a co-sharer in the village, and, when he ceased to be such, any agency which might previously have

existed came to an end. For these reasons, I concur in thinking that this appeal should be decreed, and I concur in the order proposed.

BY THE COURT.—We allow this appeal, and, setting aside the decree of this Court, we dismiss the appeal to this Court, with costs of this appeal and of the appeal to this Court, and restore and affirm the decree of the Court of first appeal.

Appeal decreed.

1897 JAN. 22. FULL BENCH.

19 A. 261 (F.B.) = 17 A.W.N. (1897) 45.

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19 A. 267 (P.C.) = 24 I.A. 1 = 7 Sar P.C.J. 117.

[267] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris, and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

NAWAB IBRAHIM ALI KHAN (*Defendant*) *v.* UMMAT-UL ZOHRA (*Plaintiff*).

[20th November and 9th December, 1896.]

Evidence—Muhammadan law—Alleged gift by a Muhammadan father to his son.

Government securities were indorsed and delivered by a Muhammadan father to his son in the presence of the local Treasury Officer. On the question, raised after the father's death, whether this was intended to transfer the ownership, or was a *benami* transaction, leaving the true ownership in the father, the courts below had drawn different inferences from the proved facts. The first Court decided that the ownership had been changed, the notes having been given with only a reservation of the temporary use of the interest. The High Court found that the ownership remained in the father.

On a review of the position of the parties at the time, and of their subsequent conduct down to the father's death, the Judicial Committee affirmed the judgment of the High Court, on the evidence, pointing out that the first Court's theory of the reservation differed from the case alleged by the defendant and from that actually made out by the plaintiff at the hearing.

[R., 27 B. 31 = 4 Bom. L.R. 754; 9 A.L.J. 300 = 14 Ind. Cas. 61 (62).]

APPEAL from a decree (27th February 1894) of the High Court, reversing a decree (30th September 1891) of the Subordinate Judge of Agra.

This suit was brought by Begam Ummat-ul-Zohra to obtain, against her elder brother, her share, valued at Rs. 21,679, of the estate left by their father, Nawab General Muhammad Hasan Khan.

The question on this appeal was whether certain Government promissory notes, and cash representing them, were part of the estate of the Nawab at his death, or, by reason of their having been given by him while living to his son, belonged to the latter.

The late Nawab made a will, as to which the facts are stated, as well as all the other facts in the case, in their Lordships' judgment.

There were other children of the late Nawab, another son, and another daughter, besides the plaintiff and the defendant.

On the 28th September the late Nawab executed a power appointing his elder son his agent to draw the interest on the [268] promissory notes and to get them renewed. On the 5th March 1885, he indorsed and delivered them to his elder son in the presence of the Treasury Officer at Agra. They were renewed in the name of that son on the 21st March in the same year, and retained by him in his possession.

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DEC. 9.
PRIVY COUNCIL.
19 A. 267 (P.C.) = 24 I.A. 1 = 7 Sar. P.C.J. 117.

On the 25th June 1886 the father died. The promissory notes, or their value in cash, Rs. 1,01,000, were the only part of his estate yielding any income, and rest of his property was of little value as compared with this part of it. In 1887 suits were brought by the daughter, Hazrat Begum and the son, Muhammad Ali Mirza, to have the notes declared part of their father's eatate. These suits ended in a compromise by which the plaintiffs got decrees for parts of their respective claims. By agreement of the parties to the present suit, instituted by the Begum Ummat-ul Zohra on the 5th July 1890, the evidence taken in those suits was treated as evidence in the present one. The defendant's case was that the whole of the Rs. 1,01,000 had been transferred to him as a gift followed by delivery, and was complete by law The Subordinate Judge, having framed an issue upon this defence found that the transfer of the 5th March 1885, by the father to the son, was not a merely formal proceeding by which it was not intended to vest the property in him but was an actually operating gift, accompanied by possession of the principal money. This gift had been subject to certain reservations of the interest upon the notes for the donor's lifetime, and after his death for certain stipends payable out of that interest. The Judge found that the notes did not form part of the estate left by the father; and decreed the plaintiff's claim only for her proportionate share in the sale proceeds of a house and moveables, with other rights of property, the value of such share amounting only to Rs. 1,757. He directed that each party should pay their own costs. His judgment referred to *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1), decided in 1867, a case which had been relied on for the defence. The judgment stated that to be a case **[269]** in which the father had transferred to his only son Government papers by indorsing them to the son, but had reserved to himself the use of interest thereon during his lifetime. On that state of things it had been held by this Committee that the father intended to transfer the promissory notes with the above reservation, and that, under the circumstances, the validity of the intended transfer was not affected thereby.

The plaintiff appealed to the High Court, and the defendant filed a cross-objection to obtain his costs.

A division Bench (TYRRELL and BLAIR, JJ.) found "that the "defendant was not the exclusive owner of the promissory notes once "belonging to his father; and that in June 1886 the whole of the notes "formed part of an unalienated estate of General Muhammad Hasan "Khan." The appeal was decreed with costs in both Courts, and the defendant's objection dismissed.

On this appeal, Mr. *H. Cowell* and Mr. *G. E. A. Ross* for the appellant argued that the indorsement and delivery of the notes passed the title thereto, in accordance with Act XXVI of 1881, s. 50; and that the presumption, in the absence of proof of their having been subjected to a trust for the donor, was that the beneficial interest therein passed to the donee. The case of *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) showed that by Muhammadan law a valid gift could be made with a reservation by the donor for himself. Here the evidence was that a reservation was made of the usufruct, not continuing, but only for the life of the donor, and until certain payments should have been made after his death. Till then the gift would be of the principal. That, on the other hand, a mere nominal transfer should have been made, was not

(1) 11 M.I.A. 517.

borne out by the evidence, express declarations by the father having been made which would be inconsistent with that intention on his part. Inferences from his conduct did not outweigh his own expressions, and such inferences were consistent only with the reservation by him of a temporary, and limited, interest for himself and his own purposes.

[270] The respondent did not appear.

Afterwards, on the 9th December, their Lordships' judgment was delivered by LORD HOBHOUSE.

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DEC. 9.
PRIVY COUNCIL.
19 A. 267 (P.C.) = 24 I.A. 1 = 7 Sar. P.C.J. 117.

JUDGMENT.

The appellant in this case, who was the defendant in the original suit, is the eldest son of the late Nawab General Muhammad Hasan Khan, who in these proceedings has been commonly called "The General." The respondent, who was plaintiff below, and who does not now appear, is his eldest daughter. He died on the 25th June 1886, leaving also another son and another daughter. This suit was instituted by the plaintiff to obtain her legal share of the General's estate. The defendant does not dispute her right to that, but as regards a sum of Rs 1,01,000 secured by Government promissory notes, and a sum of cash the produce of those notes, he contends that they form no part of the General's estate, but are his own property by virtue of a gift made by the General in his lifetime.

The other son and daughter also sued for their shares, and were met by the same plea. They obtained decrees in their favour from the then Subordinate Judge of Agra, but pending appeals to the High Court compromises were effected; and these previous suits are of no importance now except for the circumstance that evidence taken in them has by consent been used in this suit.

As regards the overt acts of the parties there is not much dispute; but the Courts below have drawn different inferences from the proved facts. Notes of the stated value were undoubtedly transferred by the General to the defendant on the 5th March 1885, and were afterwards renewed by the defendant in his own name. The question is whether this transaction was intended to be a transfer of the true ownership or was a *benami* transaction, leaving the true ownership in the General. To determine that it is necessary to see, first, what was the position of the parties at the time, and, secondly, how they conducted themselves between that time and the General's death.

It is mentioned by both the Courts below that in the year 1876, the General executed a registered deed conveying to the defendant **[271]** his whole property, including the promissory notes. In the former suits the defendant rested his title on that deed. But it was shown that at the same time the General made a will, showing that his heirs were still to get their shares out of the transferred property. The defendant then gave up his claim under that deed, and he has not renewed it. But he and his legal adviser Mr. Willis have in their evidence represented the General's endorsement of the notes as being a completion of the gift left imperfect by the transfer-deed of 1876. The High Court on the other hand have referred to the same transfer as showing that the General then intended that a transfer, on the face of it complete, should not interfere with the claims of his other heirs.

On the 28th September 1880, the General executed a deed by which he appointed the defendant to be his attorney in the Treasury Office at Agra to realize interest under promissory notes, and to get the specified notes renewed. The defendant after that drew the interest, but the

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General had the disposal of it. Such was the position of affairs up to the 5th March 1885. It should be added that the notes were at this date, and continued to be, the sole source of income, to the General. He had some other property, but it produced no income, and it was worth less than Rs. 20,000 to sell. It is also clear that the General had become very infirm in more than one way.

The only material witnesses who speak to the circumstances of the endorsement are the defendant himself, his pleader Mr. Willis, and Mr. Hollingbery the Treasury officer in whose presence it was made. There is indeed another witness called, one of the clerks of the Treasury, who professes to have been present, and who relates particulars more in the defendant's favour. But his story is on the face of it suspicious; it is not consistent with the accounts either of the defendants or of Hollingbery; and both the lower Courts pass it over in silence. Their Lordships do the same.

Mr. Willis was consulted by the General about his affairs at various times prior to March 1885. He was informed of the **[272]** transfer-deed of 1876, and of the power-of-attorney. He pointed out that endorsement was required for complete transfer of the notes. Then he says :—

"I suggested to him that after he had endorsed the promissory notes "he should make over possession of the notes to his son, Ibrahim Ali "Khan, and in the presence of Mr. Hollingbery and his son to say that "he had gifted them to him of his own free will, and that they formed his "exclusive property, and that neither the General nor his heirs or relatives "have any claim or right over them. From what I knew of the Muham- "madan law I thought that that would be sufficient for a gift."

The defendant says that he and his father went alone to Hollingbery's office and stayed half an hour. He further states :—

"When my father went to Mr. Hollingbery there was no talk with "him, but when my father's hand was shaking at the time of signing "Mr. Hollingbery said to me 'Guide your father's hand.' In reply to the "question regarding the conversation which the witness' father had in "the office before Mr. Hollingbery, in respect of the gift (the witness, "stated) : 'This conversation did not take place between me and my "'father, but it took place between my father and Mr. Hollingbery. "'My father was asked by Mr. Hollingbery whether he wanted to give "'the notes in gift, and my father replied, yes, he wanted to give them "'in gift. This conversation took place in English. My father could "'speak broken English. I was all the time sitting there quite silent.'"

A little afterwards he says : "All that Mr. Hollingbery said to me is "what I have stated above in English. Besides this there was a talk n "English between my father and Mr. Hollingbery, and what is usual in "a gift was also done."

The defendant's examination extended over eight days between the 22nd of November 1887 and the 11th of January 1888. He gave the evidence above quoted on the 28th of November. By the 10th of January it occurred to him to say something more. On that day he was examined by Willis and answered a question about the endorsements. The following is the Judge's note :—

[273] "After having given this answer to the question, he also added : "'He made them over before Mr. Hollingbery, the Deputy Collector, and "'said : I make a gift of these to Muhammad Ibrahim Ali Khan. They "'belong to him, and in them I or any member of the family has no "'right.'"

Their Lordships cannot believe that the defendant did not give at first a full account of what was said: or that the important addition he made six weeks afterwards was not a repetition of what was said by or to Mr. Willis, rather than of his father's declaration.

Mr. Hollingbery was examined on the 19th January 1888. He deposes as follows:—

"General Muhammad Hasan Khan appeared before me when he "signed the endorsements. I cannot recollect what conversation passed "between us at the time. I remember his son (pointing to Ibrahim Ali "Khan) was with him at the time. I remember so far that I understood "the transferor to say that, owing to his extreme old age, he had trans- "ferred the notes to his son. Judging from the renewal certificate, the son "must have taken renewed Government notes instead of these. General "Muhammad Hasan Khan signed the endorsement in my presence. He "did so in my official capacity as Treasury Officer.

"To Court (Mr. Ball):—To the best of my recollection the General "signed the endorsements unaided. If any one had held his hand, and "he had written with his assistance, I would have refused, or at least "certainly noted that fact in making the certificate."

He was examined again on commission in this suit, but added nothing. It is clear that he knew nothing about the important declaration comprised in the defendant's afterthought.

If the history of the case stopped at this moment, it would present some doubtful considerations. In 1876 the notes were the subject of a *benami* transfer to the defendant. In 1880 he received power to draw the interest, but when drawn it was distributed by the General. In 1885 the General under Willis' advice perfected the legal transfer to the defendant. He did so, as Hollingbery **[274]** understood from him, on account of his extreme old age. Old age may be a good cause for transferring such dominion as enables the transferee to deal with others; but whether it would induce the General to strip himself bare, and to leave himself and the rest of his family at the mercy of his eldest son is another consideration. If, as Willis avers, he was then advised to make a formal public declaration disclaiming all interest for himself and his heirs, he did not do it. Considering the extreme readiness of Indian owners of property to admit the idea of *benami* transfers, and considering what the General had already done with this very property, it would be at least very doubtful whether the transaction of 1885 was not of the same character with that of 1876. Then comes the question what light is thrown on the transaction by the subsequent conduct of the parties.

Immediately after the endorsement the General set about making a will, which was prepared by Mr. Willis. That gentleman tells us that the General and the defendant came to his office, where the parties conferred.

"The General wound up by saying: 'Bear witness, Mr. Willis, that "I have gifted the notes to Nawab Ibrahim Ali Khan, and that these are "his property and that neither I nor my *khandan* have any right or "claim over them.' These words he repeated twice. On both occasions "the eldest son, Ibrahim Ali Khan, had come with his father."

He is substantially corroborated by the defendant. If these declarations could be taken as they are stated, and as being a true expression of the General's mind, they would be very important. But they are so

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inconsistent with the overt acts which followed that they cannot be relied on; and neither of the Courts below has relied on them.

The will was duly prepared, and on the 15th of July it was signed. By it the General gives all his property to the defendant, subject to payments which he directs the defendant to consider as a trust or charge on the property bequeathed. These payments consist of life annuities amounting to Rs. 1,700 a year, and of [275] annuities and other payments, either in absolute perpetuity or of a permanent nature, amounting to Rs. 910 a year. The defendant says that his income from the notes is about Rs. 3,662 a year. Making full allowance for the facts that life annuities to the extent of Rs. 420 a year, given to the defendant's wife and daughters, may be discontinued at his discretion, and that there was some property which, though producing no income, might be sold to meet part of the charges, it is clear that the General looked to the notes as the source of payment. Willis can suggest no other source. He says:—"I have heard of nothing else yielding an "income except these promissory notes. The will mentions no source from "where the monthly allowances and other charges were to be paid. I "cannot suggest any other income but the interest of the notes. The "Government promissory notes were excluded from the description of the "properties given in the will. I asked the General from what source these "charges and allowances were to be paid. He said his son would pay "them from his own income. At that time I did not know if Ibrahim "Ali Khan had any income independently of the notes. Do you now "know if he had any? I don't know." It is impossible to believe that the General looked on the defendant as the true owner of the notes when he was making so large an inroad on them. The defendant says that the will was read out in his presence, and that he did not object to any of the clauses in it. In point of fact the will has never been treated as valid in law. Its importance consists in the light it throws on the intentions of the General.

Then comes another important piece of evidence. The General was in the habit of making out monthly statements of amounts payable to his family and servants, from himself downwards, and of paying those amounts. That practice was continued after the endorsement just the same as before. So far as the recipients could see or know, the money remained the money of the General.

Being examined on this point on the 24th November the defendant said:—"The members of the family and servants used [276] "to receive "their pay from my father, *i.e.*, he used to pay them with his own hand. "So long as he was alive he sent for the servants and the members of the "family and the relations, and paid them with his own hands." That is quite intelligible if the General remained the master of the income; otherwise not so easily intelligible.

Between the 24th November and the 11th January the defendant, probably being advised that his statement was damaging to him, sought to modify it. In answer to his own pleader, Willis, he says:—

"Dr. Mukand Lal was our family doctor. I used to pay his money "and used to have it paid by my father. Out of reverence and respect, I "used to have it paid through him. Similarly, after the transfer of the "notes, I used to pay the monthly allowances fixed for my brother and "other members of the family as well as the servants; but I used to have "the payment made through my father. Besides reverence and respect,

"there was this special reason for making payments through my father, "that if money had not been paid through his hands, those persons should "not have obeyed his orders.

"*Q.*—Is there any special reason why they should not have obeyed "his order?

"*A.*—He had transferred the notes to me."

The truth of those assertions it is impossible to test. As far as overt acts went, the General remained paymaster to the end.

The Subordinate Judge, not the same official who tried the previous cases, found in favour of the defendant. He thought indeed that the facts subsequent to the endorsement of the notes tell against the defendant. But he held that they admit of explanation. His theory is that the General, though giving away the notes, reserved to himself the right of using the interest during his lifetime and of charging the income with certain bequests to be paid after his death. He made a decree accordingly, giving the plaintiff her share of the general estate, but no part of the notes or cash.

[277] The High Court came to a different conclusion. They point out that the Subordinate Judge's explanation is a mere theory without evidence. Their Lordships add that it is against the evidence of the defendant and his pleader. Their case throughout has been that the gift was complete on the 5th of March 1885. Both were examined closely upon the circumstances of the endorsement, and both asserted an absolute gift divesting the General of all interest in the notes. From beginning to end, neither in pleading nor in evidence, do they give a hint of the very peculiar, and very vague, bargain now suggested. The case actually made has in the judgment of both Courts broken down. It is hardly right to invent a new case when the judgment comes to be delivered. At all events there is no material evidence except such as has been stated above. In their Lordship's judgment the conduct of the parties after the endorsement removes every doubt which might otherwise have affected that transaction, and leaves it certain that the General remained the true owner of the notes.

Their Lordships will humbly advise Her Majesty to dismiss this appeal and affirm the decree of the High Court.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers*.

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PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Allahabad.*]

BITTO KUNWAR (*Appellant*) *v.* KESHO PRASAD MISR (*Respondent*).

[4th December, 1896 and 6th February, 1897.]

Act No. II of 1882 (*Indian Trusts Act*), *ss*, 63, 64—*Trust not established—Civil Procedure*, *s* 13—*Res judicata not made out.*

A claim made for a share of property by inheritance from a deceased relation who had been in joint possession of it with the defendant, was met by the

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defence that the estate had been jointly held for religious and charitable purposes under a will, the deceased having had no beneficial, or heritable, interest. The defendant alleged that the original owner of the property had bequeathed the property in trust for these purposes. The claimant alleged a revocation of the will, and denied that there was such a trust.

The judgment of the High Court, decreeing the claim, observed that, even assuming that there had been a trust under the will, recognised by the deceased and the defendant, the property which had come into their possession had been [278] by them appropriated, from the first, to their own purposes, and had been so long held by them adversely to the trust title, that the defendant could not now allege that there was no beneficial interest transmissible by inheritance. Upon this the Judicial Committee pointed out that no trustee could have actually acquired a title, by such an appropriation against the trust. Indian Trusts Act 1882, sections 63 and 64. They added that, at the same time, the judgment of the High Court had come to the right conclusion, for the will, and the trust alleged had not been established.

One of the contentions upon this appeal was that the plaintiff was estopped from denying the existence of a trust by there having been a judgment of the High Court, in a prior suit, between the present defendant and the widow of the deceased, that judgment having stated that the trust had been recognised by him who was now defendant.

Held, that this was not within section 13, Civil Procedure, the matter not having been tried and determined in that suit.

Held, also that another prior judgment, in a suit brought by others interested in the trust, which judgment found the will to have been revoked, was admissible, though not conclusive, evidence against him.

[F., 25 A. 546(576); 35 C. 701=7 C.L.J. 563=12 C.W.N. 657; 5 Bom L.R. 230 (232); 9 C.L.J. 597=12 C.W.N. 739 (745)=6 M.L.T. 364 (368); R., 24 B. 591=2 Bom. L.R. 386; 25 C. 522; 4 C.W.N. 63 (65); 9 C.W.N. 402 (414); 5 Ind. Cas. 325 (329).]

APPEAL from a decree (6th June 1889) of the High Court, affirming a decree (10th December 1887) of the Subordinate Judge of Benares.

In this suit (24th March 1886) the present respondent sued Sheodial Tewari, also called Bachcha Tewari, and so named in the judgment, who died on the 12th June 1895, pending this appeal, and who was now represented by his widow, Bitto Kunwar. A co-defendant, Raja Ajit Singh, was a purchaser of some of the property in suit. The claim, valued at Rs. 54,000, was that the plaintiff, on the death of Mitho Kuar, widow of his cousin Ram Kishen Misr, had inherited a half-share of revenue-paying villages in the Jaunpur, Azamgarh, Ghazipur and Benares Districts with houses in Benares. That share had been held by Ram Kishen Misr at his death and was now in the possession of the defendant Bachcha Tewari. The whole had been acquired by Ram Kishen's maternal grandfather, Bhawani Prasad Tewari, conjointly with his brother Devi Prasad Tewari. The brother died before Bhawani, who died in 1842, leaving no legitimate offspring.

The principal question raised on this appeal was whether or not the share sued for was subject to a trust for religious and [279] charitable purposes, under a will made by Bhawani in 1842. If so subject, there would have been no transmissible right in Ram Kishen.

The plaintiff made title thus:—Baijnath Misr, father of his first cousin Ram Kishen Misr, had married a wife, of the Tewari family, Sodha Kuar, daughter of Lachho, sister of Bhawani Prasad Tewari. Ram Kishen Misr was their son. Thus Ram Kishen was on his mother's side, great nephew of Bhawani.

The relationship is thus shown :—

KAULAPAT TEWARI.

Debi Prasad Tewari, Rani Kuar and Dharma Kuar, wives.	Bhawani Prasad Tewari, without issue.	Musammat Lachho, daughter. → Musammat Sodha Kuar, daughter, married to Baijanth Misr. → Ramkishen Misr.

MAYA RAM.

SHEODIN MISR.

Baijnath Misr, husband of Sodha Kuar. → Ramakishen Misr.	Madho Misr.	Prayag Misr.	Bhondu Misr. → Kesho Prasad Misr, plaintiff.

The defendant Bachcha Tewari was the grandson of Hemnath Tewari, brother to Kaulapat Tewari, father of Bhawani; to whom, therefore, Bachcha Tewari was first cousin, once removed.

After the death of Bhawani, his brother's, Debi Prasad's widows, Rani Kuar and Dharma Kuar, together with his sister's grandson, Ram Kishen Misr, possessed the property, keeping up a temple to Mahadeo, and a bhandara, or rest-house for devotees, both of which Bhawani Prasad had founded. Disputes having arisen, as to the right to inherit the estate, between those persons and Bachcha Tewari, an agreement was arrived at, and executed on **[280]** the 4th January 1850. The agreement recited that, on the death of Bhawani Prasad, his brother's two widows had adopted Ram Kishen, and made over all the zemindari documents to him, and that, on Dharma Kuar's death, Rani Kuar had her own and the name of Ram Kishen entered, and they were in possession; that a dispute had arisen with this appellant, a cousin of Bhawani Prasad, and to avoid further quarrels they had settled the matter by agreeing that Ram Kishen should be the owner of one-half and this appellant of the other half of all the property; that the name of Ram Kishen should continue as the lambardar; and the name of this appellant should be substituted for that of Rani Kuar; the management of the ilaka remaining with Ram Kishen. "He should manage the ilaka either by "direct management or by a lease, and after paying the Government "revenue meet the family expenses, the bhandara expenses, the expenses "of the servants and others as fixed since the time of the deceased Tewari, "our common ancestor."

This appellant contracted not to transfer his half-share; alleged that there had been no mismanagement on the part of Ram Kishen; "as the expenses, &c., have been fixed by our ancestor" with reference to the produce of the ilakas; in future, too, Ram Kishen was not to be called upon to render accounts.

Also the agreement stipulated:—"We further agree that Lala "Avadh Lal, who is an old agent appointed by our ancestors, shall

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" continue to help us, and manage the estate, as he has been doing since " the time of the Tewari Sahib, and we shall manage the house and the " estate with his advice. Should there be any difference among us, we " shall be guided by the advice of the said Lala, and shall not disobey " him."

Ramkishen died on the 22nd of January 1870, being at that time the recorded joint proprietor with Bachcha Tewari. Mussammat Mitho, his widow, succeeded for her widow's estate to Ramkishen's share. She died in 1884. On her death Kesho Prasad Misr claimed in this suit, as cousin of Ramkishen, to be entitled as reversioner to the half-share held by him.

[281] The plaint alleged that the will of 1842 had been revoked by the testator; and that the widows and Ramkishen, who lived as a joint family, had obtained proprietary possession, keeping up the temple, but taking the surplus income. The plaintiff's construction of the agreement of 4th of January 1850 was that Ram Kishen and Bachcha Tewari were to be the proprietors, holding possession in equal shares.

The written answer of the defendant was to the effect that the will had not been revoked, but had been acted on. The appointment of Avadh Lal to be the executor was insisted on, and the recognition of his authority by the agreement of the 4th of January 1850, as constituting a recognition of the trust.

The issues raised the principal question, what right had Ram Kishen possessed? Was the will rovoked?

At the hearing several records, of which the principal were the following, were put in evidence:—

The decision of a Division Bench was given on the 27th of February 1878 as follows:—

" The agreement recognized the will of Bhawani Prasad Tewari, " vested the estates in Ramkishen and Bachcha Tewari as trustees to carry " out the provisions of the will, and secured to Ramkishen the manage- " ment of the property, including the right to raise the necessary funds " by *zar-i-peshgi* (mortgage); but there was no provision either that the right " of management or the right of mortgage should devolve on his heirs. " Consequently, Musammat Mitho Kuar was not competent to charge the " estate, and the appellant is entitled to the relief claimed by him," and so allowed the appeal with costs.

A suit was brought in 1880 by the managers of the temple, founded by Bhawani Prasad Tewari, against Bachcha Tewari and a mortgagee from him, to set aside the mortgage.

Bachcha Tewari did not appear to defend.

The Judge found that the suit was collusive and that the will had been revoked. A majority of the Judges of the Bench which considered this case, after a difference of opinion between the [282] Judges of a Division Bench on the case, found that the will had not been proved to have been in existence at the death of the alleged testator. The particulars fully appear in their Lordships' judgment.

In the present suit the Subordinate Judge found that Bachcha Tewari and Ram Kishen Misr had been in possession of the estate left by Bhawani in equal shares.

He was of opinion that the agreement did not recognize the will, and did not constitute Ram Kishen a trustee. He held that the plaintiff was not estopped by the decree of February 27th, 1878, the High Court having in a later suit decided against the will.

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The High Court (EDGE, C.J., and TYRRELL, J.) on appeal, affirmed this decision, giving judgment as follows :—

"It appears to us that, in 1850, when Ram Kishen and the defendant took this property and executed the deed of the 4th of January 1850, they were plainly taking the property for their own purposes, and not for the purposes of the trust, and that they never had any intention of acting as trustees, or holding the property otherwise than as adversely to the trusts of the will. The deed of 1850, although it alludes to some expenses which were to be met as theretofore, was a deed by which those two, as far as they could, appropriated the trust property to their own private uses.

"There is ample evidence on this record that those parties never intended to deal with the property as trust property, and that they were from a very early period acting adversely to the trusts of the will. We may refer to the petition of the present defendant of February 4th, 1856 (document No. 352 on the record), as an example. That was a petition for partition, and there the present defendant represented that he was entitled to a moiety of the property in his own right, and that Ram Kishen was entitled to the other moiety. He says, as one ground for his request to have the property partitioned, that as the mahal was joint there was generally a risk of its being sold by auction or farmed out. Here we have one of the so-called trustees, asking [283] for a partition of the trust property on account of the inconvenience which arose from its being held jointly with his co-trustee. We are of opinion, unless we are bound by the judgment of February 27th, 1878, that Ram Kishen and the defendant never held or volunteered to hold in any sense as trustees, and that in fact their holding was from the first adverse to the trust title. Does then the judgment of February 27th, 1878, conclude this question? It appears to us, for two reasons, that it does not. That was a suit in which the present defendant sued Musammat Mitho and her mortgagees for a declaration that she had no right to mortgage, and that the mortgages were invalid. Looking at his plaint and his supplementary statement, we find that he did allege that the will of 1842 had been executed, and that he did so set up that will with the object only of showing that under it Musammat Mitho had no power to mortgage—a contention which was prefectly correct, independently of any question of trusteeship. He did not there raise any question of trust property or trusteeship. He went on to set up what was, on paper at least, the foundation of his titles; that was the deed of January 4th, 1850. He could not have set up the foundation of his title, the will of 1842, because his title and his enjoyment were in violation of the terms of that will. Apparently, the will was alluded to, either as a matter of history, or to show that the annuitants under that will had no power to assign. So far as the will was concerned, the defences of the defendants put the will aside, either as a document which was immaterial, or as a will which had been revoked. That is the effect of the pleadings in that suit, so far as is material. The Subordinate Judge framed six issues in that suit. The sixth issue, which was 'whether the will made by Bhawani Prasad was in force, or whether he revoked the deed in his lifetime,' was the only issue which apparently referred to the will. That issue does not suggest any question in relation to trust or trusteeship, and obviously from his judgment, Rai Bakhtawar Singh, the then Subordinate Judge, did not consider that any question of trusteeship was before him. He looked at the will to see whether [284] the widows of Bhawani Prasad and Debi Prasad were entitled or forbidden to transfer. From the decree in that suit the present defendant, Sheo Dial, appealed. There was nothing in his grounds of appeal to

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suggest any question of trust or trusteeship, and so, as far we can see, no question of that kind was raised in the suit until the Judges of this Court construed the deed of 1850 as a deed which vested the estate in Ram Kishen and the present defendant as trustees to carry out the provisions of the will. The real question before them was whether, under the deed of 1850, Musammat Mitho, as the childless widow of Ram Kishen, could mortgage the property, or any part of it. The deed of 1850 certainly does not purport to vest the estate in Ram Kishen and the now defendant as trustees to carry out the provisions of the will, nor did it purport on the face of it to recognise the will of 1842. We are of opinion that the finding as to trusteeship of this Court in the judgment of February 27th, 1878, was not an issue which the parties had raised or intended to raise; that it was not raised in the Court of first instance, and, if raised at all, was raised for the first time when those learned Judges were delivering their judgment. Under these circumstances, we are of opinion that the judgment of February 27th 1878, has not concluded this matter. It is possible that this question of trusteeship was introduced into the judgment owing to the fact that, on January 21st, 1876, one of those Judges had considered that Musammat Mitho Kuar and the now defendant could not, by the deed of 1850 alone, destroy the trust created by Bhawani Prasad. We have been pressed with certain cases, *viz.*, *Katama Natchier* v. *The Raja of Shivagunga* (1); *Nand Kumar* v. *Radha Kuari* (2); and *Brammoye Dassee* v. *Kristo Mohun Mookerjee* (3). These cases would, of course, only apply if the finding of February 27th, 1878, was a finding upon a matter in issue in that suit. The cases to which we have been referred were all prior to the passing of the Specific Relief Act of 1877, and s. 43 of that Act is the second ground on which we hold that the finding [285] of the 27th February 1878 is not binding as between the parties here. We have said that the plaintiff here does not claim through Musammat Mitho at all. He claims through her husband an estate which, he says, he became entitled to on her death. We have not thought it necessary, and indeed the points were not argued at any length before us, to consider whether the alleged will of 1842 ever was revoked. The majority of a Full Bench of this Court has found against it, and the defendant himself executed a mortgage, which was in issue in another suit, and in which he alleged it was waste-paper. We dismiss the appeal with costs."

On this appeal, preferred by Bachcha Tewari and continued by his widow.

Mr. *C. W. Arathoon*, for the appellant, argued that there was error in the decisions below, and that it should have been decided that Ram Kishen Misr and Bachcha Tewari were not competent, if even they had ever intended—a fact which was wrongly found below—to appropriate the property and bring the trust to an end. The agreement of 1850, on its true construction, recognised that the property had been rendered subject to a trust, and on their taking possession they had become bound by the requirements of that trust. Moreover, the appellant could rely upon the decision of the 27th of February 1878, as well as on an earlier judgment, that the will was in operation, and that the property was subject to the trust. The judgment of the High Court in 1878 constituted the matter to be *res judicata*. The decision, which was adverse to the appellant, at which a majority of the Judges of the Bench had arrived in

(1) 9 M.I.A. 539 (543). (2) 1 A. 282. (3) 2 C. 222.

1885 was passed in a suit which the Subordinate Judge had found to be collusive, and upon which the present appellant's husband had not appeared to defend. The latter decision was in no way binding upon the appellant. It was, further, a strong point in favour of the existence of the trust that there was no evidence of the revocation, or the alleged destruction of it by the testator himself. It had been set up by Ram Kishen, as well as others, and the evidence went far to show that some at least of its provisions had been carried out.

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JUDGMENT.

[286] The respondent did not appear. On a subsequent day, February 6th, their Lordships' judgment was delivered by

SIR R. COUCH.—The present appellant is the widow and heir and legal representative of Sheo Dial *alias* Bachcha Tewari, the original appellant. On the 24th of March 1886 the respondent brought a suit against him and Raja Ajit Singh, a purchaser from him, to recover possession of property, consisting of houses and lands in the districts of Benares, Jaunpur, Azamgarh, and Ghazipur, of which he was in possession. The respondent in his plaint alleges that on the death of Bhawani Prasad Tewari, the owner of the property in suit, who died in November 1842 without issue, Rani Kuar and Dharma Kuar, the widows of his deceased brother, Debi Prasad Tewari and Ram Kishen Misr, the son of the niece of Bhawani, who lived in commensality with him, obtained proprietary possession of the property left by him. They performed the services and managed the affairs of a temple which had been built by him, and of a bhandara attached to it, and after payment of the expenses of these institutions enjoyed the rest of the income of the property. Some time afterwards, a dispute arose between them and the aprellant as to the right of heirship to the deceased; the dispute was settled by an argeement, dated the 4th of January 1850, to the effect that Ram Kishen and the appellant should be the proprietors and should hold possession in equal shares. Ram Kishen was accordingly in joint proprietary possession and enjoyment with the appellant during his life. He died on the 22nd of January 1870 without issue, and his widow, Mitho Kuar, succeeded to the possession of the property as his heir. She died on the 26th of September 1884 and on her death the respondent was the lawful heir to the estate of Ram Kishen. In 1875, in a suit brought by Mitho Kuar against the appellant for half of the profits of one of the mauzas, the appellant set up a will, dated the 7th of August 1842, made by Bhawani, but torn up in his lifetime, and not in existence at the time of his death. The case of Bachcha Tewari in his written statement, so far as it is now material, **[287]** is that, by the will Bhawani appointed one Avadh Lal to be his executor and entrusted him with the whole estate for charitable and religious purposes, and fixed salaries for the support of his heirs; that Bhawani never tore up or destroyed the will; and that Rani Kuar and Dharma Kuar and Ram Kishen always admitted its existence and validity.

It was not disputed before their Lordships that the respondent is the heir of Ram Kishen. Of the issues settled by the Subordinate Judge, only two are now material: (4) "Of what right had Ram Kishen Misr been in possession?" and (5) "Did Bhawani Prasad Tewari revoke the will which he had made during lifetime, and was it acted upon after his death?" A copy of a will of Bhawani, dated the 27th of August 1842, and registered on the 30th of that month, was filed in the suit. Bhawani having died

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in November 1842, the only evidence upon these issues was documentary.

It appears in the judgment of the Subordinate Judge that it was contended before him on behalf of the defendants that the agreement of the 4th of January 1850 recognised the will and constituted Ram Kishen a trustee of the property for certain trusts created by the will, and that the respondent was estopped by a decision of a Division Bench of the High Court dated the 27th of February 1878 from averring that the property was Ram Kishen's own. This decision was in a suit by Bachcha Tewari against Mitho Kuar and three others (two of them mortgagees and the third a purchaser at a sale in execution) to have a mortgage of the property made by her declared invalid, and a sale in execution of a decree thereon cancelled. From the judgment of the Subordinate Judge in the suit Bachcha Tewari appears to have alleged that, under the agreement of January 1850, Ram Kishen was declared proprietor of one-half of the property and he of the other half, the estate being kept joint, and that Mitho Kuar, exceeding her power, had mortgaged the property contrary to the will of the ancestor and the interest of the plaintiff. The 6th issue in that suit was :—" Whether the will made by Bhawani Prasad was enforced or [288] whether he revoked the deed in his lifetime ?" The Judge did not decide this issue, saying that as Ram Kishen transferred half of the shares to Bachcha Tewari and he had made certain transfers to Babu Balgobind, he had no right to say that under the will the heir of Ram Kishen had no power to transfer. A decree was made in favour of Bachcha Tewari for a half share only of the house and villages in dispute. He appealed to the High Court, which decreed the appeal on the ground that the agreement recognised that the will of Bhawani Prasad Tewari vested the estates in Ram Kishen and Bachcha Tewari as trustees to carry out the provisions of the will, and secured to Ram Kishen the management of the property, including the right to raise the necessary funds by mortgage, and consequently that Mitho Kuar was not competent to charge the estate. The question whether the agreement had this effect had not been raised either in the Lower Court or in the grounds of appeal, and there was no issue upon it. This statement is therefore not within s. 13 of the Code of Civil Procedure.

The parties to the agreement, Rani Kuar, Ram Kishen, and Bachcha Tewari are described in it as heirs of Bhawani, and it purports to be made upon a dispute in respect to the property owing to the claim of Bachcha Tewari as cousin of Debi Prasad Tewari, the of husband Rani Kuar and in direct lineal descent with him, and to avoid the property being wasted by litigation. It contains no reference to any will of Bhawani or to any trusts under such a will. The property is to be held by Ram Kishen and Bachcha Tewari in equal shares, but is to remain joint, and the provisions are naturally such as would be made in that case. Their Lordships are of opinion that the agreement does not recognise any trust.

There is another suit which has a very material bearing upon the question in this case. In 1880, a suit was instituted by two persons, who are described in the plaint as managers of the Chetr Bhandara of the late Bhawani Prasad Tewari, against Balgobind Das and Bachcha Tewari, which is described in the [289] judgment of the Judge of Jaunpur as a claim for a declaration of right by removal of unlawful possession of debts by annulment of a miscellaneous order of the Subordinate Judge. It appears that on the 4th of September 1877, Bachcha Tewari had made a mortgage of the property now in dispute to

Balgobind who had obtained a decree upon it, and had the property put up for sale in execution of the decree. The 1st and 2nd of the issues in that suit were—"(1) Was the property in suit bequeathed for public charit-"able purposes? (2) Was the will revoked by the testator in his lifetime?" Upon these the Judge found that the estate was not bequeathed for charitable purposes and that the will was revoked. The plaintiffs appealed to the High Court at Allahabad and the Divisional Bench of two Judges by whom the appeal was first heard differing in opinion, it was heard by a Full Bench consisting of the Chief Justice and four Judges, the majority of whom affirmed the judgment of the lower Court and dismissed the appeal. This decision is not conclusive against Bachcha Tewari, as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him.

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The Subordinate Judge with this evidence before him having found on the 4th and 5th issues in the present suit that Ram Kishen had been in possession as proprietor by virtue of the agreement of 1850 and that the will of Bhawani was revoked by him in his lifetime made a decree for the plaintiff. The respondent and the defendant Bachcha Tewari appealed to the High Court. They dismissed the appeal. Their Lordships upon the evidence which has been referred to agree in that result as if Bhawani left no will, the property was not proved to be subject to any trust. But they feel called upon to make some observations upon the judgment of the High Court, in order that it may not be thought that they agree in the reasons given by the learned Judges. The Subordinate Judge having found that the will was revoked by Bhawani, the issue whether it was revoked was the first that should have been decided as it went to the root of the defence. Instead **[290]** of deciding this issue, the learned Judges begin by saying: "Assuming without deciding the question that that "will was really made and was not revoked, Bhawani Prasad by it "bequeathed certain annuities and created trusts for religious and "charitable purposes and devoted property to those purposes," and, after stating some facts not now material, they say it had been contended on behalf of the appellant that Ram Kishen and he took the property in question, that it was trust property, and having taken with notice and without having given any consideration for it to the trustee or to any person entitled to deal with it, they must be held to have voluntarily taken upon themselves the trust created by the will of 1842, and that the question of trusteeship was concluded by the judgment of 27th February 1878. Then they say: "It appears "to us that in 1850, when Ram Kishen and the defendant took this "property and executed the deed of 4th January 1850, they were "plainly taking the property for their own purposes and not for the "purposes of the trust, and that they never had any intention of acting as "trustees or holding the property otherwise than as adversely to the "trusts of the will. The deed of 1850, although it alludes to some "expenses which were to be met as theretofore, was a deed by which "those two gentlemen so far as they could appropriated the trust pro-"perty to their own private uses. There is ample evidence on this record "that those parties never intended to deal with the property as trust "property, and that they were from a very early period acting adversely "to the trusts of the will." Further on, they say: "We are of opinion "unless we are bound by the judgment of February 27th, 1878, that "Ram Kishen and the defendant never held or volunteered to hold in

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"any sense as trustees, and that in fact their holding was from the first "adverse to the trust title." They then proceed to consider that judgment and decide that they were not bound by it. Their Lordships are of the same opinion upon this question.

A judgment of the High Court of the 21st January, 1876, was relied upon in the present appeal for the appellant. It does not [291] appear to have been considered by either of the lower Courts, and clearly does not decide the question whether there was a trust.

The learned Judges of the High Court appear to their Lordships to have been of opinion that assuming that there was a will, and it was not revoked, Bachcha Tewari and Ram Kishen could appropriate the trust property to their own private uses, and that they did so and held adversely to the trust title and themselves acquired a title. At the end of their judgment they say: "We have not thought it necessary and indeed the points were "not argued at any length before us to consider whether the alleged will of "1842 ever was revoked." Their Lordships can only understand their thinking thus by supposing they were of opinion that although there might be a trust, Bachcha Tewari and Ram Kishen might acquire a title by having possession of the property and appropriating it to their own use. The learned Judges appear not to have had in their minds the statement of the law in ss. 63 and 64 of the Indian Trusts Act, 1882. They have refrained from considering the fundamental question in the case, whether there was a trust, but having, though by an erroneous process, arrived at the right conclusion and dismissed the appeal before them, their Lordships will humbly advise Her Majesty to affirm their decree and to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

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19 A. 291=17 A.W.N. (1897) 52.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

IN THE MATTER OF THE PETITION OF GUDAR SINGH.*

[9th February, 1897.]

Criminal Procedure Code, ss. 110, 117—*Security for good behaviour—Transfer—Criminal Procedure Code*, s. 526.

Where a Magistrate instituting proceedings against a person under s. 110 of the Code of Criminal Procedure has "acted" within the meaning of s. 117 of the Code, no order can be made subsequently under s. 526 of the Code transferring the case from his Court.

[F., 30 A. 47=A.W.N. (1907) 268=7 Cr. L.J. 214.]

[292] PROCEEDINGS under s. 110 of the Code of Criminal Procedure had been started against Gudar Singh and some others in the Court of a Magistrate of the first-class exercising jurisdiction within the Meerut district. When the case came on for hearing, two of the persons against whom the said proceedings were taken, admitted the facts alleged against them and offered to find security. Thereupon, although no evidence had up to that time been recorded against Gudar Singh, the

* Criminal Miscellaneous No. 8 of 1897.

Magistrate, according to Gudar Singh's affidavit, informed him that unless he also admitted his guilt and furnished the necessary securities he would be dealt with severely and would be sent to jail. Upon this Gudar Singh applied to the High Court for the transfer of the proceedings pending against him to the Court of some other Magistrate.

Mr. *W. Wallach*, for the applicant.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

The following order was passed:—

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REVISIONAL CRIMINAL.

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ORDER.

EDGE, C.J.—A Magistrate of the first-class having taken proceedings under s. 110 of the Code of Criminal Procedure against Gudar Singh and others, is said, in the course of those proceedings and before evidence had been taken, to have stated in Court that unless Gudar Singh admitted his guilt and furnished the necessary security, he would be dealt with severely and would be sent to jail. I have taken that statement from the third paragraph of an affidavit which was sworn by Gudar Singh, and which has been filed in support of an application to transfer the case to some other Magistrate. No explanation has been offered, and no denial made that such words were used, on the part of the Magistrate concerned. Under these circumstances, there having been an opportunity for the making of an explanation or a denial, I am forced to conclude that the Magistrate concerned did threaten Gudar Singh that he would be dealt with severely and sent to jail if he did not admit his guilt and furnish security. No man charged with any criminal offence or *quasi*-criminal offence is bound or is under any obligation to make any admission injurious to his own interests. It is needless to say that no judicial officer should [293] attempt to compel any accused person to make any admission detrimental to his interests. As a matter of fact the procedure invariably in England is to inform the accused that he may make a statement, but that any statement he may make may be given in evidence against him. Having regard to s. 117 of the Code of Criminal Procedure, and to the fact that the Magistrate concerned has 'acted' within the meaning of that section, it appears to me that I have got no power to make an order of transfer, and that also is the opinion of other Judges of this Court whom I have consulted in the matter. What I have power to do is to quash the proceedings, so far as Gudar Singh is concerned, and I accordingly make an order quashing the proceedings in question so far as Gudar Singh is concerned. This order will not prevent fresh proceedings being taken against Gudar Singh by any Magistrate other than the Magistrate referred to in the affidavit of Gudar Singh.

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FULL BENCH.

19 A. 293 (F.B.)= 17 A.W.N. (1897) 61.

19 A. 293 (F.B.)=17 A.W.N. (1897) 61.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Burkitt.

REFERENCE UNDER S. 46 OF ACT NO. 1 OF 1879.*

[11th February, 1897.]

Act No. I *of* 1879 (*Indian Stamp Act*), *sch. I, art.* 22—*Stamp*—*Copy of order of a Municipal Board certified by the Secretary*—*Public Officer*—*Act No.* I *of* 1872 (*Indian Evidence Act*), *ss.* 74, 76, 78.

Held that a copy of an order passed by a Municipal Board on a petition presented to it, and certified as a true copy by the Secretary to the Board, came within art. 22 of the first schedule to the Indian Stamp Act, 1879, and required to be stamped.

The Secretary of a Municipal Board is a public officer within the meaning of art. 22 of the first schedule to the Indian Stamp Act, 1879, for the purposes indicated therein.

THIS was a reference made under s. 46 of the Indian Stamp Act, 1879, by the Board of Revenue for the North-Western Provinces of the question whether a copy of an order passed by a Municipal Board, such copy being certified by the Secretary of the [294] Board, required to be stamped under art. 22 of the first schedule to the Indian Stamp Act, 1879. The facts which gave rise to the reference are sufficiently stated in the opinion given by the Court.

Mr. *E. Chamier*, for the Board of Revenue.

OPINION.

The opinion of the Court (EDGE, C.J., KNOX and BURKITT, JJ.) on the question referred was delivered by—

EDGE, C.J.—One Subhan presented a petition to the Municipal Board of Allahabad, asking permission to erect a tiled shed and to keep a house for storing wood on certain land within the jurisdiction of the Municipal Board. On that petition action was taken by the Municipal Board, and certain orders were passed by the department of the Board to which such questions were delegated. Later on Subhan applied to the Secretary of the Board for, and obtained a copy of his petition and the order passed by the Board thereon. That copy was certified as correct by the Secretary of the Board. That copy was produced by Subhan and put in evidence in a Magistrate's Court. The Board of Revenue for these Provinces has referred to us the question whether the copy, which was given upon plain paper and bore no stamp, came within art. 22 of the first schedule to the Indian Stamp Act. It was not a copy chargeable with duty under the law relating to court fees. The question turns in our opinion on the point as to whether or not the Secretary of the Municipal Board was, in certifying the copy to be a true copy, a public officer.

The question is not free from difficulty and doubt. The term "public officer" is not defined in the Stamp Act. We may say that, in our opinion, in a fiscal Act, which imposes the payment of duty on the subject, ought to contain definitions of all terms which have to be considered in applying the Act, and which are not accepted as well recognised terms of

* Miscellaneous No. 131 of 1896.

[N.B.—This case appears with the following name in 17 A.W.N. (1897) 61—*In the matter of the petition of Subhan.*]

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universal application. For instance, under the Indian Penal Code, apparently, the Secretary of a Municipal Board would be a public servant, but he would not be a public officer as that term is defined in the Code of Civil Procedure. On turning to the Evidence Act we find that, by clause v of s. 78, the record of the proceedings of a Municipal [295] body in British India is a 'public document.' Curiously the word 'record' is not used in the clause, which merely enacts that the proceedings of a Municipal body in British India are within the meaning of public documents. Clause v of s. 78 brings the record of the proceedings of a Municipal body in British India within clause 2 of sub-section (1) of s. 74, as the record of the acts of an official body. Turning to s. 76 we find that "every public officer having the custody of a public document which any person has a right to inspect shall give that person a copy on payment, &c." According to the explanation to s. 76, "Any officer who, by the ordinary course of his official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section." Working back from that we find that the record of the proceedings of a Municipal Board is public document, and the officer who is authorized by the ordinary course of his official duties to give copies of public documents is for these purposes a public officer. Now the Secretary of a Municipality is an officer who by the ordinary course of his official duty is authorized to deliver copies of the public documents of which he has the custody as Secretary. Our answer is that the copy in question came within art. 22 of sch. 1 of the Indian Stamp Act and required an eight-anna stamp. We wish to guard ourselves against it being considered that we have decided that the Secretary of a Municipal Board is, for any other purposes than that of certifying copies or extracts of public documents, a public officer. Our opinion will be communicated to the Board of Revenue.

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19 A. 296 = 17 A.W.N. (1897) 62.

[296] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

BIJAI BAHADUR SINGH (*Decree-holder*) *v.* BHUP INDAR BAHADUR SINGH (*Judgment-debtor*).* [11th February, 1897.]

Civil Procedure Code*, s. 211—*Execution of decree—Mesne profits—Interpretation of decree awarding "future mesne profits."

A decree for possession of immoveable property was passed by the District Judge of Mirzapur on the 12th of November, 1887, in favour of a plaintiff declaring that "the plaintiff is also entitled to mesne profits." That decree was affirmed by an order of Her Majesty in Council, dated the 11th of May, 1895, without variation in respect of the order as to mesne profits. Possession of the immoveable property to which the decree related was obtained by the decree-holder on the 30th of November 1895.

Held, that the decree of Privy Council was to be construed as a decree awarding mesne profits up to the date when possession was obtained and from the date of the institution of the suit. *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1) and *Puran Chand* v. *Roy Radha Kishen* (2), referred to.

[Affirmed, 23 A. 152 (P.C.) = 2 Bom. L.R. 978 = 5 C.W.N. 52 = 27 I.A. 209 = 7 Sar. 788; R., 6 A.L.J. 327 (330) = 2 Ind. Cas. 464 (465); D., 24 B. 149 (155).]

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* First Appeal, No. 268 of 1896, from an order of L. H. Turner, Esq., District Judge of Mirzapur, dated the 22nd July 1896.

(1) 8 I.A. 197. (2) 19 C. 132.

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THE facts of this case are fully stated in the judgment of the Court.

Mr. *B. E. O'Conor*, Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

Messrs. *C. Dillon* and *E. A. Howard*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—In this case the appellant-decree-holder obtained by order of Her Majesty in Council a decree for possession of certain immoveable property, possession of which he has obtained.

The order of Her Majesty in Council reversed a decree of this Court and affirmed a decree, dated November 12th, 1887, of the District Judge of Mirzapur. That decree, with respect to mesne profits, was in these words:—"The plaintiff is also entitled to future mesne profits." So, whatever be the meaning of those words, they were wholly affirmed by the order of Her Majesty in Council, **[297]** which, referring to the decree of the District Judge, contains these words:—"That the same be and is hereby affirmed."

On proceedings taken under s. 610 of the Code of Civil Procedure the District Judge, referring to ss. 244 and 211 of the Code of Civil Procedure, has held that the decree-holder is entitled under the decree of Her Majesty in Council to recover mesne profits for a period of three years only from the date of the decree of the District Judge, *i.e.*, from the 12th of November, 1887. He holds that "the power of the Court giving the decree was limited by that section (211); it could not give mesne profits for a longer period, and the vague terms actually used in the decree—'that the plaintiff is also entitled to future mesne profits'—cannot give the decree further effect than is allowed by law under that section." But the learned Judge failed to explain why he assumed the date of the decree from which the three years were to be counted to be November 12th, 1887, the date of the decree of the Court of first instance, and not May 11th, 1895, which is the date of the order of Her Majesty in Council. We may add here that it was admitted, and very properly admitted, and indeed it could not be denied, that the only operative decree, and the only decree which could be executed in this matter, was Her Majesty's order of May 11th, 1895.

The decree-holder appeals from the order of the Court below restricting the mesne profits recoverable by him to a period of three years. His contention is that under the order of May 11th, 1895, he is entitled to recover mesne profits from the date of the institution of the suit up to the date of the order in Council, and thenceforward, future mesne profits either up to the date when he was put in possession in execution of that order, or until the expiration of three years from the date of that order, whichever event may first occur. Admittedly he obtained possession on November 30th, 1895, and he therefore asks for mesne profits up to that date.

For the respondent it is contended that there is no decree for mesne profits capable of execution. His learned counsel urged that the decree is defective in that it was not drawn up in **[298]** accordance with s. 211 of the Code of Civil Procedure, as it does not prescribe the period for which mesne profits are recoverable. He drew our attention to the law (s. 196 of Act No. VIII of 1859), as it stood before the present Civil Procedure Code was passed, and argued that, though a decree for mesne profits unlimited as to period was allowable under the former law, a decree under the present Code for mesne profits is bad and inoperative if it does not specify the period for which the mesne profits are to be recovered.

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For the appellant we were referred to the case of *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal* (1) in which their Lordships, approving of two cases in 12 Weekly Reporter and 22 Weekly Reporter, held that the proper interpretation to be put on a decree which gave "possession with *wasilat*" was that it was a decree for *wasilat* (mesne profits) up to the time when possession was delivered. The words used by the District Judge in his decree, which has been adopted by their Lordships of the Privy Council, in the present case are similar in effect to those in the case from 8 Indian Appeals cited above. In accordance with the decision in that case we hold that the proper interpretation to put on the decree for mesne profits, which we are now considering, is that it is a decree for mesne profits up to date of possession. It was contended that the case just cited was inapplicable, as it was founded on and interpreted a section of the repealed Code of Civil Procedure. In that contention we cannot concur. Section 211 practically reproduces s. 196 of Act No. VIII of 1859, in empowering a Court to subjoin a decree for future mesne profits to a decree for possession of immoveable property. The only difference is that under the former Code the decree for mesne profits might have been for an unlimited term, while under s. 211 of the present Code two alternative limits are fixed for the period during which mesne profits can be given. The interpretation we have adopted is precisely similar to the interpretation put by the High Court of Calcutta on an order passed under ss. 211 and 212 of the **[299]** present Code, an order in which no period was prescribed for which mesne profits were to be payable. See *Puran Chand* v. *Roy Radha Kishen* (2).

For the above reasons we hold that we have before us an operative decree for mesne profits.

Further, the learned counsel for the respondents contended that, if there were in this case an operative decree for mesne profits, the Court below was right in not awarding such profits, for more than three years from the date of the decree of the Court of first instance, his reason being, as we understood him, that a regular suit could not have been maintained for more than has been given here.

In our opinion the decision of the Court below is wrong. This appeal has been throughout argued on both sides on the assumption that the case was governed by s. 211 of the Civil Procedure Code. That being so, and it being admitted that the decree to be enforced here is the order in Council of May, 1895, we have to apply s. 211 to the dates and circumstances of this case interpreting the decree in the manner we have indicated above.

Accordingly we find that the appellant is entitled to recover mesne profits from September 23rd, 1886, the date on which the suit was instituted, up to May 11th, 1895, the date of the order in Council, and thereafter from May 11th, 1895, up to the 30th of November, 1895, the date on which the appellant obtained possession in execution of the order in Council.

We accordingly allow this appeal. We set aside the District Judge's finding on the second issue framed by him and his formal order, dated August 3rd, 1896, and we return the record to him with instructions to proceed to determine the amount of mesne profits recoverable by appellant in accordance with our decision. The costs of this appeal will be borne by the respondent.

Appeal decreed.

(1) 8 I. A. 197.

(2) 19 C. 132.

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FEB. 12.

APPELLATE CIVIL.

19 A. 300 = 17 A.W.N. (1897) 69.

19 A. 300 = 17 A.W.N. (1897) 69.

[300] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

DHIRAJ SINGH (*Plaintiff*) *v.* MANGA RAM AND ANOTHER (*Defendants*).*
[12th February, 1897.]

Hindu law—Hindu widow—Reversioner—Debt incurred by a Hindu widow for legal necessity, but without any charge on the ancestral property in the hands of the widow—Such property not liable in the hands of the reversioners.

The creditors of a Hindu widow cannot after her death have recourse to ancestral property in the hands of the reversioners, in respect of which property the widow had enjoyed only a widow's life-estate, if in fact no instrument charging the property beyond the widow's lifetime has been executed by the widow, even though the debt sued upon was incurred for legal necessity and was one in respect of which such property might have been made liable beyond the widow's lifetime. *Shiamanand* v. *Har Lal* (1), *Ramasami Mudaliar* v. *Sellattammal* (2), referred to; *Ramcoomar Mitter* v. *Ichamoyi Dasi* (3), dissented from.

[R., 26 B. 206 = 3 Bom L.R. 738.]

IN this case one Musammat Lari, a Hindu widow in possession as such widow of immoveable property which had belonged to her husband in his lifetime, borrowed from time to time from the plaintiff to the suit certain sums of money and some grain, the principal portion of the debt being incurred on account of the marriage of her granddaughter. The debt thus incurred was purely a book-debt, and no document of any kind was executed by the widow binding the ancestral property in her hands. On the 16th November 1890 the widow signed a statement of account in the plaintiff's books which showed the amount of the debt to be Rs. 862-7-9. On the 22nd March 1891 the widow died, and the immoveable property above referred to passed into the hands of Manga Ram and Bhairon as heirs of the widow's late husband. On the 11th of April 1892 the plaintiff filed the suit out of which this appeal has arisen, seeking to recover from Manga Ram and Bhairon the amount due to him by Musammat Lari.

The plaintiff's suit was dismissed by the Court of first instance (Munsif of Jhansi) on the ground that the fact of the loan was not proved. On appeal to the District Judge, the District Judge [301] found that the plaint disclosed no cause of action and dismissed the appeal. The plaintiff appealed to the High Court (S. A. No. 237 of 1893), which remanded the case to the lower appellate Court for trial on the merits.

On the retrial the then Officiating District Judge found on one issue alone – that of legal necessity for the loan—and finding that issue against the plaintiff-appellant, dismissed the appeal. The plaintiff again appealed to the High Court.

On this appeal the High Court referred certain issues to the Court below under s. 566 of the Code of Civil Procedure. On these issues the lower appellate Court found that the loan was in fact made and the balance of account struck as alleged by the plaintiff, and that the money was borrowed for legal necessity, but that there was no agreement on the part of Musammat Lari to pay interest.

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* Second Appeal, No. 845 of 1894, from a decree of R. Scott, Esq., District Judge of Jhansi, dated the 30th November 1892, confirming a decree of Munshi Sakhawat Ali, Munsif of Jhansi, dated the 15th July 1892.

(1) 18 A. 471. (2) 4 M. 375. (3) 6 C. 36.

1897
FEB. 12.

APPELLATE CIVIL.

19 A. 300 = 17 A.W.N. (1897) 69.

On return of these findings the appeal was again put up for hearing.
Babu *Durga Charan Banerji*, for the appellant.
Mr. *E. A. Howard*, for the respondents.

JUDGMENT.

The judgment of the Court (EDGE, C. J., and BLAIR, J.) was delivered by

EDGE, C. J.—The plaintiff in this case advanced moneys to the widow of a separated Hindu, partly to defray the expenses of the marriage of her granddaughter, partly for agricultural purposes and to some small extent for the payment of Government revenue. It is found by the Court below that the Hindu widow could and ought to have paid out of her own money the expenses of the marriage of her granddaughter. Our judgment, however, does not turn upon that finding. The defendants to the suit are the reversioners, who have succeeded to the possession of the ancestral property on the death of the widow. The widow gave no mortgage and executed no document which created a charge on the ancestral property in favour of the plaintiff. It is contended that the advance made by him to the Hindu widow of money for agricultural purposes, and for the payment of Government [302] revenue, was an advance made for such necessary purposes as would have enabled the Hindu widow to have made a mortgage of the ancestral property, which would not have been limited to her own interest, and on behalf of the plaintiff the decision in *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1) was relied on. If the decision in that case is good law, the plaintiff would be entitled to a decree. On the other side the decision in *Ramasami Mudaliar* v. *Sellattammal* (2) and the decision of this Court in *Shiamanand* v. *Har Lal* (3) have been relied on.

It appears to us that the case presents no difficulty. The plaintiff, if he had chosen, could, before lending his money, have obtained from the Hindu widow the security of the ancestral property by obtaining a mortgage. He did not choose to demand a mortgage before advancing his money; he accepted the personal liability of the widow. He now seeks to get a decree under which he can bring to sale the ancestral property in the hands of the reversioners. He seeks a decree which would bind that property. In other words, he is seeking a decree in this suit, there being no assets of the widow in the hands of the reversioners, which he could only have obtained if he had had a valid charge on the ancestral property. The plain answer to his suit is that the plaintiff lent his money on the personal liability of the widow, and, the defendants-reversioners having no assets of the widow in their hands, the plaintiff cannot get a decree against them. We dismiss this appeal with costs.

Appeal dismissed.

(1) 6 C. 86. (2) 4 M. 375. (3) 18 A. 471.

1897
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CRIMINAL MISCEL-LANEOUS.

19 A 302=17 A.W.N. (1897) 52.

19 A. 302=17 A.W.N. (1897) 52

CRIMINAL MISCELLANEOUS.

Before Sir John Edge, Kt., Chief Justice.

IN THE MATTER OF THE PETITION OF LALJI AND OTHERS.* [12th February, 1897.]

Criminal Procedure Code, s. 526—Transfer—Magistrate, powers of—View of the scene of the occurrence by a Magistrate trying a criminal case.

It is not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the [303] occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other.

[R., 37 C. 340=14 C.W.N. 422 (427)=11 Cr. L.J. 121=5 Ind. Cas. 365 (367); 39 C. 476 (481)=15 C.L.J. 403=16 C.W.N. 426=13 Cr. L.J. 156 (157)=13 Ind. Cas. 844; 13 P.R. 1901 (Cr.)=80 P.L.R. 1901.]

THIS was an application under s. 526 of the Code of Criminal Procedure for the transfer of a criminal case based chiefly on the ground that the trying Magistrate had personally inspected the scene of the occurrence out of which the case arose, and was said to have made inquiries relative to the subject of the complaint from persons present at the time of the inspection.

The facts of the case sufficiently appear from the order of Edge, C.J.

Babu *Jogindro Nath Chaudhri* and Babu *Satish Chundar Banerji*, for the applicants.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C.J.—This is an application under s. 526 of the Code of Criminal Procedure to transfer a case from the Court of one Magistrate to the Court of some other Magistrate. It is said in the application that, after examining some of the witnesses for the prosecution, the Deputy Magistrate, before whom the case was, personally inspected the ground and made inquiries relative to the subject of the complaint from persons present at the time of the inspection: also that he expressed a wish that some of the accused should compromise the case. In support of the application the decision in *Queen-Empress* v. *Manikam* (1) and *Hari Kishore Mitra* v. *Abdul Baki Miah* (2) have been relied on. The Magistrate has stated that he did inspect the place. He has denied that he made any inquiry from any persons except the witnesses in their examination. He has stated that he directed the patwari to prepare a plan.

It appears to me that it never could have been the intention of the Legislature that in a criminal case, in which the evidence was conflicting or was difficult to understand by a person not acquainted with the locality, the Magistrate trying the case should not go and see the locality for himself. It is highly convenient [304] that he should adopt such a course, if the evidence is conflicting or if the guilt or innocence of the party depends upon local peculiarities of situation which cannot be understood except by the Magistrate seeing the place himself. When a

* Criminal Miscellaneous No. 11 of 1897.

(1) 19 M 263.

(2) 21 C. 920.

Magistrate goes to view a place for the purpose of understanding the evidence, he should be careful not to allow any one either side to say anything to him which might prejudice his mind one way or the other. It would be practically impossible in some cases that the Magistrate should be accompanied by each side. Take the case of a dacoity with, let us say, twenty prisoners. It might become necessary for the Magistrate to see the village in order rightly to appreciate the evidence for the prosecution or the evidence for the defence. It surely could not be the law that the Magistrate should not go and see the village in order to understand the case unless he was accompanied by some one for the Crown and all the twenty dacoits in fetters, they not being represented by any one. In this particular case it appears to me that the Magistrate acted wisely. The question was —Had the shrubs been torn up by the accused, as said by the prosecution, or had they been destroyed by the accumulation of rain, as was said by the defence? It would probably be difficult to decide in such a case, for example, whether six witnesses for the prosecution were to be believed who might say that the shrubs had been destroyed by the accused, or whether six witnesses for the defence were to be believed who might say that an accumulation of rain water had destroyed the shrubs. A Magistrate does not make himself a witness by going to a place and viewing it for the purpose of understanding the evidence, any more than does a Judge in England who goes to view a place, or do jurymen who view a place under an order, make himself or themselves witnesses in the case. It would be seldom that a Magistrate, or a Judge or jury could come to a correct conclusion on conflicting evidence if they did not import into the consideration of the evidence before them, not only common sense, but also common knowledge of what ordinarily passes in life. In this case I do not see that the Magistrate has done anything improper or anything **[305]** to suggest to my mind that a fair and impartial trial will not be had before him. It is very possible that the accused may think that the Magistrate's mind may have been biased against their case by what he saw on the view. Possibly the view explained to the Magistrate's mind on which side the truth was, and the accused may be under the impression, rightly or wrongly, that the view would support the case for the prosecution and show that the case for the defence was utterly improbable. But the ends of justice are that the truth should be arrived at, and should be arrived at whether an accused person objects to the truth being ascertained or not. I see nothing here to bring this case within s. 526 of the Code of Criminal Procedure, and I dismiss this application.

Application dismissed.

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19 A. 305 = 17 A.W.N. (1897) 64.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

QUEEN-EMPRESS *v.* NAND KISHORE.* [12th February, 1897.]

Act No. XLV *of* 1860 (*Indian Penal Code*), *s.* 218—*Offence—Public servant framing an incorrect record to save himself from legal punishment.*

A public servant who does that which, if done to save another from legal punishment, would bring the public servant within s. 218 of the Indian Penal

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* Criminal Appeal No. 36 of 1897.

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APPELLATE CRIMINAL.

19 A. 305=
17 A.W.N.
(1897) 64.

Code, has equally committed the offence punishable under s. 218 if the person whom he intends to save from legal punishment is himself. *Queen-Empress* v. *Gauri Shankar* (1) *quoad hoc* overruled. *Queen-Empress* v. *Girdhari Lal* (2), referred to.

THE facts of this case are as follows:—

On May 29th, 1896, Nand Kishore, who was a patwari, was summoned as a witness in a rent case before a Deputy Collector. He did not bring with him, according to the usual practice in such cases, his copy of the settlement record. The Deputy Collector took his reply in respect of this omission, and he stated that he had not brought it because he had come to Court straight from the tahsil, where he had been engaged in some account business, [306] and had not got it with him. The Deputy Collector discredited this, and in the exercise of the power conferred upon him under the patwari rules, which are framed under the Land Revenue Act, inflicted on the accused a fine of a month's pay.

The accused preferred a formal appeal to the Collector, who directed the Deputy Collector to make a further inquiry into the patwari's allegations. This inquiry was formally made.

The evidence of one of the parties to the rent case was taken on oath, and to make good his case the patwari produced his diary. In that he had altered the entry of the 26th May, which was—"To-day I came from the tahsil into my circle" into—"To-day I wrote the account of my circle in the tahsil."

In respect of this alteration the Collector ordered the prosecution of Nand Kishore, and he was committed to the Sessions Court and convicted under s. 218 of the Indian Penal Code, and sentenced to three months' rigorous imprisonment. From this conviction and sentence he appealed to the High Court.

Mr. *E. A. Howard*, for the appellant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—The simple question in this case is whether a public servant who does that which, if done to save another from legal punishment, would bring the public servant within s. 218 of the Indian Penal Code has committed the offence punishable under that section if the person whom he intends to save from legal punishment is himself. In our opinion there is no reason why it should be an offence for a public servant to make a false record in order to save another person from legal punishment, and why it should not be an offence for him to make a false record to save himself from legal punishment. If the Legislature had intended that this section should only apply when the intention was to save some person other than the public servant, it would have been easy to insert the word "other" between the words "any" and "person." It appears to us that the appellant, who was a public servant, did not cease to be a person when he made a [307] false entry in his diary for the purpose of saving himself from punishment. Two authorities have been cited to us in this Court. One is that of *Queen-Empress* v. *Gauri Shankar* (1) and the other that of *Queen-Empress* v. *Girdhari Lal* (2). In our opinion the appellant committed the offence under s. 218 of the Indian Penal Code. We dismiss his appeal.

(1) 6 A. 42.

(2) 8 A. 653.

19 A. 307 = 17 A.W.N. (1897) 49.

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FEB. 16.

REVISIONAL CIVIL.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

RAM CHANDAR (*Plaintiff*) *v.* CHANDI PRASAD AND OTHERS (*Defendants*).* [16th February, 1897.]

19 A. 307 = 17 A.W.N. (1897) 49.

Act No. XV *of* 1877 *(Indian Limitation Act), s.* 20—*Part payment of debt—Endorsement of hundi by debtor.*

Where the only evidence in the handwriting of the debtor of the part payment of the principal of a debt was the endorsement of a hundi to the creditor; *held* that such endorsement was not sufficient within the meaning of s. 20 of Act No. XV of 1877 to give a new starting-point for limitation. *Mackenzie* v. *Tiruvengadathan* (1), referred to.

THIS was a suit in a Court of Small Causes to recover Rs. 426-1-6 as due on an account. The defendants pleaded that the claim was barred by limitation. The plaintiff relied upon the endorsement made on a hundi given him by the defendants as evidence of part payment within the meaning of s. 20 of the Indian Limitation Act, 1877. The Judge of the Small Cause Court overruled this plea, relying on *Mackenzie* v. *Tiruvengadathan* (1), and dismissed the suit. The plaintiff applied in revision to the High Court.

Mr. *D. N. Banerji*, for the applicant.

Munshi *Jwala Prasad*, and Munshi *Madho Prasad*, for the opposite parties.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This case is covered by the decision of the Madras High Court in *Mackenzie* v. *Tiruvengadathan* (1). We agree with the decison of the Madras Court, and we dismiss this application with costs.

Application dismissed.

19 A. 308 = 17 A.W.N. (1897) 71.

[308] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

NAZAR ALI (*Plaintiff*) *v.* KEDAR NATH AND ANOTHER (*Defendants*).†
[25th February, 1897.]

Act No. XV *of* 1877 *(Indian Limitation Act), sch. ii, art.* 12, *cl* (*b*)—*Suit to recover property sold in execution of a decree in excess of what was saleable under the decree—Execution of decree—Limitation.*

Article 12, clause (*b*) of the second schedule to the Indian Limitation Act, 1877, does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact not authorized by the decree under which the said property purported to have been sold. *Ram Lall Moitra* v. *Bama*

* Civil Revision, No. 28 of 1896, from a decree of Babu Nilmadhab Rai, Judge of the Small Cause Court, Benares, dated the 30th March 1896.

† Second Appeal, No. 1019 of 1895, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 17th May 1895, confirming a decree of Babu Giraj Kishore Dutt, Munsif of Haveli, Bareilly, dated the 5th December 1894.

(1) 9 M. 271.

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FEB. 25.

APPELLATE CIVIL.

19 A. 308 = 17 A.W.N. (1897) 71.

Sundari Dabia (1), *Balwant Rao* v. *Muhammad Husain* (2), *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (3), *Dakhina Churn Chattopadhya* v. *Bilash Chunder Roy* (4), *Mahomed Hossein* v. *Purundur Mahto* (5), and *Sadagopa* v. *Jamuna Bhai Ammal* (6), referred to. *Suryanna* v. *Durgi* (7), dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Karamat Husain*, for the appellant.

Mr. *Roshan Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The appellant Nazar Ali owned a 2½ biswas share in a certain zamindari. He mortgaged 2 biswas to Tika Ram, the respondent, on the 9th of October, 1878. On the 18th of July, 1890, Tika Ram obtained a decree for the sale of the 2 biswas. He applied for execution of that decree by sale of that share, and the Court ordered the 2 biswas share to be sold. As the property was ancestral property, the Court, under s. 320 of the Code of Civil Procedure, transferred the execution of the decree to the Collector. By some mistake the Collector, on the 20th of August, 1891, sold 2½ biswas instead of the 2 biswas which he had been ordered to sell. The sale was confirmed on the 13th of November, 1891. On the 3rd of September, 1894, the plaintiff **[309]** instituted the present suit, claiming possession of a ½ biswas share on the ground that that share had not been sold, and further that the sale of that share was null and void. Both the Courts below dismissed the suit, applying to it clause (*b*) of art. 12 of the second schedule to Act No. XV of 1877.

The plaintiff has preferred this appeal, and it is contended on his behalf that art. 12 is not applicable. In our opinion the appeal must prevail. Where a sale is in its inception void it is not necessary for the plaintiff to have that set aside which is itself a nullity. This view is supported by several rulings, of which we may quote the following:—*Ram Lall Moitra* v. *Bama Sundari Dabia* (1) followed by this Court in the case *Balwant Rao* v. *Muhammad Husain* (2); *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (3); and *Dakhina Churn Chattopadhya* v. *Bilash Chunder Roy* (4). In our opinion art. 12 applies to cases in which a sale would be binding on the plaintiff if not set aside. An illustration of such a case is afforded by *Mahomed Hossein* v. *Purundur Mahto* (5).

In the case before us, if the Collector who sold the half biswa share claimed had no jurisdiction to sell it, the sale of that share was *ab initio* void. The power under which the Collector sold the plaintiff's property in execution of Tika Ram's decree was derived from the order made by the Court to which the application for execution was made, and which transferred the decree to Collector under s. 320 of the Code of Civil Procedure. Section 321 (*c*) authorizes the Collector to sell only the property ordered to be sold, or so much thereof as may be necessary. The authority of the Collector was therefore confined to the sale of that property only which he was ordered by the Court to sell. In this case the Court ordered only a 2 biswa share to be sold. The Collector therefore acted *ultra vires* in bringing to sale any share in excess of 2 biswas. *Qua* the excess the sale

(1) 12 C. 307. (2) 15 A. 324. (3) 11 C. 200. (4) 18 C. 526.
(5) 11 C. 287. (6) 5 M. 54. (7) 7 M. 258.

was a nullity, and there was no necessity for the plaintiff to seek to set it aside.

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[310] The authorities to which we have referred lay down the proposition that, if the Court which ordered the sale had no jurisdiction to do so, the sale held in pursuance of that order is a nullity. Similarly, if the officer who held the sale had no authority to sell the property, that sale would be equally a void sale. In this case, as we have said, since the Collector had no jurisdiction to sell any share in excess of that which the Court ordered to be sold, the sale of the share in question was void and not binding on the plaintiff. The Lower Appellate Court has relied on an unreported judgment of this Court (S. A. No. 1138 of 1893, decided on the 16th March, 1894.) It does not appear that in that case the Court had acted without jurisdiction, or that the officer who held the sale had gone beyond his authority. The case is therefore clearly distinguishable. The Court of first instance has referred to a ruling of the Madras High Court (*Suryanna* v. *Durgi*) (1). That is, no doubt, a ruling which supports the view of the Court below, but we are unable to follow it. We observe that it not only differs from numerous rulings some of which have been cited above, but from one of the same Court (*Sadagopa* v. *Jamuna Bhai Ammal*) (2).

We allow the appeal, and, setting aside the decree of the Court below, remand the case under s. 562 of the Code of Civil Procedure to the Court of first instance with directions to re-admit it under its original number in the register and to try it on its merits.

Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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19 A. 311 = 17 A.W.N. (1897) 121.

[311] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

MUSHTAQ AHMAD AND ANOTHER (*Defendants*) *v.* AMJAD ALI AND OTHERS (*Plaintiffs.*)* [20th January, 1897.]

Pre-emption—Wajib-ul-arz—"*Stranger.*"

Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'share-holders.' *Held*, the parties being Muhammadans, that in regard to a sale of land to which such *wajib-ul-arz* applied, a nephew (brother's son) of a co-sharer vendee was a 'stranger' and his joinder as a co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Ram Nath* v. *Badri Narain* (3), approved.

[R., 10 O.C. 225 (235).]

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Burkitt, J., in the case of *Amjad Ali* v. *Mushtaq Ahmad* (3) The facts of the case sufficiently appear from the judgment under appeal.

Pandit *Sundar Lal*, for the appellants.

Mr. *D. N. Banerji* (for whom Mr. *W. K. Porter*), for the respondents.

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* Appeal, No. 11 of 1895, under s. 10 of the Letters Patent.

(1) 7 M. 258. (2) 5 M. 54. (3) 19 A. 148.

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APPELLATE CIVIL.

19 A. 311 = 17 A.W.N. (1897) 121.

JUDGMENT.

EDGE, C.J., and KNOX, J.—

In our opinion our brother Burkitt rightly held that the son of a Muhammadan co-sharer in the village was not, merely in virtue of his birth, a co-sharer, within the meaning of the pre-emptive clause of the *wajib-ul-arz*. A Muhammadan son does not take a vested interest in ancestral property on his birth, as a Hindu son does. Consequently, the order of remand was right. But the Court below should apply the principles expounded by the Full Bench of this Court in *Ram Nath* v. *Badri Narain* (1). We dismiss this appeal with costs.

Appeal dismissed.

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19 A. 311 = 17 A.W.N. (1897) 117.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

QUEEN-EMPRESS *v.* BALA MISRA AND OTHERS.*

[30th January, 1897.]

Act No. III *of* 1867 (*Gambling Act*), *s.* 6—*Evidence of house being a common gaming house—Instruments of gaming—Cowries.*

Held, that the mere finding of cowries in a house searched in pursuance of a warrant issued under Act No. III of 1867 would not raise the presumption **[312]** that the house was used as a common gaming house; but evidence that cowries were used in that house as instruments whereby to carry on gaming would bring the house within s. 6 of the Act. *Queen-Empress* v. *Bhawani* (2), referred to.

[R., 25 C. 432 (434).]

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the District Magistrate of Ballia. The house of one of the accused had been searched in pursuance of a warrant issued under s. 5 of Act No. III of 1857, and there was found in the room where the accused were a quantity of cowries. A Deputy Magistrate convicted the accused under s. 4 of Act No. III of 1867, holding that these cowries were instruments of gaming within the meaning of the Act. One of the accused applied for revision of this order to the Magistrate, who, in view of the ruling of the High Court in *Queen-Empress* v. *Bhawani*, referred the case to the High Court.

The following order was passed:—

ORDER.

EDGE, C.J., and KNOX, J.—In this particular case, there is evidence that gambling was actually being carried on in the house. Our attention has been drawn to the case of *Queen-Empress* v. *Bhawani* (2) in which it was held, on the authority of some previous cases, that "cowries are not instruments of gaming." Ordinarily speaking, it would be incorrect to describe cowries as instruments of gaming, but if cowries are used in a particular case as a means of gaming, they are in that particular case

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* Criminal Revision No. 15 of 1897.

(1) 19 A. 148.

(2) 15 A.W.N. (1895) 139.

instruments of gaming, at least in our opinion, within the meaning of that term as it appears in Act No. III of 1867. To explain ourselves a little further, the mere finding of cowries in a house would not raise the presumption that the house was used as a common gaming house, but evidence that cowries were used in a particular house as a means whereby to carry on gaming would bring the house within s. 6 of the Act. It entirely depends upon the use to which the cowries are put. If they are used for the purposes of gaming, as they frequently are in this country, they are, when they are shown to be so used, as much instruments of gaming as dice. We decline to interfere in this case. The record will be returned.

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19 A. 313 = 17 A.W.N. (1897) 65.

[313] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

GANGA NARAIN (*Plaintiff*) *v.* THE MUNICIPAL BOARD OF CAWNPORE (*Defendant*).* [16th February, 1897.]

Act No. XV *of* 1883 (*N.-W.P. and Oudh Municipalities Act*), *s.* 55, *cl.* (*c*)—*Municipal Board—Powers of Municipal Boards to frame bye-laws—Act No.* XV *of* 1873, *s.* 22 *—Nuisance.*

Clause (c) of s. 55 of Act No. XV of 1883 was not intended to empower a Municipal Board to make rules which would enable it to confiscate private rights without making any compensation, or to treat as nuisances acts which are not in law or with regard to public health or convenience capable of being considered nuisances.

The clause was meant to give to Municipal Boards power to make rules for prohibiting the establishment of markets, that is, to prevent new markets being established, and to give them power to control the maintenance of existing markets or of markets which might be established with their sanction.

By "maintenance" is meant the keeping up of a market in such a manner as would make it a fit place for the carrying on of a market having regard to public health and publice convenience.

[R., 21 A. 348 (354)]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Mr. *E. Chamier*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—In this case the plaintiff sought an injunction restraining the Municipal Board of Cawnpore from interfering with the exercise of his right to hold and maintain a market for the sale of vegetables, fruit and other articles within the grounds of a temple of which he was manager. The defence to the suit was that according to certain rules of the Municipal Board the plaintiff had no right to establish or continue a market without the permission of the Municipal Board. It is necessary to see how this suit arose.

The Municipal Board of Cawnpore had established within the Municipality a market for the sale by wholesale of vegetables, [314] fruit and

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* Second Appeal, No. 404 of 1895, from a decree of J. J. McLean, Esq., District Judge of Cawnpore, dated the 1st April 1895, modifying a decree of Syed Zainul-ab-din Khan, Subordinate Judge of Cawnpore, dated the 3rd October 1894.

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such like things. They had let that market to a contractor. The contractor had by his conduct so disgusted the people who had used the market that they had refused any longer to come to that market, and they had betaken themselves to a market in the cantonments of Cawnpore. One can easily understand that it was not pleasing to the Municipal Board of Cawnpore that the market over which they had spent a considerable amount of money should be abandoned, and that the tolls which they expected to derive from the use of their market should go into other pockets. It is not quite clear how they approached the cantonment authorities of Cawnpore, but they were determined, if they could, to obtain the closing of the market in cantonments, in the hope, no doubt, of compelling the public to return to their own Municipal market. The correspondence between the cantonment authorities and the municipality, if we had it, would probably be instructive. This much we know, that the cantonment authorities having granted a lease of their market to certain contractors were apprehensive that they might be sued for damages if they complied with the request of the Municipal Board, and that they insisted upon having an indemnity bond to secure them against loss by any damages which might be awarded to the persons with whom they were about to break their contract. Whether the cantonment authorities would have been liable in damages or not, and whether or not they had the power to put an end to the lease granted to their contractors are beside the question here. What we know is that the cantonment authorities thought it reasonable that they should get an indemnity bond, and declined to act without it, and that the Municipal Board of Cawnpore authorised the execution of an indemnity bond, and the bond was apparently given, signed by the Chairman. Whether the Municipal Board of Cawnpore intended, if the cantonment authorities were made liable for their breach of contract, to pay the damages out of the public moneys of the Municipal Board of Cawnpore, or whether the members of the Board intended to pay these damages out of their private purses, we do not know. It is probable that an auditor would **[315]** have surcharged the Municipal Board, and have forced the members of the Board individually to make good the sums, if any, which had been paid under that indemnity bond. Municipal Boards are not entrusted with public moneys in order that they may employ them in inducing other persons to break their lawful contracts. However, the indemnity bond was given; the cantonment market was closed, and thereupon customers who had formerly attended the market of the Municipal Board looked about to see whether they could find another place to sell their goods, and they proceeded to the market which had been held lawfully by the plaintiff within the grounds of the temple for a period of something like twenty-five years.

The Municipal Board by closing the cantonment market had not effected their object; but they were not to be defeated. The indemnity bond was given on the 25th of June, 1892. By the 23rd of July, 1892, the Board awoke to the necessity of closing another market in order to get back their customers, and on this occasion they had no cantonment authorities, who would be willing to close a market on receiving an indemnity, to deal with; they had to deal with the plaintiff in this suit. On the 23rd of July, 1892, they served the plaintiff with the following notice:—"Under order of this date you are directed to discontinue at once, within twenty-four hours, the holding of the bazar established by you without permission, otherwise proceedings will be taken. In case of non-compliance legal steps will be taken in accordance with the

rules of the Municipal Board, and no excuse will be heard." That threat was not sufficient: the market continued; and on the 25th of July, 1892, they served on the plaintiff the following notice:—"Under order of this date you are directed to close at once, within twenty-four hours, the bazar *Sabzi Mandi* (market for the sale of vegetables and fruit) which you have newly established without permission within the enclosure known as that of Prag Narain. Otherwise, in case of non-compliance, legal steps will be taken in accordance with the rules of the Municipal Board (s. 56), and no excuse will be heard." It so happened that the notice of the [316] 23rd July was one which would not fit in with the existing rules of the Municipal Board. The then existing rules of the Municipal Board, even according to the contention of the Board, only gave them power to deal with new markets. It is to be observed that in the notice of the 23rd of July the Board did not suggest that the market was a new one, as in fact it was not; but they were determined to try it on, and accordingly served the notice of the 25th of July, in which they alleged the market to be new. Even that notice did not much frighten the plaintiff, for he continued to hold his market. Thereupon the Municipal Board proceeded to put the criminal law in motion. They did not attempt to prosecute the plaintiff under the Indian Penal Code for conducting a market which was a public nuisance, for in truth it was a well-conducted market and no case of nuisance could be made out, but they proceeded to prosecute his brother, Jamna Narain, who managed for him, under their rules. The case was tried by a Magistrate of another district, this Court having made an order of transfer, and the Magistrate of the other district (Fatehpur), on the 16th of November, 1892, acquitted Jamna Narain on the ground that the market was an old market. One would have thought that that ought to have satisfied the Municipal Board; but it was not so. They were determined not to let the matter drop, and were determined, if they could, to confiscate, in order to benefit their own market, the plaintiff's long acquired right in his market.

Accordingly, in December, 1892, they proceeded to apply to the Local Government for sanction of an amendment of the rule under which they had taken proceedings by leaving out the qualifying word "new" which that rule contained and by practically reverting to the words of a rule which had been made under s. 22 of Act No. XV of 1873, which was a section which gave a committee power to frame rules for declaring what acts or omissions within a Municipality shall be considered to be public nuisances. The old rule, which they practically wished to reinstate, was as follows:—It was declared that "the establishment or maintenance of a public market, bazar, ganj or slaughter-house, except under such conditions [317] as the Board may from time to time prescribe" was a public nuisance. It has been contended here before us that under s. 22 of Act No. XV of 1873, a Municipal Board had, subject to the sanctioning of their rules by Government, unlimited and uncontrolled discretion to declare any act or any omission within their Municipal boundaries to be a public nuisance, to declare, for instance that a man should not eat his dinner within his house, or that persons should not walk along the streets of Cawnpore with any clothes on; the argument went as far as that. The contention was that the Municipal Board in its discretion or indiscretion, whether for the purposes of public health or for the oppression of traders in Cawnpore, might by a rule declare anything which might happen in Cawnpore to be a nuisance, and that a person not hearkening to such a rule would be liable to a prosecution. In our opinion the Legislature was

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never so foolish as to intend to give so sweeping a discretion to a Municipal body. Certainly the proceedings in this case, as we shall presently point out, will be a warning, we hope, to the Legislature to be more precise in future in limiting and defining the powers which it grants to Municipal Boards in these Provinces.

Now we have said that in order to close the plaintiff's market the Municipal Board were desirous of getting back to some rule similar to the old one and of striking the limitation "new" out of the then rule. The matter went from the Municipal Board to the then Commissioner of Allahabad, apparently by means of a letter signed by the Chairman of the Board and dated the 6th of January, 1893. in which reference was made to some objections to any alteration of the rule recently taken by the plaintiff. The letter of the Chairman alleges that the insertion of the word "new" in the rule in question he believed was due to a mistake. We believe that it was more probably due to the fact that the High Court at Calcutta in the case of *Moran* v. *The Chairman of Motihari Municipality* (1) had pointed out in vigorous, but not too strong, language the lamentable consequences of entrusting Municipal **[318]** Boards with powers under which they might practically confiscate private rights without making any compensation. The Chairman of the Board, in the letter to which we are referring, says, as to the objection that, if the word "new" is omitted from the rule, the Municipal Board will have authority to remove hundreds of markets from private places and establish them in places fixed by the Municipality, that "it cannot be said that the Board has misused the powers it had in the past." Probably not, before that period and before this case arose, because the Board had not found that the markets and shops of private persons in Cawnpore were in competition with the market which the Board had established. So soon, however, as the Board met with competition, it, in our opinion, misused its supposed powers. Then the Chairman goes on to make a representation as to the facts connected with this market. We cannot believe that he was acting on his own knowledge. We must believe that he was entirely misled by those about him. In fact the language of the sentence which we are about to quote is not the language which an educated Englishman would use. The letter says:—"When the Municipal Board tried to close this market it was heard that they could not do so under the new bye-laws, as for many years a few vegeatable sellers had been allowed to sit in the temple compound for the convenience of people frequenting the temple."

It has been found, and we entirely agree with the finding, that the market was an old established market of from twenty to twenty-five years' standing, at which sales, not only by retail but also by wholesale, had been publicly conducted. We regard that description of the market as a false and misleading description. We do not believe that it was false and misleading to the knowledge of the Chairman, but certainly false and misleading to the knowledge of those who were instructing him. Now let us see what was the view that the Local Government took of this matter when it came before it. The Local Government, in reply to the Municipal Board of Cawnpore, says that "the amended rule which has been submitted for sanction really asks sanction for the following **[319]** proposals:—First, that no private bazar, however old, will be maintained until the sanction of the Board has been obtained; second, the Chairman may be empowered to shut up and close by means of a written notice any

(1) 17 C. 329.

private bazar where retail selling is going on, however old and well managed it may be, and however willing its owner may be to carry out all instructions." The Local Government had no difficulty in dividing what the motives and object of the Municipal Board were. Its comment is as follows:—"From the foregoing, it will appear that the Municipal Board should be empowered to withhold sanction to the holding of any particular private bazar at any time it likes without assigning any reason, and without making any compensation to the owner, who may lose his valuable right which he may have acquired by prescription. Furthermore, if the Municipal Board sanctions the holding of any private bazar, and that bazar is subsequently sold for a large value, the Chairman will, even if the conditions prescribed by the Board are fulfilled in that bazar, be empowered at any time he pleases to close the bazar without consulting the Board or taking any evidence or assigning any reason," and it says further that "although the Government does not wish to curtail those powers, still it is quite inadvisable to grant such arbitrary powers to the Board as have been suggested." On that the Chairman of the Municipal Board writes to the Commissioner and informs him that the Board is prepared to modify its request, we presume by leaving out the arbitrary powers of the Chairman, and to simply ask that the bye-law which was in force for years in the Municipality may be sanctioned, "as this bye-law is practically the same as the rule printed at p. 76 of the Government Manual as one of the rules approved by Government."

The Chairman forgot to draw the attention of the Commissioner to the fact that s. 22 of Act No. XV of 1873, under which the old rules or bye-laws had been made, had been most materially altered by s. 56 of Act No. XV of 1883, the Act then in force. The Legislature by 1883 had obviously become aware of the danger of entrusting a power to Municipal Boards under which **[320]** they could declare any act or omission to do any act to be a nuisance and make a person liable to a prosecution.

The old rule which the Chairman asked the Government practically to re-introduce could not have been re-introduced under Act No. XV of 1883. The Municipal Board had no longer the right or the power, either with or without the sanction of the Local Government, to declare what acts or omissions should be deemed to be nuisances within Municipal limits. S. 56 of Act No. XV of 1883 put the question of nuisance at rest for ever by giving the Board power to interfere only in the case of public nuisance.

How it came to pass we know not, but the Local Government sanctioned the following rule:—"No person shall establish or maintain a public market, bazar, ganj or slaughter-house in any place without the sanction of the Board or except under such conditions as the Board may from time to time prescribe." The Board, having been defeated up to that time in their attempts to confiscate without compensation the private rights and private property of the plaintiff, had now got a rule which, they thought, gave them a free hand, and accordingly they at once proceeded to prosecute the plaintiff again in order to force him to close the market and abandon the competition. That prosecution, we understand, is awaiting the decision of this case.

It has been said to us in this case on behalf of the Board that the Board will make compensation. All we can say is that, seeing how the Board has acted in this case, we should be very sorry to be anywhere in the position of the plaintiff going to the Board for compensation. The

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plaintiff forwarded a petition against this alteration of the rule to the Governor-General. The Board, we presume, had got their opportunity of representing the facts as they chose, for it is obvious, on looking at the letter of the 5th of February, 1894, from the Government of India to the Secretary to the Government of the North-Western Provinces, that misleading representations as to the facts had been put before the Government of India. It is obvious that it was represented to the Government of India that the selling of vegetables by wholesale in the plaintiff's [321] market was quite recent. That was not a fact. It was represented to the Government of India that if the Municipal Board did close the plaintiff's market under their rules, the plaintiff would have a right to obtain, through the Civil Courts compensation. In one sense that representation was true. If the Municipal Board, having no authority to close the market, did close it, no doubt they would have to pay damages, but if the Municipal Board was right in believing that they had the power to close the market lawfully, no provision had been made, either under the rules or by the Legislature, to compel them to pay one anna of compensation to any person whose rights they might confiscate. The Governor-General in Council decided that he did not consider that the previous practice in respect of this market should be stopped, or that the income derived from it should be confiscated, without a grant of suitable compensation, and the Governor-General in Council expressed an opinion that the new rule, *i.e.*, the altered rule, should be worked with due regard to the custom of the temple and to the rights which had accrued before the rule was framed, and a suggestion was thrown out that it might be possible that a Court of law might not hold that the last rule was retrospective, that is, that the last rule did not apply to a market which was in existence before it was made. So we understand it.

This case came on for trial before the Subordinate Judge of Cawnpore, who dismissed it on a preliminary point. He was set right upon that point, and then he started to try the case on the merits. He found that there had been no old market there for wholesale. A perusal of his judgment is sufficient to show that he went in that finding entirely against the evidence. The plaintiff's witnesses called by the Board proved the plaintiff's case; but the Subordinate Judge found for the defendants upon the evidence of three witnesses. What he has written about these three witnesses in our opinion shows that he ought not to have depended upon their evidence. The plaintiff appealed. The District Judge of Cawnpore, in a very careful and well considered judgment, found every issue of fact in the plaintiff's favour. He found that this [322] was an old market for retail sales and also for wholesale. He found that it was a well conducted market, against the management of which not one word could be said; and indeed the only thing that can be said in favour of the Municipal Board of Cawnpore is that, with all their determination to ruin the plaintiff, they have not ventured to suggest that any fault can be found with the management or with the conduct of the plaintiff's market. The District Judge, having found all the facts, as we think rightly, in favour of the plaintiff, dismissed his suit on a construction of the last rule to which we have referred, and which, he held, applied in this case.

We have got to consider, first, what is the true construction of cl. (*c*) of s. 55 of Act No. XV of 1883. It is contended upon behalf of the Municipal Board that that section enables them to make a rule which they can put in force against new markets or old markets, whether they are well conducted and unexceptionable or the reverse, and that

they can do this with the prime object of promoting the revenue of the Municipal market at the expense of the rate-payer or rate-payers of Cawnpore whose market is to be confiscated. In our opinion, although the clause is ambiguously worded, it never could have been the intention of the Legislature to give power to a Municipal Board to make a rule which would enable them to confiscate private rights in markets where the holding of the market and the maintenance of the market could not be objected to upon any public ground, and to do this without making any compensation to the person whose rights are affected. We find that in Act No. XV of 1883, when the Legislature did intend to give to Municipal Boards the power to acquire private property, they put them under the obligation of complying with the Land Acquisition Act, that is, if the Board desired to obtain the land of a private person, they had to pay just compensation for the rights which they were taking for themselves; but it is contended that, if the Board had a right to close any market in Cawnpore, although the market may be absolutely unobjectionable on the ground of public health or convenience, there was no obligation imposed by this Act on the Board to pay one anna of [323] compensation. It is quite obvious from the conduct of the Board in this case that it would not be advisable for the man whose rights were confiscated to trust himself to the tender mercies of the Board or to their conceptions of justice.

There is another reason against our construing this clause as the Board contends we should, and it is this. We do not believe it possible that the Legislature could have intended to give a power to the Board by the exercise of which they might confiscate private rights for the purpose of increasing their own revenues; and that in truth is what the Board has been trying to do with regard to the plaintiff and his market. The Legislature could not have intended that a Municipal Board should, of its own free will, and at its own indiscretion, have a right to treat that as a nuisance which by no possible view could be regarded by the public or by a lawyer as a nuisance. As we read the clause it was meant to give to Municipal Boards power to make rules for prohibiting the establishment of markets, that is, to prevent new markets being established, and to give them power to control the maintenance of existing markets or of markets which might be established with their sanction. By "maintenance" we presume was intended the keeping up of a market in such a manner as would make it a fit place for the carrying on of a market having regard both to public health and public convenience. It also gave them the power to make rules for the management of such markets. But until the Legislature tell us that it was their intention to confer upon Municipal Boards power to confiscate private rights, the maintenance of which is entirely unobjectionable on public grounds, and to do so without paying any compensation, we must construe clause (*c*) in such a manner as not to cast the slur upon the Legislature of having worked a gross injustice, and we do so construe it.

We allow this appeal, with costs and in this Court and in the Courts below; and we decree the plaintiff's suit and make the declaration which he has asked for.

Appeal decreed.

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[324] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BHUPAL SINGH (*Defendant*) *v.* MOHAN SINGH AND OTHERS (*Plaintiffs*).* [26th February, 1897.],

Pre-emption—Wajibularz—Hindu widow in possession of property of her deceased husband but not as his heir—Stranger—Effect of joining a stranger as plaintiff in a suit for pre-emption.

A Hindu widow in possession of the immoveable property of her deceased husband, but not as his heir, there being a son living, has no right of pre-emption as a co-sharer by virtue of such possession, even though she may be recorded as a co-sharer in the village papers. *Phopi Ram* v. *Rukmin Kuar* (1) and *Imam ud-din* v. *Surjaiti* (2) followed.

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, *i. e.*, a person who has no such right, he thereby forfeits his right to pre-empt, and this disability cannot be overcome by amending the plaint by striking out the name of the stranger. *Bhawani Prasad* v. *Domru* (3), *Ram Nath* v. *Badri Narain* (4) and *Fida Ali* v. *Muzaffar Ali* (5) referred to.

[Diss., 1 O C. 308 ; R., 31 A. 623 = 6 A.L J. 887 = 3 Ind. Cas. 820 = 6 M.L.T. 352.]

THE suit out of which this appeal arose was a suit for pre-emption on the basis of the *wajib-ul-arz*. The property in suit was ten biswa share in the village, forming a separate patti belonging to Shibraj Singh and Bahadur Singh. They sold their share under a sale deed dated the 18th of August and registered on the 7th of September 1893 to Kunwar Misr Harcharan Lal ; and he in turn sold it to one Bhupal Singh on the 22nd of July 1894. The plaintiffs were for the most part sharers in the other patti in the village, and as such entitled under the *wajib-ul-arz* to pre-emption as against Kunwar Misr Harcharan Lal who was a stranger ; but they joined with themselves in the suit two widows, Musammat Indar Kunwar and Musammat Gaura, who, though recorded in the village papers as co-sharers, were only so recorded by courtesy, being widows of deceased co-sharers whose sons were living. The subsequent vendee, Bhupal Singh, was made a party to the suit, under s. 32 of the Code of Civil Procedure, and he raised the plea that the female plaintiffs, being in fact not [325] co-sharers in the village, had no right of pre-emption, and further, that the other plaintiffs who were co-sharers, by joining with them in their suit these two strangers, had forfeited their own right of pre-emption.

The Court of first instance found that the two widows were not strangers, inasmuch as their names were recorded in the *khewat* of the village, and also apparently because they would be entitled to get a share on partition. In other respects the Court found in favour of the plaintiff and gave them a decree for $\frac{12}{13}$ of the share claimed, having regard to the fact that Bhupal Singh was a pre-emptor of equal rights with themselves.

From this decree Bhupal Singh appealed to the High Court, raising the same plea as to the effect of the joinder of the two widows as plaintiffs as he had raised in the suit.

Mr. *Roshan Lal* and Pundit *Sundar Lal*, for the appellant.

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* First Appeal No. 79 of 1895, from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated 27th March 1895.

(1) 15 A.W.N. (1895) 84. (2) 15 A.W.N. (1895) 85. (3) 5 A. 197.
(4) 19 A. 148. (5) 5 A. 65.

Mr. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondents.

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JUDGMENT.

BANERJI and AIKMAN, JJ.:—This was a suit for pre-emption, on the basis of the *wajib-ul-arz*. The property in suit belonged to Shibraj Singh and Bahadur Singh, and was sold by them on the 18th of August, 1893, to Kunwar Misr Harcharan, a stranger to the village. The latter sold the property on the 22nd of July, 1894, to Bhupal, the appellant, who is a co-sharer of the original vendors. The plaintiffs brought the present suit to enforce their right of pre-emption in respect of the sale to Kunwar Misr Harcharan, and subsequently added Bhupal as a defendant to the suit. One of the grounds on which Bhupal contested the claim was that the female plaintiffs were not co-sharers in the village, and had not the right to pre-empt, and that the other plaintiffs by associating them with themselves in the suit had forfeited their own right of pre-emption. The Court below has granted to the plaintiffs a decree for a portion of the property after excluding the portion which in its opinion Bhupal was entitled to pre-empt. Bhupal has preferred this appeal, and he reiterates the plea raised in the Court below as to the right of the plaintiffs to maintain the suit. We have two [326] questions to decide in this appeal, first, whether the two female plaintiffs are co-sharers or strangers; and secondly, if they are strangers, what is the effect on the claim of the other plaintiffs of their being associated in the suit with those plaintiffs.

As regards the first point, it appears that the sons of both the ladies are alive, and therefore the ladies have no right as heirs to their husbands to share in their husbands' property. It is not alleged that they had acquired a share in the property by any right other than a right derived from their husbands, who were the original owners of the property, on the strength of which they claim to be co-sharers. It is true that in the revenue records, their names have been entered along with those of their sons as co-sharers in the village, but that circumstance alone would not make them co-sharers and confer on them the right of pre-emption as co-sharers, since as a matter of fact they have no right to the property as co-sharers. The Subordinate Judge has held that the ladies have a right of pre-emption, because they have a right to maintenance and also because on a partition they would get a share in their husband's estate. This view is opposed to the ruling of this Court in *Phopi Ram* v. *Rukmin Kuar* * (1) and *Imam-ud-din* v. *Surjaiti* † (2). Had these rulings been before the Subordinate Judge he would probably have arrived at a different conclusion.

We must, therefore hold that the two plaintiffs, Musammat Indar Kunwar and Musammat Gaura, were not entitled to claim pre-emption in respect of the property in suit.

As for the second question, it has been held that a co-sharer by associating with himself a stranger in a suit brought for pre-emption thereby forfeits his right of pre-emption. By the very act of joining a stranger in the suit he attempts to violate the pre-emptive right and estops himself from asserting it. This was held in *Bhawani Prasad* v. *Damru* (3) and in the recent case of *Ram Nath* v. *Badri Narain* (4) decided by a Bench of three Judges. It was contended before us that the female plaintiffs

(1) 15 A.W.N. (1895) 84.
(2) 15 A.W.N. (1895) 85.
(3) 5 A. 197.
(4) 19 A. 148.
* 19 A. 327.
† 19 A. 329.

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were not such strangers as would entail the dismissal of the suit of the other [327] plaintiffs, and that the defect in the suit, if any, might be remedied by an amendment of the plaint and by striking out the names of the female plaintiffs. We cannot accept either of these contentions. As held in *Fida Ali* v. *Muzaffar Ali* (1) the word "stranger" is a correlative to "pre-emptor," and is used to denote a person who has not the right of pre-emption. If these ladies, who had not the right of pre-emption by reason of their not being co-sharers in the village, were granted a decree in this case, the result would be that a share of the village would pass into the hands of the personal heirs of these ladies, who might be entire strangers to the village. As to the argument that the defect in the plaint could be remedied by an amendment, we may observe, as held in the cases above referred to, that the very fact of a person having the right of pre-emption joining with himself strangers, *i.e.*, persons who have not a right of pre-emption, is in itself sufficient to estop him from asserting his claim. An amendment of the plaint therefore would not be of any avail to the other plaintiffs. For the above reasons we are of opinion that the suit ought to have been dismissed. We allow the appeal, and, setting aside the decree below, dismiss the suit with costs here and in the Court below. The objections under s. 561 necessarily fail and are dismissed with costs.

Appeal decreed.

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* Judgment in this case was as follows :—

EDGE, C.J., and BRODHURST, J.—This appeal has arisen in a pre-emption suit. The appellants before us are the defendants to the suit. The plaintiff is the respondent. She is a Hindu lady. Her husband, Jai Singh, had two sons by her, and one son, Beni Singh, by a first wife. Beni Singh brought a suit for partition. On that the plaintiff here brought her suit claiming her share on partition and obtained a decree for a share, and on partition her share. It is in right of her interest in that share that she claims to be entitled to maintain this suit for pre-emption. It has been contended on behalf of the appellants that a Hindu widow or wife who has obtained on partition a share does not in right of that share obtain any right of pre-emption. On the other hand it is contended that a Hindu lady who obtains a share on partition stands exactly in the same position, so far as pre-emption is concerned, as does a Hindu widow who has taken by inheritance a share from her deceased husband. In support of the contention that a Hindu widow who has taken a share by inheritance from her [328] deceased husband has a right of pre-emption; we have been referred to the case of *Phulman Rai* v. *Dani Kuari* (2), to Mayne on Hindu Law and Usage, (4th edition), page 689, para. 577, and that portion of the judgment of the Calcutta High Court in *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (3) at page 307. On behalf of the appellants we have been referred to *Dila Kuari* v. *Jagarnath Kuari* ; (4) Tagore Law Lectures on the Hindu Widow, 1879, page 467 ; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (3), and particularly to that portion of the report at page 303; *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (5), and particularly to that portion of the judgment at pages 765 and 766. We have also been referred to *Sheo Dyal Tewari* v. *Jadoonath Tewari* (6) ; Mitakshara, Chap I., s. 7, para 1, and Chap I, s. 2, verse 8 ; Smiriti Chandrika, Chap. IV, verse 7 ; West and Bubler's Hindu Law, page 303. Now it appears to us that it is admitted law that a Hindu lady, whether she be wife or widow, cannot claim partition unless and until some male member of the Hindu family entitled to partition, has claimed partition. It is also, we think, certain, in these Provinces at least, that a Hindu lady who has obtained a share on partition obtains nothing beyond a life-interest in the share. A Hindu widow is entitled to maintenance out of the family property, and it appears to us that her right to a share on partition flows from her right to maintenance and arises on the breaking up of the family property ; and, so far as pre-emption is, concerned her obtaining a share on partition would give her no more right to claim pre-emption in the village than if she had been allowed to have possession of a particular share for maintenance without partition, that is, that she does not obtain, by

(1) 5 A. 65. (2) 1 A. 452. (3) 15 C. 292.
(4) 6 A. 17. (5) 16 C. 758. (6) 9 W.R. 61.

reason of getting a share on partition, such an interest as would support a suit for pre-emption. We do not see in the case of a Hindu lady who has obtained a share on partition, anything which would give her a right to claim pre-emption, any more than what existed in *Dila Kuari* v. *Jagarnath Kuari* (1) in which case a Hindu widow had under the decree of Court been put in possession of a share in lieu of maintenance. Difficulties might arise if we were to hold that a Hindu widow in right of a share obtained by her on partition, got thereby a right of pre-emption in the village. Cases might arise in which a share obtained by pre-emption by a Hindu widow, if she had such a right, might on her death pass away into the hands of a person who was not a co-sharer, and under circumstances which would preclude any co-sharer in the village claiming pre-emption. Such a case might possibly arise if the Hindu widow paid the pre-emptive price out of her *stridhan*, which on her death would go to her father's heirs. We think it is better for us to follow the principle which we find in *Dila Kuari* v. *Jagarnath Kuari* (1) which will not interfere with the very object of the custom of pre-emption, namely, the exclusion of strangers from the village, rather than to follow the principle affirmed in *Phulman Rai* v *Dani Kuari* (2) which was a case in which a lady took by **[329]** inheritance to her husband. We need not express any opinion as to whether that case was correctly decided or not. In our opinion the plaintiff here did not obtain in right of the share she got on partition any right of pre-emption in the village. We allow the appeal with costs and dismiss the suit with costs.

Appeal decreed.

[N.B. This note case has been followed in 19 A. 324 (326) ; 19 A. 329 N. = 15 A.W N. (1895), 84.]

† In *Imam-ud-din* v. *Surjaiti*, the following judgment was delivered :—

EDGE, C.J., and BANERJI, J.—This appeal has arisen in a suit for pre-emption brought on a *wajib-ul-arz*. The first Court gave a decree, and the defendants, who were the vendees, have appealed. The facts are simple in so far as they refer to the point which decides this case. The plaintiff is the widow of one Sukh Darshan Singh. Sukh Darashan Singh and his brother, Umrao Singh, were in the possession of twenty biswas in the village. On the death of Sukh Darshan Singh, a disptue arose between Umrao Singh and the present plaintiff as to her rights, and in the end that suit was settled by an agreement of compromise, dated the 19th of March, 1887, entered into between the parties. Under that agreement the plaintiff was allowed the profits of 5 biswas of the property for her life, but the agreement specifically provided that she should have no other interest in the property and that she should have no power to transfer by way of mortgage, or sale, or will, or in any other way, any part of the property. The Subordinate Judge who tried the case, found that the brothers were separate and not joint. In our opinion it is immaterial whether Umrao Singh and Sukh Darshan Singh were joint or separate. The plaintiff's sole title now is that conferred on her by the compromise of the 19th of March, 1887. It appears to us that the effect of that compromise was to limit the interest of the plaintiff, whatever it may have been before the compromise, to the enjoyment of the profits of the 5 biswas for her life-time without any power of mortgaging or selling or transferring even her life interest. Under that agreement, the plaintiff was in the position of a Hindu widow in a joint family who is allowed the profits of a portion of the family property for her maintenance, that is, so far as any interest she took in the property is concerned. The interest which the plaintiff has under that compromise is of a totally different description and far more limited than the interest which the Hindu widow of a sonless separated husband would have in his estate on his death. In our opinion the plaintiff is not a proprietor in the mahal within the contemplation of the pre-emption clause of the *waji-ul-arz*. The position of Hindu widows, so far as the right of pre-emption is concerned, has been considered by this Court in *Phulman Rai* v. *Dani Kuari* (2) in *Dila Kuari* v *Jagarnath Kuari* (1), and in Second Appeal No. 958 of 1888, decided on the 20th of May 1890, [ante p. 327].

We hold that the plaintiff in this case had no pre-emptive right, and we allow this appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

(1) 6 A. 17.

(2) 1 A. 452.

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19 A. 330=17 A.W.N. (1897) 75.

19 A. 330=17 A.W.N. (1897) 75.

[330] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

THAKUR RAGHUNATHJI MAHARAJ (*Plaintiff*) *v.* SHAH LAL CHAND (*Defendant*).* [11th March, 1897.]

Amendment of plaint—Suit brought in the name of the idol of a temple—Amendment allowed to name of manager of temple—Practice.

A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple.

Where such a suit was so brought, the Court in Second Appeal allowed the plaint to be amended, on certain conditions, by substituting the name of the person alleged to be the manager of the temple, but without prejudice to any question which might subsequently be raised as to such person's *locus standi* in the suit.

[Overruled, 33 A. 735, (737)=8 A.L J. 817 (819)=11 Ind. Cas. 47; **Appr.,** 23 A.167.]

THE suit out of which this appeal arose was brought really on behalf of a temple for the recovery of certain property alleged to be due under an award. The plaint was thus entitled :—"Thakur Raghunathji Maharaj seated in the temple at Ramghat, pargana Anupshahr in the Bulandshahr district, through Salig Ram, son of Raghunath, Manager and Superintendent of the Temple." No objection was taken to this form of the plaint in the Court of first instance, and that Court (Subordinate Judge of Aligarh) gave the plaintiff a decree as claimed. On appeal by the defendant the District Judge dismissed the appeal and the suit, holding that the suit could not be brought in the name of an idol. The Judge also held that s. 539 of the Code of Civil Procedure applied, and no sanction having been obtained to its institution, the suit was on that ground also unmaintainable.

The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—This suit, which relates to property alleged to belong to a temple, was brought in the name of the idol of the temple—"Thakur Raghunathji Maharaj, seated in the temple at Ramghat, Pargana Anupshahr in the Bulandshahr district, through Saligram, son of Raghunath, Manager and Superintendent of the temple." The lower appellate Court **[331]** dismissed the suit upon two grounds—(1) that an idol cannot be a plaintiff in a suit under the Code of Civil Procedure, and (2) that s. 539 of that Code applied to this case, and the requirements of that section had not been complied with.

We do not see how s. 539 applies in this case at all. In our opinion the Code of Civil Procedure, which requires that there must be a plaintiff to a suit, does not contemplate an idol being made plaintiff. Difficulties might arise in enforcing the process of the Court if an idol or a god of a temple were accepted as a plaintiff in a suit.

We are willing to allow an amendment to be made, which will be, of course, without prejudice to any rights which may have been acquired

* Second Appeal No. 1027 of 1894, from a decree of L.G. Evans, Esq., District Judge of Aligarh, dated the 8th August 1894, reversing a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 26th September 1893.

by limitation, or as to any question which may arise as to the right to sue of the person who may be substituted as plaintiff by way of amendment. We only allow the amendment conditionally, the condition being that within four months from this date the costs already incurred by the defendant in this suit be paid to him, including the costs of this appeal. When these costs have been paid to the defendant, or into Court to his credit, we permit an amendment to be made making Saligram, son of Raghunath, plaintiff in the suit. We do not decide in allowing the amendment that he is the proper plaintiff or that he has any right to sue. If the costs of the defendant up to the present time be not paid within the time limited, the appeal in this Court will stand dismissed with costs. If these costs are paid within the time limited, the amendment may be made within a fortnight from the payment of the costs, and in that case the decrees of the Courts below will be set aside and the case will be remanded to the Court of first instance for trial on the merits and on any issues which may arise owing to the amendment.

1897 MARCH 11. APPELLATE CIVIL. 19 A. 330 = 17 A.W.N. (1897) 75.

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19 A. 332=17 A.W.N. (1897) 73.

[332] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

LALJI MAL (*Defendant*) *v.* NAND KISHORE (*Plaintiff*).*

[12th March, 1897.]

Execution of decree—Civil Procedure Code, s. 244—Representative of a party to the suit—Purchaser of property under attachment in execution of a decree.

The purchaser of property which is under attachment in execution of a decree is a representative of the judgment-debtor under that decree within the meaning of s. 244 of the Code of Civil Procedure. *Madho Das* v. *Ramji Patak* (1) referred to.

A person to whom s. 244 of the Code of Civil Procedure applies cannot avoid the application of that section by filing his objection to execution under s. 278. *Shankar Dat Dube* v. *Harman and Co.*, (2) and *Imdad Ali* v. *Jagan Lal* (3) referred to.

[F., 21 A. 20; Appr., 28 C. 492 (496); R., 26 A. 406 (441)=A.W.N. (1904) 74 (87); 26 A. 447=A.W.N. (1904) 61; 34 M. 450 (451)=(1910) M.W.N. 574=20 M.L.J. 961 (963)=8 M.L.T. 240=7 Ind. Cas. 418 (419); 2 A.L.J. 265; 5 A.L.J. note 15; 5 C.L.J. 80=11 C.W.N. 163; 13 C.P.L.R. 1 (15); D., 20 A.W.N. 107.]

IN this case the plaintiff, Nand Kishore, sued for a decree declaring that the interest of his judgment-debtor, Ram Mohan, in certain property was liable to sale in execution of his decree dated the 25th of May 1889. On the 2nd of May 1891 Ram Mohan had transferred the property in suit by a private sale to the second defendant, Lalji Mal. At that time the property was under attachment in pursuance of the decree of the 25th of May 1889. On application being made by the decree-holder to bring the said property to sale in execution of his decree, Lalji Mal filed an objection under s. 278 of the Code of Civil Procedure. That objection was allowed: hence the present suit.

The Court of first instance (Subordinate Judge of Bareilly) dismissed the suit. The plaintiff appealed, and the Court of first appeal allowed the

* First Appeal No. 100 of 1896 from an order of E. J. Kitts, Esq., District Judge of Bareilly, dated the 27th August 1896.

(1) 16 A. 286. (2) 17 A. 245. (3) 17 A. 478.

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19 A. 332 = 17 A.W.N. (1897) 73.

appeal and made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand the defendant Lalji Mal appealed to the High Court.

Mr. *D. N. Banerji*, for the appellant.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—Lalji Mal purchased from the judgment-debtors some immoveable property whilst it was under attachment in execution of a decree. Application was sub-[333]sequently made to bring that property to sale in execution of the decree. Lalji Mal filed an objection under s. 278 of the Code of Civil Procedure and that objection was allowed. Thereupon Nand Kishore, the judgment-creditor, brought this suit under s. 283 of the Code to have it declared that the property purchased by Lalji Mal might be brought to sale in execution of his (Nand Kishore's) decree. The first Court dismissed the suit. The second Court, in appeal, set aside the decree of the first Court, and made an order of remand under s. 562 of the Code of Civil Procedure. From that order this appeal has been brought.

It is contended on behalf of the appellant, Lalji Mal, that the suit did not lie, as the order passed on his objection was an order in a matter to which s. 244 of the Code applied. On the other side it is contended that Lalji Mal was not a representative of a judgment-debtor within the meaning of s. 244, and further, that, his objection having been filed under s. 278 of the Code, s. 244 did not apply.

Convenience, which is not always a good reason for laying down a proposition of law, would suggest that a sale which was contrary to the provisions of s. 276 of the Code of Civil Procedure, should, if challenged by the decree-holder, be a matter to be adjudicated upon under s. 244. In our opinion, as the property in question was under attachment at the time the sale took place, the purchaser must be treated as a representative of the judgment-debtor; on the same principle as he would have been a representative of the judgment-debtor by reason of his purchase, if the decree had been one for sale of a particular property. The position of a purchaser of a property affected by a decree for sale was discussed by this Court in *Madho Das* v. *Ramji Patak* (1).

Now as to the other point. It has been decided by two different Benches of this Court that a person to whom s. 244 of the Code applies cannot avoid the application of that section by filing his objection to execution under s. 278. The cases [334] to which we refer are *Shankar Dat Dube* v. *J. G. Harman and Co.*, (2) and *Imdad Ali* v. *Jagan Lal* (3). The plaintiff's suit was, in our opinion, barred by s. 244 of the Code of Civil Procedure.

We allow this appeal with costs, and, setting aside the order of the Court below, we dismiss the appeal to the Court below with costs, and restore and affirm the decree of the Court of first instance.

Appeal decreed.

(1) 16 A. 286.

(2) 17 A. 245.

(3) 17 A. 478.

19 A. 334 = 17 A.W.N. (1897) 93.

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APPELLATE CIVIL.

19 A. 334 = 17 A.W.N. (1897) 93.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD YUNUS KHAN AND ANOTHER (*Defendants*) *v.* MUHAMMAD YUSUF (*Plaintiff*).* [12th March, 1897.]

Pre emption—Muhammadan law—Effect of offer by pre-emptor to purchase from vendee— Talab-i-ishtishhad—*Witnesses—Servants of pre-emptor.*

Held that where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption.

Held, also that in the making of the *talab-i-ishtishhad*, the servants of the pre-emptor are competent witnesses. The disability in this respect imposed by the Muhammadan law is limited to minors and persons convicted of slander.

Muhammad Nasir-ud-din v. *Abdul Hasan* (1), followed. *Habib un-nissa* v. *Abdul Rahim* (2), referred to.

[D., 10 Ind. Cas. 143.]

IN this case the plaintiff, Muhammad Yusuf, sued for possession by right of pre-emption of a house and compound sold by Hafiz Abdul Karim to Muhammad Yunus Khan and Mahammad Isa Khan, defendants, on the 27th of June, 1893. The plaintiff based his claim on Muhammadan law, and also on the *wajib-ul-arz*. The defendants, vendees, pleaded that the Mahammadan law did not apply under the special circumstances of the case, and that the formalities required by that law had not been observed by the plaintiff. The other pleas taken by the defendants related to the claim so far as it might be based on the *wajib-ul-arz*.

[335] The Court of first instance (Subordinate Judge of Aligarh, found on the two most material issues in the case, *viz.* (1) whether the plaintiff had a right of pre-emption under the Muhammadan law) ; and (2) whether the plaintiff had duly performed the ceremonies of *talabi-i-muasibat* and *talab-i-ishtishhad* in favour of the plaintiff, and accordingly gave the plaintiff a decree.

The defendants, vendees, appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellants.

Pundit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the respondent to enforce his right of pre-emption in respect of the sale of a house and compound, made in favour of the appellants on the 27th of June 1893. The plaintiff is the owner of an adjoining house, and he founded his claim on Muhammadan law, and also on the *wajib-ul-arz*. The defence of the defendants, vendees, was that the plaintiff had refused to purchase the property, that he did not perform the preliminary demands required by the Muhammadan law, and that he was not entitled to pre-empt the property. The Court below has found in favour of the plaintiff and granted him a decree.

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* First Appeal No 71 of 1894, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 22nd January 1895.

In 17 A.W.N. (1897) 93, this case is referred to as First Appeal No. 71 of 1895.

(1) 16 A. 300. (2) 8 A. 275, also appearing as Habib-un-nissa *v.* Barkat Ali.

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19 A. 334 = 17 A.W.N. (1897) 93.

The first contention raised before us in appeal is that the plaintiff acquiesced in the sale, and thereby forfeited his right of pre-emption. In our opinion, there is no evidence to support this contention. The only evidence to which our attention has been drawn is the deposition of Mr. Shapurji. He states that before the purchase by the defendants he had a conversation with the plaintiff about the purchase of the property in question, and that the plaintiff told him that he did not care to purchase the property. There is nothing to show that after the terms of the sale had been settled with the appellants, and the sale to them had been arranged, the plaintiff was aked if he would purchase the property on the same terms and declined to make the purchase. On the contrary we find that on the 8th of October, 1892 he wrote to the vendor expressing his willingness to purchase the **[336]** property and in fact asking him to convey it to him. That letter clearly shows that the plaintiff was insisting on his right of pre-emption, and there is nothing to prove that subsequently to the date of that letter he changed his mind.

Mr. *Moti Lal* on behalf of the appellants next contends that, as it appears from the deposition of the plaintiff himself that after the purchase by the defendants-vendees he, the plaintiff, expressed his willingness to purchase the property from them, this circumstance was enough to extinguish the right of pre-emption of the plaintiff. In support of his contention he referred us to the case of *Habib-un-nissa* v. *Abdul Rahim* (1). The same question was considered by another Bench of this Court in a later case, *viz.*, *Muhammad Nasir-ud-din* v. *Abdul Hasan* (2). In that case it was held, that "where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right, and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption." With the latter ruling, we agree. As in this case the plaintiff offered to purchase the property from the vendees whilst insisting on his right as pre-emptor, he did not by that offer forego his right of pre-emption.

The next contention on behalf of the appellants is that the respondent failed to prove that he had complied with the preliminary requirements of the Muhammadan law. With reference to this contention, we may observe that the respondent is a lawyer and a Muhammadan: it may therefore be presumed that in asserting his right of pre-emption he would do all that was required by Muhammadan law. We have in this case the evidence of the plaintiff himself that as soon as he heard of the sale in question he made the first demand, that is, the *talab-i-muasibat*, and that he then proceeded to the spot where the property is situated, and there, in the presence of two witnesses who had also been present **[337]** at the time of making the first demand, made the invocation in the presence of witnesses called *talab-i-ishtishhad*. It has been urged that the *talab-i-ishtishhad* was not performed in compliance with the Muhammadan law, inasmuch as it was made in the presence of persons who were the servants of the plaintiff, and who, it is said, were on that account not competent witnesses according to that law. We may observe that the disability as competent witnesses under the Muhammadan law is limited to minors and persons convicted of slander and does not extend to servants. There is therefore no basis for the contention that the servants

(1) 8 A. 275 ; also appearing as Habib-un-nissa v. Barkat Ali.
(2) 16 A. 300.

of the plaintiff, in whose presence the *talab-i-ishtishhad* was performed, were not competent witnesses. Further, it is laid down in Baillie's Muhammadan law, at p. 489, that "invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand." That being the object of the invocation of witnesses, any persons who under the law as now administered would be competent witnesses can attest the fact of the demand with invocation being made.

These being the only pleas pressed before us, this appeal fails and is dismissed with costs.

Appeal dismissed.

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19 A. 337 = 17 A.W.N. (1897) 75.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

MADHO PRASAD (*Decree-holder*) *v.* KESHO PRASAD (*Objector*).*

[15th March, 1897.]

Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 179—Civil Procedure Code, sections 234, 248—Applications for execution made without any representative of the deceased judgment-debtor being brought on to the record.

Applications for the execution of a decree made after the death of the judgment-debtor and without either any representative of the judgment-debtor being brought upon the record or there being any subsisting attachment of the property against which execution is sought are not good applications for the purpose of saving limitation. *Sheo Prasad* v. *Hira Lal* (1), distinguished.

[Diss., 35 C. 1047; R., 6 A.L.J. 944 = 3 Ind. Cas. 817; D., 10 C.L.J. 19 (21) = 2 Ind. Cas. 941.]

THE facts of this case sufficiently appear from the judgment of the Court.

[338] Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellant.

Munshi *Jwala Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This appeal arises in the execution of a decree. The decree was passed on the 25th of January, 1878. On the 9th of January, 1879, the first application was made for execution. On the 19th of March, 1880, the second application was made. On the 8th of June, 1880, the third application was made. After the last-mentioned application had been made, one Sheo Dial filed an objection to the execution of the decree against this property. His objection was filed under s. 278 of the Code of Civil Procedure. The objection was allowed. The allowance of that objection had the effect of determining any attachment or any order for sale which had previously been made. The decree-holder brought this suit under section 283 of the Code to have his right declared to execute his decree against this property. In that suit, he ultimately succeeded, but the decree

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* First Appeal No. 8 of 1895, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 28th September 1894.

(1) 12 A. 440.

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19 A. 337 = 17 A.W.N. (1897) 75.

establishing his right did not reinstate the attachment or any order for sale, if any, which may have been made. The decree-holder having by his suit established his right to execute his decree against this property, it was for him to take the necessary steps to put his decree in execution. On the 21st of August, 1886, he filed an application for the execution of his decree. Before the 21st of August, 1886, the judgment-debtor had died. The decree-holder appears to have assumed that he had a decree *in rem* which he could proceed to execute without bringing upon the record or giving notice to any representative of the deceased judgment-debtor. On the 4th of December, 1887, he filed another application, still without anyone to represent the estate of the deceased judgment-debtor. On the 23rd of July, 1889, he filed his sixth and last application. On the 21st of December, 1888, he had obtained an order for attachment, there being at that time no respondent to his application representing the estate or the interest which had been in the deceased judgment-debtor.

[339] It appears to us that this was a case to which s. 234 and s. 248 of the Code of Civil Procedure applied, and that the proceedings in execution after the death of the judgment-debtor made in the absence of and without notice to the representative of the judgment-debtor were ineffectual proceedings. The Subordinate Judge in the present case has held that the present application for execution is barred by limitation, and he has so held having come to the conclusion that the applications which were made when there was no representative of the deceased judgment-debtor on the record were ineffectual. On behalf of the decree-holder appellant the decision of the Full Bench in *Sheo Prasad* v. *Hira Lal* (1) was relied upon. That case is not in point. In that case in the life-time of the judgment-debtor a valid attachment had been made, which continued after his death, and an order for sale had been made, and nothing remained but to carry into effect the order for sale. The decree-holder has only himself or his advisers to thank for the position in which he finds himself. There is quite sufficient irregularity in the execution of decrees in this country without our introducing the novel system that a decree can be executed against the estate of a deceased judgment-debtor without any notice to his representative and without anyone to protect the property being brought upon the record.

We dismiss this appeal with costs.

Appeal dismissed.

(1) 12 A. 440.

19 A. 339=17 A.W.N. (1897) 78.

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19 A. 339=17 A.W.N. (1897) 78.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

THE CROWN BREWERY, MUSSOORIE (*Opposite Party*) *v.* THE COLLECTOR OF DEHRA DUN (*Applicant*).*

[17th March, 1897.]

Act No. X of 1870 (*Land Acquisition Act*), *s.* 15—*Reference by Collector to Judge—Land in respect of which the reference is made claimed by Collector on behalf of Government—Jurisdiction.*

The Collector has no power to make a reference to the District Judge under s. 15 of Act No. X of 1870 in cases in which he claims the land in respect of which such reference is made on behalf of Government, and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or [340] determine such reference. *Imdad Ali Khan* v. *The Collector of Farakhabad* (1) followed.

[R, 34 B. 618 (623)=12 Bom. L R. 31=5 Ind Cas. 621 (623); 38 C. 230 (244)=12 C.L.J. 505=15 C W.N. 87 (93)=8 Ind. Cas. 107 (110); 10 Bom.L.R. 994 (999); D, 4 C.L.J. 256; 115 P.R. 1906=87 P.L.R. 1907.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *C. Ross Alston*, for the appellant.

Mr. *E. Chamier*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—This is an appeal from an order passed by the Judge of Saharanpur on a reference made to him on the 16th of February, 1894, by the Superintendent of the Dun. The reference was made under s. 15 of Act No. X of 1870, as Act No. I of 1894 did not come into force till the 1st of March, 1894. The Collector (Superintendent) described the land proposed to be taken up as being land situated in Kinlock's State Crown Brewery, Jharipani, consisting of 17 acres, 6 poles. He described the Crown Brewery as being the "persons interested" in the land, and stated that he had offered 476 Rupees as compensation for that land, standing trees, &c., to this he added 15 per cent. for forcible acquisition, the total amount offered being Rs. 616-7-8, a sum which he says the manager of the Brewery refused as being insufficient.

In the reference the Superintendent of Dehra Dun alludes to a claim made by the Brewery as to a spring of water and for compensation for the same, but he adds that the spring clearly belongs to Government. He did not propose to take it up under the Act.

The case first came on for hearing before the District Judge on the 20th of April, 1894, when three issues were fixed, namely:—

1. The value of the land, trees, &c.?

This was a perfectly proper issue and the only one that arose in the case.

The next two issues were:—

2. The right to the water, *i.e.*, could the claimants claim a right to it against Government?

3. If so, the value of the water right?

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* First Appeal No. 89 of 1895 from an order of H. Bateman, Esqr., District Judge of Saharanpur, dated the 8th February 1895.

(1) 7 A. 817.

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19 A. 339 = 17 A.W.N. (1897) 78.

These two issues did not arise on the reference and were improperly fixed for trial by the Judge as issues in the case.

[341] The evidence of one witness, Mr. Campbell, was taken and the case was adjourned to the 28th of January 1895. Before that date arrived Mr. Winter, who had succeeded Mr. Tweedie as Superintendent of the Dun, addressed to the Judge a letter, dated the 9th of November 1894, (No. 25 on the record) appended to which, with reference to his predecessor's reference of the 16th of February 1894, he submitted what he called "a further note on the subject" together with copies of certain documents. The "note" is referred to in the Judge's memorandum of the 28th January 1895 as a "long written statement" filed by the Collector. We have no hesitation in saying that the Collector was wrong in addressing such a communication to the Judge, and the Judge was equally wrong in receiving and filing it. When the appeal was being argued, Mr. *Chamier*, who appeared for the Government, very rightly admitted that such proceedings should never have taken place and did not attempt to support them.

In his decision the learned District Judge found, firstly, that the Brewery had no title to the land, and, secondly, that the Brewery had no title to the spring and the water. But, as the Collector had offered Rs. 616-7-8, he confirmed that award. Thus it will be seen that he did not decide the issue as to the value of the land which had been raised at the first hearing, which, as we have pointed out, was the only real issue in the case. The Crown Brewery has appealed.

It is contended that the Judge was wrong in entering into the question of the title of the Crown Brewery to the land as against the Government. In our opinion the contention is a sound one and must be supported. We fully concur in the rule of law laid down in the case of *Imdad Ali Khan* v. *The Collector of Farakhabad* (1) in which it was held:—"The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or determine **[342]** such reference." If Mr. Winter desired to deny the title of the Crown Brewery to the land, &c., proposed to be taken up, his proper course, we conceive, would have been to withdraw the reference, but his not having done so did not in our opinion give the District Judge jurisdiction to decide the question of title. It therefore follows that whatever the Judge has decided in his judgment as to the title of the Brewery to the land is irrelevant and not called for by the reference. As to the spring and water, we have pointed out that the Collector did not propose to take them up under the Act; no question respecting them was before the Judge, and his finding on this point also is equally irrelevant and without jurisdiction.

There was one point and one point only awaiting decision, namely, the value of the land. On this point no decision has been given: it must now be decided. We set aside the order of the Court below and refer, under s. 566 of the Code of Civil Procedure, that point for the determination of the Judge, namely, what is the value of the 17 acres 6 poles of the land together with the trees standing thereon, which the Collector proposes to take up, and what amount of compensation should

(1) 7 A. 817.

be given under the Act? As both parties have had full opportunity of giving evidence, no further evidence will be taken. The Judge will send a reply to this reference in two months. On its return ten days will be allowed for objections by either party and the appeal then put up for hearing.

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APPELLATE CIVIL.

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19 A. 342 = 17 A.W.N. (1897) 76.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SIYADAT-UN-NISSA (*Defendant*) *v.* MUHAMMAD MAHMUD (*Plaintiff*).* [17th March, 1897.]

Act No. XV of 1877 (*Indian Limitation Act*), *ss.* 5 *and* 12, *sch. ii, art* 152—*Appeal—Limitation — Exclusion of time necessary for obtaining copies of decree and judgment.*

If the period prescribed by the second schedule of the Indian Limitation Act, 1877, for the presentation of an appeal expires on a day on which the [343] Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the re-opening of the Court, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time it is not barred by limitation.

A decree was passed against a defendant by the Court of a Munsif on the 17th of September 1894. The appellate Court (Subordinate Judge's Court) was closed from the 6th of October to the 4th of November both days inclusive. On the 5th of November, the defendant-appellant applied for copies of the decree and judgment. The copies were delivered to her on the 6th November, and on the same day she presented her appeal to the appellate Court. *Held* that the appeal was within time.

[F., 25 B. 584 = 3 Bom. L.R. 143; 2 Bom. L.R. 221; 7 C.L.J. 50 (N); **Rel. on**, 10 Ind. Cas. 866 (867) = 7 N.L.R. 67; **R.**, 25 B. 586; 36 M. 131 (133) = 21 M.L.J. 1000 (1003) = 10 M.L.T. 254 = (1911) 2 M.W.N. 221 (222) = 12 Ind. Cas. 58 (59)]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The only question to be determined in this second appeal is whether the appeal preferred to the lower appellate Court by the present appellant was or was not barred by the law of limitation. In order to understand that question it is necessary to state a few dates. The decree of the Court of first instance was made on the 17th of September, 1894. The Courts were closed for the Dasehra vacation from the 6th of October to the 4th of November, 1894, both days inclusive. On the 5th of November, 1894, the day on which the Courts re-opened, the appellant applied for copies of the decree and judgment. The copies were delivered to her on the 6th of November, 1894. On that date she presented her appeal. There can be no doubt that the period of thirty days prescribed by art. 152 of sch. II of the Indian Limitation Act, 1877, had expired on that date; but it was contended on behalf of the appellant

* Second Appeal No. 432 of 1895, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 18th January 1895, confirming a decree of Munshi Anant Prasad, Munsif of Amroha, dated the 17th September 1894.

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that, as the thirty days had expired on the 17th of October, 1894, when the Court was closed, she was entitled under the first paragraph of section 5 to present her appeal on the date of the re-opening of the Court; that on that date she applied for copies of the decree and judgment, and that, as the copies were not delivered [344] on that date, the time requisite for obtaining the copies should have been excluded from computation under s. 12, and therefore her appeal was in time on the 6th of November, 1894.

This contention, which was overruled by the Court below, has been reiterated in this appeal, and we are of opinion that it must prevail. It is beyond doubt that, had the copies applied for on the 5th of November, 1894, been prepared and delivered on that date, and had the appeal been presented on that date, it would have been within time. It is equally beyond doubt, and has indeed been conceded, that had the thirtieth day from the date of the decree been the 5th November, 1894, the appellant would have been entitled to exclude the time requisite for obtaining copies of the decree and judgment, that is, to add the number of days occupied in the preparation of the copies to the thirty days prescribed by art. 152. In that case the appeal preferred on the 6th of November, 1894, would undoubtedly have been in time. We have to consider whether it was contemplated by the Legislature that a different rule as to the computation of limitation would apply if the last day of the period of limitation prescribed in the second schedule expired on a day when the Court was closed. It is conceivable, and indeed it not unfrequently happens, that a judgment is delivered at a late hour on the day preceding a vacation extending over a longer period than thirty days, and it becomes impossible for the party against whom judgment is given to apply for copies of the decree and judgment on that day. Section 541 of the Code of Civil Procedure requires that a memorandum of appeal should be accompanied by a copy of the decree appealed against and, unless the Court dispenses with it, by a copy of the judgment also; and it has been held in this Court that a petition of appeal unaccompanied by such copies is not a valid petition. If therefore the contention be correct that an application for copies of the decree and judgment made on the day of the re-opening of the Court after a long vacation lasting over a period exceeding thirty days is beyond time, and that the time requisite for obtaining the copies cannot for that reason be excluded under s. 12 of [345] the Indian Limitation Act, 1877, the result would be that the defeated suitor would under such circumstances be deprived of his right of appeal. Unless the copies which he was bound to produce with his memorandum of appeal were applied for, prepared and delivered to him on the date of the re-opening of the Court, he could not present a valid appeal on that date by reason of his not having obtained and not having had the opportunity of obtaining the copies before that date; and if the copies were not prepared and delivered on that very date, he was not entitled, according to the respondent's contention, to have the benefit of the time occupied in the preparation of the copies. There would thus be a denial to him of the right of appeal which he would otherwise have under the law. We cannot conceive that the law contemplates such an anomalous state of things, and we do not consider we should be justified in holding that it does, unless compelled to do so by clear and unambiguous provisions contained in the Indian Limitation Act. In our opinion the Act does not contain such provisions. Mr. *Sundar Lal* for the respondent urged that the

question before us was concluded by the ruling of the Full Bench in *Bechi* v. *Ahsan-ul-lah Khan* (1), and he pressed on us a passage in the judgment of Mr. Justice Mahmood at pp. 471 and 472 of the report. With reference to that ruling we may observe in the first place that the question which we have to decide in this appeal did not arise in that case and therefore any remarks which may have been made in the judgment on that question were *obiter*. In the next place, the learned Judges did not in that case hold that an appeal presented under circumstances similar to those of the present appeal would be time-barred. The observations of Mr. Justice Mahmood to which our attention has been called had reference to a contention raised in that case that a vacation preceding the date of the application for a copy of the decree should be regarded as time requisite for obtaining the copy. We fully agree with Mr. Justice Mahmood that no period of time can be regarded as time requisite for obtaining a copy which **[346]** is not subsequent to the presentation of the application for a copy. That, however, is not the question which arises in this case. There can be no doubt that, if the time within which an appeal may under the law of limitation be presented is allowed to expire and the decree to become final, the subsequent presentation of an application for copies of the decree and judgment cannot entitle the appellant to prefer an appeal by excluding from computation the time requisite for obtaining the copies. But what we have to consider is whether an application for copies made on the date of the re-opening of the Court is within time. Section 4 of the Indian Limitation Act, 1877, provides that 'subject to the provisions contained in ss. 5 to 25 (inclusive), every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed shall be dismissed." Article 152 of the second schedule should therefore be read subject to the provisions of ss. 5 and 12. By the first paragraph of s. 5, if the period of limitation prescribed for an appeal expires on a day when the Court is closed, the appeal may be presented on the day that the Court re-opens. An application for copies of the decree and judgment presented on that day would therefore be an application made before the expiry of the time allowed for the presentation of the appeal, and under s. 12 the appellant would be entitled to the benefit of the time requisite for the obtaining of the copies. It was argued by Mr. *Sundar Lal* that, if this view were correct, an appellant who had obtained the necessary copies before the commencement of the vacation would still be entitled to exclude from computation the period requisite for obtaining the copies, and would thus enjoy the benefit of a longer period of limitation than that to which other appellants would be entitled. This argument, though ingenious, is in our opinion fallacious. Section 12, it is true, lays down a rule of exclusion, but it is in reality a rule enabling a certain period, namely, that occupied in the preparation of copies of the decree and judgment, to be added to the period prescribed by the second schedule and to be taken **[347]** into account in computing the period of limitation. If the copies were obtained before the commencement of the vacation, the time requisite for obtaining the copies is known, and if that period of time which is already known and the period prescribed by the schedule, both added together, expired on a day on which the Court was closed, s. 5 would enable the appellant to present his appeal only on the day of the re-opening

(1) 12 A. 461.

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of the Court and not on a later date. We are accordingly of opinion that if the period prescribed by the second schedule for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the re-opening of the Court, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation. If, however, the copies were obtained before the closing of the Court, and the time requisite for obtaining the copies and the period of limitation prescribed by the second schedule added together expired on a day on which the Court was closed, the appeal will not be in time unless presented on the day that the Court re-opens. A similar view appears to have been held by the Punjab Chief Court in *Chatar Singh* v. *The Empress*, quoted in Rivaz's Edition of the Indian Limitation Act, 4th edition, p. 40.

For the above reasons we hold that the appeal presented by the appellant in the Court below on the 6th of November, 1894, was not beyond time, and that the lower appellate Court has erred in dismissing the appeal as time barred.

We allow this appeal, and, setting aside the decree below, remand the case to the lower appellate Court under s. 562 of the Code of Civil Procedure for trial according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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19 A. 348 (F.B.)=17 A.W.N. (1897) 86.

[348] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

BRIJ MOHAN DAS (*Plaintiff*) *v.* MANNU BIBI AND ANOTHER (*Defendants*).* [23rd March, 1897.]

Limitation—Act No. XV of 1877, *s.* 14—*Suit instituted by mistake in wrong Court*—Bona fide *mistake of law.*

Section 14 of the Indian Limitation Act, 1877, applies to a case where a plaintiff has been prosecuting his suit in a wrong Court in consequence of a *bona fide* mistake of law.

Sitaram Paraji v. *Nimba* (1). *Huro Chunder Roy* v. *Sunnamoyi* (2). *Krishna* v. *Chathappan* (3) referred to. *Ramjiwan Mal* v. *Chana Mal* (4) considered.

[R., 22 A. 248=20 A.W.N. 61; 29 A. 638=4 A.L.J. 515=A.W.N. (1907) 219; 6 A.L.J. 741; 23 A.W.N. 32; 2 O C. 133; 3 O.C. 13 (15); 18 Ind. Cas. 92 (93).]

THE facts of this case are fully stated in the judgment of EDGE, C. J.

Pandit *Sundar Lal* and *Madan Mohan Malaviya*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J.—The plaintiff had obtained a decree for money. The decretal amount was below Rs. 1,000. He sought to execute his decree by

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* Second Appeal No. 1087 of 1894 from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 28th August 1894, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 11th June 1894.

(1) 12 B. 320. (2) 13 C. 266. (3) 13 M. 269. (4) 10 A. 587.

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selling certain houses. One of the defendants to the suit filed objections under s. 278 of the Code of Civil Procedure to the execution of the decree against the houses. These objections were allowed, and thereupon the plaintiff brought this suit to establish his right to bring the property to sale. The value of the property sought to be sold exceeded Rs. 1,000, and was in fact about Rs. 1,200. The plaintiff *bona fide* believing that, having regard to the value of the property, his suit was not within the jurisdiction of the Munsif, brought his suit in the Court of the Subordinate Judge of Allahabad. Subsequently the Subordinate Judge held that the suit should have been valued with reference to the amount of the decree sought to be executed and not with [349] reference to the value of the property sought to be sold. He decided he had not jurisdiction to try the suit and returned the plaint to the plaintiff to be presented to the proper Court. On the same day on which the plaint was returned the plaintiff presented his plaint to the Court of the Munsif, but at that time more than twelve months had expired since the date of the order allowing the objection to execution. The Munsif has held that the suit was barred by time. The District Judge in appeal considered he was bound to apply a ruling of this Court according to which a litigant proceeding on an error of law could not be held to be proceeding in good faith. The judgment to which I refer is that of *Ramjiwan Mal* v. *Chand Mal* (1). The section of the Limitation Act there specifically in question was s. 5, and one of the Judges expressed an opinion that no honest mistake in law could bring a person within the terms of s. 14 or s. 5. He came to that conclusion by applying the legal maxim —*Ignorantia legis neminem excusat*—to a civil case. In my opinion the application of this maxim to the question before him was too wide. Of course no one can be allowed to plead that, in a common assault on another, he was acting in ignorance of the fact that the act was an unlawful one, nor could a defendant in a suit be heard to plead as a defence in an action for damage for breach of contract, that he believed in law he was justified in breaking his contract, if the law did not in fact afford such justification. There can be no doubt that in this case the plaintiff was prosecuting his suit in the Court of the Subordinate Judge in good faith. We need not decide whether or not the suit should have been filed originally in the Court of the Munsif. The mistake, if there was one, arose through ignorance of the law and will not exclude the plaintiff from the indulgence of s. 14 of Act No. XV of 1877. That a mistake of law can be made in good faith most Judges would probably admit from their own personal experiences on the Bench. We have not been referred to any case in which the point directly in issue (and which was decided) was whether a person who had [350] prosecuted a civil proceeding in good faith in a Court which from a defect of jurisdiction or from some other cause of a like nature, was unable to entertain it, was excluded from the protection of s. 14 of Act No. XV of 1877, if the prosecution of such a civil proceeding in such a Court arose through his having made a mistake in law as to the Court which had jurisdiction to entertain the proceeding.

We were referred to several cases in which the question as to what was sufficient cause under s. 5 of the same Act arose. In the case of *Sita Ram Paraji* v. *Nimba* (2) the Bombay Court held that ignorance of the law cannot be recognized as a sufficient reason for delay under s. 5 of

(1) 10 A. 587.

(2) 12 B. 320.

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Act No. XV of 1877. In my opinion that proposition, which is really the proposition of the head note, went too far. No doubt, if a litigant alleged that he had never heard of the Indian Limitation Act of 1877, his ignorance of the existence of such an Act would not be a sufficient cause under s. 5.

In *Huro Chunder Roy* v. *Surnamoyi* (1) the learned Judges decided, with regard to s. 5, as to what is sufficient cause, that it is for the Judge in each case to exercise his discretion having regard to the particular facts established before him, and they declined to hold that a *bona fide* mistake as to the period of limitation could not in any circumstances be a valid ground for the admission of an appeal under s. 5.

In *Krishna* v. *Chathappan* (2) the learned Judges said in reference to s. 5:—"We are not prepared to hold that a mistake of law is in no circumstances a sufficient cause within the meaning of that section," and later on (p. 271):—"The true rule is whether under the special circumstances of each case the appellant acted under an honest, though mistaken, belief formed with due care and attention. Section 14 of the Limitation Act indicates that the legislature intended to show indulgence to a party acting *bona fide* under a mistake. We think that s. 5 gives the Courts a discretion which in respect of jurisdiction is **[351]** to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant." I agree with this view, understanding that by "imputable to" the learned Judges meant "established against." I myself am conscious of having made many mistakes of law, and in my opinion s. 14 is applicable to such a case as this.

I would allow the appeal, and, setting aside the judgment of the Court below, would remand the case under s. 562 of the Code of Civil Procedure to the Court of first instance so that the suit may be decided on its merits. I would make the order with costs to the plaintiff in this Court and in the lower appellate Court.

BLAIR, J.—I acquiesce in the proposed order. I can gather nothing from the phraseology of s. 14 to justify the drawing of a distinction between a *bona fide* mistake of fact and a *bona fide* mistake of law. The case upon the authority of which the Court below decided is *Ramjiwan Mal* v. *Chand Mal*.(3) There in the judgment of one of the Judges I find broadly laid down a distinction which I am unable to draw. It is true that one Judge in his judgment took care to base his decision on a general consideration of the facts of the case, which included inexplicable delay on the part of the litigant. As, however, that case may well be misleading to litigants and their advisers, I am desirous of emphasizing my dissent from this proposition which it may well be supposed that case decided, *viz.*:—that an error in law does not fall within the scope of s. 14.

BANERJI, J.—I am of the same opinion as the learned Chief Justice.

AIKMAN, J.—I concur with the learned Chief Justice in thinking this appeal should be allowed and in the order proposed by him.

[352] In my opinion the judgment in *Ramjiwan Mal* v. *Chand Mal*(3) imposes a restriction on the application of s. 14 of the Limitation Act which was not contemplated by the legislature. It is perfectly conceivable that there may be a *bona fide* mistake as to the proper Court in which

(1) 13 C. 266. (2) 13 M. 269. (3) 10 A. 567.

a suit should be instituted. The Judges of this Court know for instance how difficult it is to define the boundary line which separates the jurisdiction of the civil Courts from the jurisdiction of the Courts of revenue. Had the legislature intended to put on s. 14 of the Limitation Act the narrow interpretation which has been placed upon it in the ruling referred to above, I should have expected to find inserted in it, or in the last clause of s. 3 of the Act, a proviso to the effect that nothing should be deemed to have been done in good faith which is done by reason of a mistake of law and not by reason of a mistake of fact.

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BY THE COURT.—The order of the Court will be in terms of the order proposed by the Chief Justice.

Appeal decreed and cause remanded.

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19 A. 352=17 A.W.N. (1897) 88.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

THE MAHARAJA OF BENARES. (*Plaintiff*) *v.* DALJIT SINGH AND OTHERS (*Defendants*).* [30th March, 1897.]

Land-holder and tenant—Suit to recover arrears of rent from representatives of deceased tenant at fixed rates—Liability of representatives.

Held that the legal representatives of a deceased tenant at fixed rates who had died leaving the rent payable by him in arrears were liable for payment of such arrears to the extent of the assets of the tenant which had come into their hands, and that this liability was not affected by the question whether or not they took over the tenancy of the deceased themselves. *Lekhraj Singh* v. *Rai Singh* (1) referred to.

THE facts of this case are as follows :—

One Thakur Dayal Singh was a tenant at fixed rates under the plaintiff-appellant, the Maharaja of Benares. Thakur Dayal **[353]** Singh's tenure was sold by auction, and his tenancy rights were purchased by the Maharaja on the 20th of April 1892. Subsequently, in March 1893, Thakur Dayal Singh died. On the 14th of January 1895 the Maharaja sued Supher Singh and Makhan Singh, the sons and heirs of Thakur Dayal Singh, for the arrears of rents of the fixed rate holding for 1299 Fasli.

The first Court dismissed the suit, holding that the heirs of Thakur Dayal Singh were not liable for the arrears of rent due by their father.

The plaintiff appealed, and the lower appellate Court (District Judge of Benares) dismissed the appeal. The District Judge based his decision on his interpretation of the Full Bench ruling of the High Court in *Lekhraj Singh* v. *Rai Singh* (1), and held that, inasmuch as the tenancy had not been taken over by the sons of Thakur Dayal Singh, neither were they liable to pay arrears of rent due by him.

The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kalindi Prasad*, for the respondent.

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* Second Appeal No. 274 of 1896, from a decree of E. L. M. Eales, Esq., District Judge of Benares, dated the 18th January 1896, confirming a decree of Maulvi Nizam-ud-din Ahmad, Assistant Collector of Benares, dated the 6th April 1895.

(1) 14 A. 881.

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APPELLATE CIVIL.

19 A. 352 = 17 A.W.N. (1897) 88.

JUDGMENT.

BANERJI, J.—This appeal must prevail, and the learned vakil for the respondent has frankly conceded that he cannot support the judgment of the lower appellate Court. The facts which gave rise to the suit were these. One Thakur Dayal Singh was a tenant at fixed rates of the plaintiff appellant. His rights as such were sold by auction, and purchased by the plaintiff in 1892. Thakur Dayal was in arrears for the period prior to the date of the auction sale. He died in 1893 leaving those arrears unpaid; thereupon the present suit was brought against his sons as his legal representatives for recovery of the arrears. The Courts below have dismissed the suit as against the legal representatives of Thakur Dayal Singh, and the learned Judge of the lower appellate Court has based his judgment on what he conceived to be the result of the Ruling of the Full Bench in *Lekhraj Singh* v. *Rai Singh* (1). He thinks that **[354]** since the tenancy did not devolve on the defendants, they were not liable in any capacity for the arrears due by their father Thakur Dayal Singh. This view is clearly erroneous, and is not borne out by the ruling of the Full Bench referred to by the learned Judge. The question which arose in that case was whether a suit for arrears of rent due by a deceased tenant brought against the legal representatives of that tenant, who had succeeded him in his holding was cognizable by the Revenue Court or the Civil Court. It was held by the majority of the Judges constituting the Full Bench, that such a suit was cognizable by a Court of Revenue. It was not held in that case, that if the legal representative of the deceased tenant did not choose to take possession of the holding he would not be liable for the arrears due by the deceased tenant, although he might be in possession of the assets of the deceased. It is impossible that such a view could be entertained by the Full Bench. It may happen that a tenant, who has died leaving his rent in arrear, has left assets of large value which have passed to his legal representative. Surely it cannot be said that if the legal representative did not elect to take the holding of the deceased, he would not be liable for the arrears, although he might have taken possession of the assets of the deceased. In the judgment on which the learned Judge has relied it was observed by the learned Chief Justice that "the person upon whom the right of occupancy devolves is not bound to accept the tenancy, but, if he does accept it, he, in my opinion, must accept it subject to its burdens, and one of those burdens is the legal liability to pay the rent which is in arrear and a suit for which is not barred by limitation. If such a person elects not to accept the right of occupancy, his liability would be limited to that of a legal representative to whom assets had come." The learned Judge was therefore in error in thinking that the mere fact of the holding of Thakur Dayal Singh not being in the possession of the defendants relieved them of liability to pay the rent due by Thakur Dayal Singh. They as legal representatives of Thakur Dayal Singh would be liable to the extent of the assets which have come **[355]** into their hands. It was not asserted on behalf of the defendants that they had not received any assets. It was admitted, as is indeed the fact, that they were the legal representatives of Thakur Dayal Singh. The existence of the arrears is also not denied. The plaintiff was therefore entitled to a decree against the defendants, their liability being limited

(1) 14 A. 381.

to the extent of the assets of Thakur Dayal which have come into their hands. I make such a decree in favour of the appellant, and vary the decree of the lower appellate Court to that extent with costs here and in the Courts below.

Decree modified.

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19 A. 355 = 17 A W.N. (1897) 89.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

BHAGWAN DAI AND ANOTHER (*Opposite Parties*) *v.* HIRA (*Applicant*).* [8th April, 1897.]

Civil Procedure Code, ss. 108, 157 – *Order setting aside* ex parte *decree – Appeal.*

No appeal will lie from an order made under s. 157 read with s. 108 of the Code of Civil Procedure setting aside a decree passed *ex parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned. *Jonardan Dobey* v. *Ramdhone Singh* (1) referred to.

[R., 20 A. 195.]

MUSAMMAT Bhagwan Dai and another brought a suit in the Court of the Subordinate Judge of Meerut against one Hira, a minor under the guardianship of his mother, Musammat Lado. The case was partly heard, when, on a day to which the hearing of the suit had been adjourned, the defendant's pleader did not appear, and the Court proceeded with the case and made a decree *ex parte* in favour of the plaintiffs. Thereupon the defendant presented to the Court an application purporting to be an application under s. 623 of the Code of Civil Procedure for review of judgment, the application being mainly based on the allegation that the defendant's pleader was ill and unable to appear at the **[356]** time when the *ex parte* decree was passed, and that the defendant's guardian was not aware of that fact and therefore had made no arrangement to retain another pleader. The Subordinate Judge, characterizing the application as one under s. 108 of the Code, accepted the applicant's plea, and, setting aside his *ex parte* decree, appointed a fresh date for proceeding with the suit. From this order the plaintiffs appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—The Subordinate Judge proceeded *ex parte* and made a decree. His procedure really was under s. 157 of the Code of Civil Procedure. An application was made to him under s. 108 of the Code to set aside the decree on the ground that there was "sufficient cause" which prevented the defendant from appearing when the suit was called on for hearing after an adjournment. The Subordinate Judge set aside the decree in compliance with the application. This appeal has been brought from that order. The appellants contend that s. 108 did not apply, and that the defendant's remedy (if any)

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* First Appeal No. 121 of 1896, from an order of Babu Prag Das, Subordinate Judge of Meerut, dated the 12th September 1896.

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was by way of appeal. On the other hand the defendant-respondent contends that s. 108 did apply, and this appeal did not lie.

When a Court acts under s. 157 of the Code it has to apply the procedure of Chapter VII. Part of the procedure pertinent to such a case is the procedure of s. 108. In our opinion s. 108 applied, and, as no appeal is given from an order allowing an application under s. 108, this appeal does not lie. We are supported in this view by a decision of the Full Bench of the Calcutta Court in *Jonardan Dobey* v. *Ramdhone Singh* (1). We dismiss this appeal with costs.

Appeal dismissed.

19 A. 357 = 17 A.W.N. (1897) 80.

[357] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

HANUMAN PRASAD SINGH AND OTHERS (*Plaintiffs*) *v.* BHAGAUTI PRASAD AND OTHERS (*Defendants*).* [10th April, 1897.]

Limitation—Act No. XIV of 1859, *s.* 1—*Act No. XV of* 1877 (*Indian Limitation Act*), *sch. ii, art.* 141—*Suit by reversioner to recover possession of immoveable property alienated by intermediate female heir—Hindu Law.*

A female heir in possession of immoveable property for her life can without legal necessity make a valid alienation of her life estate, but the possession of the alienee will not under ordinary circumstances be adverse to the reversioner, whose cause of action for possession of the said property will not accrue until the death of the female heir, or of the last of such heirs if more than one.

One Paltan Singh, a separated Hindu, died about 1822 leaving two widows, Harnam Kunwari and Asman Kunwari, and three daughters, Rachpali, Jairaji, and Dilraji. The widows took possession of the immoveable property of Paltan Singh, and some time before 1857 Harnam Kunwari the survivor of them sold a certain village to one Harnam Pathak. Harnam Kunwari died in 1857. The three daughters next succeeded to the estate of Paltan Singh, and the last of them died in 1890 without having made any attempt to interfere with the possession of the alienee. In 1894 the two sons of Rachpali sued for possession of the property which had been sold by Harnam Kunwari.

Held that the suit was within time.

Per BURKITT, J.—Decrees affecting immoveable property obtained against a female heir in respect of the subject matter of the inheritance (if obtained without fraud or collusion or the like) are binding on the reversioner.

An alienation made by a female heir in possession is good against her for her life, but is not necessarily binding on the reversioner, to whom, if it be invalid, a cause of action accrues on the death of the female heir.

Where property the estate in which has descended to a female heir, never reaches her hands, but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of the adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property.

The enactment of art. 142 in the schedule to Act No. IX of 1871 and of art. 141 in the schedule to Act No. XV of 1877 has not made any alteration in the law as laid down in the last preceding rule.

[Appr., 20 A. 42; 21 A.W.N. (1901) 62; R., 23 A. 67 (68); 23 A. 448; 25 A. 435 (441); 6 C.L.J. 490 (524); 41 P.R. 1903.]

* First Appeal, No. 26 of 1895, from a decree of Kuar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 17th November 1894.

(1) 23 C. 738.

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[358] *Sambasiva* v. *Ragava* (1), *Cursandas Govindji* v. *Vundravandas Purshotam* (2), *Mukta* v. *Dada valad Supadu* (3), *Babu valad Sheikh Ibrahim* v. *Bhikaji* (4), *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (5), *Amirto Lal Bose* v. *Rajonee Kant Mitter* (6) *Srinath Kur* v. *Prosunno Kumar Ghose* (7), *Hari Nath Chatterji* v. *Mothurmohun Goswami* (8), *Mussummat Lachhan Kunwar* v. *Anant Singh* (9), *Appasami Odayar* v. *Subramanya Odayar* (10), *Drobomoyi Gupta* v. *Davis* (11) and *Ramkali* v. *Kedar Nath* (12) referred to.

In the suit out of which this appeal arose the principal plaintiffs claimed possession of a certain village as reversionary heirs of their maternal grandfather, one Paltan Singh. The village in suit formed part of the estate of Paltan Singh, who died about 1822, leaving him surviving two widows, *viz.*, Harnam Kunwari, who died in January 1857, and Asman Kunwari, who predeceased her co-wife. Some time before 1857, Harnam Kunwari alienated the village in suit to one Harnam Pathak, the predecessor in title of the defendants-respondents. Paltan Singh also left him surviving three daughters, namely, Musammat Rachpali (the mother of the two first plaintiffs), who died in June 1858, Musammat Jairaji, who died without issue in May 1879, and Musammat Dilraji, who died without issue in November 1890. The suit was instituted on the 30th of March 1894.

On the first of the issues framed by it the Court of first instance (Subordinate Judge of Gorakhpur) held that the cause of action to contest the sale accrued on the death of the vendor Harnam Kunwari in January 1857, and that it became barred by limitation some time in 1869 under the limitation contained in cl. 12 of s. 1 of Act No. XIV of 1859, which prescribes a period of twelve years from the time when the cause of action arose as the [359] limitation period within which a suit to recover immoveable property must be brought. The Subordinate Judge consequently dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Munshi *Ram Prasad* and Babu *Durga Charun Banerji*, for the respondents.

JUDGMENT.

KNOX, J.—The property in dispute in the present appeal is the village of Kot Kambarya. The plaintiffs, Babu Hanuman Prasad Singh and Babu Jadu Nath Singh, who are now appellants, claim to be entitled to, and ask to be put in possession of, it as being the grandsons of Babu Paltan Singh, deceased. There are two other persons arrayed as plaintiffs who are transferees in respect of 8 annas of the property under a deed executed in their favour by Babu Hanuman Prasad Singh and Babu Jadu Nath Singh, dated the 16th of February, 1894.

Babu Paltan Singh died in 1299 Fasli, which corresponds with 1822 A.D. He left him surviving two widows and three daughters, but no male issue. The appellants are the sons of Rachpal Kunwari, the eldest of the three said daughters.

The appellants contend that under the Hindu Law each of the widows and of the daughters was entitled to nothing further than a life interest in

(1) 13 M. 512. (2) 14 B. 482. (3) 18 B. 216. (4) 14 B. 317.
(5) 9 W.R. 505. (6) 23 W.R. 214 = 2 I.A. 113. (7) 9 C. 934.
(8) 21 C. 8. (9) 22 I.A. 25. (10) 15 I.A. 167. (11) 14 C. 323.
(12) 14 A. 156.

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the property. Both the widows according to them came into possession of the entire estate upon the death of Babu Paltan Singh. Upon the death of one of the two, Musammat Harnam Kunwari, the surviving widow continued to be recorded in the Collector's records as in possession. While thus in possession she, without right or legal necessity, made a gift of the property to one Harnam Pathak, the ancestor of the respondents, and got mutation of names recorded in his favour. The respondents are still in possession, and the present suit is for their ejectment in favour of the appellants.

On the 5th of February, 1857, Musammat Harnam Kunwari died and was succeeded by the three daughters. Each of these died in turn; the date on which the last of them died is the 3rd of **[360]** March 1890, and it is on this date that the appellants maintain that their cause of action accrued, as it was on this date that they first became entitled to succeed as heirs to Babu Paltan Singh.

One of the pleas raised in defence was that the claim was barred by limitation.

The Subordinate Judge held that the cause of action accrued to the appellants on the expiry of twelve years from the date of the death of Musammat Harnam Kunwari and that the suit was governed by Act No XIV of 1859. The suit had therefore to be brought within twelve years from the time when the cause of action arose. The twelve years of dispossession which followed upon the death of Musammat Harnam Kunwari barred the daughter's right and also barred the plaintiffs, and he therefore dismissed the claim.

The only question which was argued, and which arises for decision, is whether the suit was or was not barred by limitation.

It is contended on behalf of the appellants that the case is not governed by Act XIV of 1859, but by art. 141 of sch. ii of Act No. XV of 1877. This article provides that in the case of suits by a Hindu entitled to the possession of immoveable property on the death of a Hindu female, the period of limitation prescribed within which the suit can be brought is twelve years from the date when the female in question dies. The possession of the respondents could not begin to run adversely to the appellants until the 3rd of March, 1890, the date on which the last surviving daughter of Babu Paltan Singh died.

It is further contended that under the Hindu Law widows and daughters take a qualified estate, which is interposed between that of the last male owner and the next male reversioner, and that as between the family and a stranger each such widow or daughter represents the inheritance for the time being. The appellants, who are sons of one of the daughters, do not claim from or under their mother, but they claim as the next male *sapindas* of their maternal grandfather, into possession of whose estate, however, they could not come until all the widows and daughters had passed away. So **[361]** far as Act No. XIV of 1859 is concerned it is contended that it contained no provision which could bar such a right as that of the appellants. At the outside all that it did was to take away the remedy under that Act. The right survived and under it the appellants could maintain their present claim.

In support of their contention we were referred to *Sambasiva* v. *Ragava* (1), to *Cursandas Govindji* v. *Vundravandas Purshotam* (2) and to *Mukta* v. *Dada valad Supadu* (3).

(1) 13 M. 512. (2) 14 B. 482. (3) 18 B. 216.

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The respondents on the other hand support the judgment of the learned Subordinate Judge. They take their stand upon the ground that any right the appellants may have had became extinct under Act No. XIV of 1859, and could not and cannot now be revived. In support of this view they cited *Babu valad Sheik Ibrahim* v. *Bhikaji* (1), *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (2), *Amirto Lall* v. *Rajonee Kant Mitter* (3), *Srinath Kur* v. *Prosunno Kumar Ghose*, a Full Bench case, (4), and *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (5).

"No suit," so runs Act No. XIV of 1859, s. 1, "shall be maintained in any Court of Judicature unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding." According to them the cause of action arose on the death of Musammat Harnam Kunwari on the 5th of January, 1857. Within twelve years from that date the daughters of Paltan Singh should have instituted their suit to recover the property out of the hands of Harnam Pathak. They did not do so, and by the beginning of 1869 no suit to recover could be maintained in any Court of Judicature.

In this contention, however, the respondents ignore entirely the nature of the transfer made by Musammat Harnam Kunwari, and they also with it ignore the circumstances which constitute the cause of action upon which the appellants have come to Court. [362] Assuming for the moment the contention of the appellants that Musammat Harnam Kunwari was acting under the press of no legal necessity, she had no power to bind the inheritance as against the reversioners. All that she could do was to give to Harnam Pathak such an interest as she herself possessed, *viz.*, an interest conterminous with her own life. Whatever might be the language of the deed by which she purported to convey the property, this is all she could convey. The respondents in their written statements have set out nothing from which it could be inferred that as against her Harnam Pathak set up any position from which any higher title or adverse possession could be inferred.

Again, the appellants set out as their cause of action the death of Musammat Dilraj Kunwari, and say that it did not arise until then. Their position is that they are the heirs of Babu Paltan Singh, and that they now seek to succeed to his estate. They could not do so as long as there lay interposed between them the lives of Paltan Singh's widows and daughters. During that period their right remained dormant, but, upon the death of the last survivor of these ladies the right at once revived and accrued against all who might seek to keep them out of their right. In this view the neglect or omission of the daughters of Paltan Singh to bring any suit against the respondents can in no way affect the appellants' interests. Their cause of action was not the appellants' cause of action, and, as already stated, there was no direct assertion of any adverse possession as against the appellants made during this interval. The respondents could not in the lifetime of the daughters acquire any higher interest than they had already acquired, except by some overt act of adverse possession. The view taken in I.L.R., 13 Mad. 512, is the view which I am prepared to take.

There is much force, too, in what was said by Parsons, J., in *Cursandas Govindji* v. *Vundravandas Purshotam* (6), that the right of the heir

(1) 14 B. 317.
(2) 9 W.R. 505.
(3) 23 W.R. 214.
(4) 9 C. 934.
(5) 21 C. 8.
(6) 14 B. 482.

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cannot be taken away by the conduct of the widow, but by the act of the owner of the paramount estate ; [363] only his act or some act of the respondents evidencing adverse possession would operate to divest him of the estate which is conferred upon him by inheritance.

The cases cited by the respondents differ materially. In the first, *viz.*, *Babu valad Sheik Ibrahim* v. *Bhikaji* (1), which was a second appeal, one Ram Chandra, a separated Hindu, had died leaving him surviving his widow Janki and a son Ganu. Ganu succeeded to the property and then died leaving him surviving his widow Sarasvatibai and his mother Janki. Sarasvatibai lived with her brother ; Janki remained in possession of the property left by Ram Chandra. Janki mortgaged the property to her brother in 1854-55, and in 1862 she sold it free from mortgage to the defendants, who at once took possession. Janki died on March 6th, 1874, and afterwards Sarasvatibai died without ever having had possession of the property. In this case, therefore, as both the Courts found that the possession of Janki and of her alienees was adverse to the widow Sarasvatibai, they could not do otherwise than hold that the adverse possession of Janki and her alienees for more than twelve years was a bar, not only to Sarasvatibai but also to the claim of the reversionary heirs on her death; but, as already noted above, in the present case, I can find no trace of any adverse possession with the respondents during the lifetime of either Paltan Singh's widows or daughters as against the appellants. Much stress was laid upon the case of *Nobin Chunder Chuckerbutty* (2). It was a Full Bench decision of the Calcutta High Court, and was relied upon in support of the contention that where the cause of action had been extinguished under Act No. XIV of 1859, no new cause of action could accrue by virtue of any of the provisions contained in the succeeding Limitation Acts. But looked at carefully the precedent is one which tells strongly in favour of the appellants. As pointed out by Sir Barnes Peacock in that case, and concurred in by the other Judges, it is settled Hindu law that the wife takes as heir to her husband in default of issue, and upon her death [364] those persons succeed as reversionary heirs who would have been the heirs of the husband if he had died at that time. "It is a very anomalous position that a person should take as heir, and that his right to take as heir should be determined, according to a state of facts not existing at the time of the death of the ancestor, but caused by events which may have occurred many years after his death."

"These considerations," he adds," lead me to the conclusion that a reversionary heir, who is bound by a decision against a widow respecting the subject matter of inheritance, is also barred by limitation, if, without fraud or collusion, the widow is barred by limitation."

Applying that rule to the present case, as no adverse possession is established against the widows or the daughters, the appellants are not to be held as injuriously affected by the mere fact that throughout this period the respondents have held this land under a title which could not convey to them anything further than the life-estate of a Hindu widow. This was their only title, and as they never asserted adverse possession they must be deemed to have held it under that title. This principle was approved by their Lordships of the Privy Council in the case of *Amirto Lal Bose* v. *Rajonee Kant Mitter* (3). That was a case by a reversionary heir claiming succession, but also a case in which it had been found that

(1) 14 B. 317. (2) 9 W.R. 505. (3) 23 W. R. 214.

the widow, whose life-estate intervened between him and his inheritance, had been dispossessed by trespassers who set up and maintained adverse possession under which the title of the widow to a life-estate, and therefore of the reversioners, both became extinguished. The case of *Srinath Kur* v. *Prosunno Kumar Ghose* (1) decides nothing more than this, that the rule laid down under the Limitation Act of 1859 is no longer the law under the Acts of 1871 and 1877, and that a reversioner who succeeds to immoveable property has now twelve years to bring his suit from the time when his estate falls into possession. In this case, the estate did not fall into possession till the last daughter **[365]** died, *viz.*, on March 3rd, 1890. In the case of *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (2) Sampurna, whose position the Privy Council held was similar to the position of a Hindu widow, had been found to be never in possession of the estate under dispute, and that her claim to it was already barred by limitation at a time when Act No. XIV of 1859 was in force. The contention that the Act of 1877 gave the reversionary heir a new cause of action simply because Sampurna died in 1884 was naturally rejected; he was held bound by the decree which had been passed against Sampurna, and their Lordships of the Privy Council pointed out that the intention of the law of limitation is not to give a right where there is not one but to interpose a bar after a certain period to a suit to enforce the existing right. In the present case, the right had continued to exist until 1890, and was subject to no bar created by the Act of 1859. The same distinction runs through, and is very clearly brought out in, the case of *Mussummat Lachhan Kunwar* v. *Anant Singh and Mussummat Lachhan Kunwar* v. *Manorath Ram* (3).

For the above reasons I hold that the cause of action in the present case accrued to appellants on the death of the last surviving daughter, and that their suit is amply within time. I would therefore allow this appeal, set aside the judgment and decree of the lower Court, and remand the case under s. 562 of the Code of Civil Procedure to the lower Court with directions to enter it on its list of pending cases and dispose of it according to law. Costs to abide the event.

BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Gorakhpur, by which he dismissed the plaintiffs' suit on the ground that it was barred by limitation. The suit was for the possession of a village to which the plaintiffs Hanuman Prasad and Jadu Nath Prasad (the other plaintiffs are their assignees) asserted title as reversionary heirs of their maternal grandfather, one Paltan Singh. There is no dispute about the preliminary facts. The village in suit was part of the estate left **[366]** by Paltan Singh, who died about 1822, A. D., leaving him surviving two widows, namely, (1) Harnam Kunwari, who died in January 1857, and (2) Asman Kunwari, who predeceased her co-wife. Sometime before 1857 Harnam Kunwari sold the village in dispute—the sale which is impugned in this suit—to the predecessor in interest of the defendants-respondents. Paltan Singh also left him surviving three daughters, namely, (1) Musammat Rachpali (mother of the first two plaintiffs), who died in June 1858, (2) Musammat Jairaji, who died without issue in May 1879, and (3) Musammat Dilraji, who died without issue in November 1890. This suit was instituted in March 1894.

On the first of the many issues fixed by him for trial, the Subordinate Judge held that the cause of action to contest the sale accrued on the

(1) 9 C. 934. (2) 21 C. 8. (3) 22 I.A. 25.

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death of the widow Harnam Kunwari in January 1857, and that it became barred by limitation sometime in 1869 under the limitation contained in clause 12 of s. 1 of Act No. XIV of 1859, which prescribes a period of twelve years from the time when the cause of action arose as the limitation period within which a suit to recover immoveable property must be brougbt.

For the plaintiffs, it was contended, and the contention is repeated in this appeal, that the limitation rule applicable is that prescribed by art. 141 of the second schedule to the present Limitation Act (Act No. XV of 1877), which, in the case of a suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a female, prescribes a limitation period of twelve years from the time when the female dies. The appellant's contention is that, as the estate came into possession only on the death of the last survivor of Paltan Singh's daughters in 1890, they have a period of twelve years from her death within which they can sue. The respondents support the decision of the Court below.

A large number of cases were cited at bar and by the Court during the argument at the hearing of this appeal, *viz.*, *Sambasiva* **[367]** v. *Ragava* (1) *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (2) *Cursandas Govindji* v. *Vundravandas Purshotam*(3), *Mukta* v. *Dada valad Supadu* (4), *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (5), *Appasami Odayar* v. *Subramanya Odayar* (6), *Babu valad Sheik Ibrahim* v. *Bhikaji* (7), *Amirto Lal Bose Rajonee Kant Mitter* (8), *Ram Kali* v. *Kedar Nath* (9). *Lachhan Kunwar* v. *Manorath Ram* (10) and *Drobomoyi Gupta* v. *Davis*(11).

The above cases may be roughly divided into two classes, the first being that in which the widow or other female, in succession to (but not through) whom the reversioner claimed, had been dispossessed or had been kept out of and had not obtained possession of the property, *e.g.*, by a trespasser, by a decree of Court or the like.

The case of *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (5), was one in which a separated Hindu died leaving him surviving two sons, two daughters and a widow. The sons died without issue in the life-time of their mother, upon whom their respective estates then descended as heir. The mother, however, never got possession, as on the death of the sons a stranger, a trespasser, entered on the property and took and retained possession. On suit by the daughters' sons for possession after the death of the mother (the limitation law applicable being Act No. XIV of 1859) it was contended for the reversioners that they had acquired a fresh cause of action on the death of the mother. It was held on the authority of the *Shiva Ganga* case (12), that, if the mother had sued the trespasser for possession and (without fraud or collusion) had failed to make out her case, the reversionary heirs would have been bound by the decision, and that on the same principle the adverse possession against her was adverse also to the reversioners, the reason being "that the widow **[368]** fully represents the estate, and it is also settled law that adverse possession which bars her bars the heir also after her." As to an alienation made by a female heir it was held that no cause of action would accrue to her against her grantee, who would not be a wrong-doer, during her life, but that the alienation would not be binding against the reversioner. The cause of action would not arise till her

(1) 13 M. 512. (2) 21 C. 8 (17). (3) 14 B. 492. (4) 18 B. 216.
(5) 9 W.R. 505. (6) 15 I. A. 167. (7) 14 B. 317. (8) 2 I. A. 113.
(9) 14 A. 156. (10) 22 I. A. 25. (11) 14 C. (323) 343. (12) 9 M. I. A. 539.

death, when the reversioner's cause of action for the first time accrues. As to the case in which the female never got possession of the property, it having been held adversely to her and never having reached her hands, it was held that the suit to recover the property by ejectment of the wrong-doer must be brought within twelve years from the commencement of the adverse possession. The meaning of the learned Judges who decided this case clearly was that in such a case the cause of action arose once and for all on the commencement of the trespass. This case was cited with approval by their Lordships of the Privy Council in the case of *Amirto Lal Bose* v. *Rajonee Kant Mitter*.(1)

In *Babu valad Sheik Ibrahim* v. *Bhikaji* (2), a separated Hindu died leaving him surviving his widow and a son. The son succeeded to the property and died leaving a widow, on whom his estate descended as heir. The son's widow, however, was kept out of possession by her mother-in-law (the father's widow), who had no title to the property, but who retained possession of it and ultimately sold it. Subsequently, on suit brought by the son's reversioners after the death of the son's widow, it was held (following the two cases above cited) that the possession of the usurping mother-in-law and of her alienees was adverse, not only to the true heir, the son's widow, but also to the son's reversioners. The case was one under Act No. XIV of 1859, and the Court considered it unnecessary to discuss the effect of art. 142 of Act No. IX of 1871 and art. 141 of No. XV of 1877. In *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (3) the plaintiff as son of the survivor of five daughters of his **[369]** maternal grandfather, who herself died in 1884, sued in April 1887, to recover his share in his maternal grandfather's property, from the sons and grandson of his mother's sisters. The defence was that his suit was barred by a decree obtained against his mother, who had sued for possession in 1879 against a son of one of her sisters and had been defeated. Their Lordships of the Privy Council, after referring to the changes in the law of limitation from Act No. XIV of 1859 to Act No. IX of 1871 and Act No. XV of 1877, cited the judgment in the *Shiva Ganga* case (4), in which it had been held that an adverse decree in a suit brought by a Hindu widow for possession of a zamindari as heir to her husband would, if it had become final in her life-time, have bound those claiming in succession to her, and would have barred any new suit by any person claiming in succession to her unless the decree could be successfully impeached on some special ground. Their Lordships then went on to remark that the judgments in *Nobin Chunder v. Issur Chunder* (5) and in *Amirto Lal Bose* v. *Rajonee Kant*(1) were not directly applicable (no doubt because those cases turned on adverse possession against the female heir and not on a decree of Court), and held that the estate to which the plaintiff's mother had succeeded was similar to the estate of a widow, and that the *principle* of those decisions would apply to it. Their Lordships then considered the contention that (the law being as described in the three cases cited above when Act No. IX of 1871 was passed). the effect of art. 142 in the sch. to Act No. IX of 1871 and of art. 141 in the sch. to Act No. XV of 1877 was that a decree founded on the law of limitation was now exempted from the rule laid down in the *Shiva Ganga* case (4), and that the decree in the plaintiff's mother's suit of 1879 only bound her, and that the plaintiff had under art. 141 a

(1) 2 I. A. 113. (2) 14 B. 317. (3) 21 C. 8.
(4) 9 M. I. A 539. (5) 9 W. R. 505.

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period of twelve years from her death to bring a suit. For that contention their Lordships could see no ground. They held that the words in art. 141 "entitled to the possession of immoveable [370] property" referred to the then existing law, under which the plaintiff would not, (by reason of the adverse decree) be entitled to bring a suit for possession, the intention of the law of limitation being not to give a right where there is not one, but to interpose a bar, after a certain period, to bar a suit to enforce an existing right; and finally their Lordships say that art. 141 cannot be construed as altering the law respecting the effect of a decree. In *Lachhan Kunwar* v. *Anant Singh* (1) the facts are the same as in *Babu valad Sheik Ibrahim* v. *Bhikaji* (2) cited above. A Hindu widow took possession of her husband's property to the exclusion of her son's widow, the true heir, and held possession for twenty-five years. Their Lordships held that if she took possession absolutely and without any qualification, her possession would be a bar to the title of all persons who could claim as reversioners. Their Lordships approved of the decision then under appeal, in which it was held that the trespasser by virtue of her adverse possession had acquired an absolute indefeasible title to the property, extinguishing not merely the title of the next heir (the son and after him his widow), but also that of the reversioners expectant on the death of the son's widow. The last of this class of cases to which I would refer is that of *Appasami Odayar* v. *Subramanya Odayar*. (3) The suit in it was brought to recover the plaintiff's share in joint ancestral property from which the plaintiff alleged he had been excluded by the defendants. It was held by their Lordships of the Privy Council that the plaintiff's suit had been barred by clause 13 of s. 1 of Act No. XIV of 1859, which prescribed twelve years from the date of the last participation in the profits of the estate as the limitation period, and their Lordships further held that the right to sue could not have been revived by the later limitation Acts. They also held [as in *Hari Nath Chatterjee* v. *Mothurmohun* (4)] that if the limitation Acts had altered the law (of limitation), they had not revived the right of suit. This case therefore, though it is not one of a suit by a [371] reversioner claiming on the death of a female, is of importance on the limitation question.

From a consideration of the above cases it seems to me that the following rules can be deduced, namely, (1) that decrees affecting immoveable property obtained against a female heir in respect of the subject-matter of the inheritance (if obtained without fraud or collusion or the like) are binding on the reversioner:—(2) that an alienation made by a female heir in possession is good against her for her life, but is not necessarily binding on the reversioner, to whom, if it be invalid, a cause of action accrues on the death of the female heir:—(3) that where property, the estate in which has descended to a female heir, never reaches her hands, but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of the adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property, and (4) that the enactment of art. 142 in the schedule to Act No. IX of 1871 and of art. 141 in the schedule

(1) 22 I. A. 25. (2) 14 B. 317. (3) 15 I. A. 167. (4) 21 C. 8.

to Act No. XV of 1877 has not made any alteration in the law laid down in the last preceding rule.

In the second class of cases the first I would cite is *Sambasiva* v. *Ragava* (1). In it the facts are that a separated Hindu died in 1845, leaving him surviving, a widow, who died in 1846, and two daughters, the survivor of whom died in 1883. The plaintiff, a son of the last-mentioned daughter, sued in 1887 to set aside an alienation made by the other daughter in 1850 while she was in possession of her father's property. The District Judge held that the suit became barred by limitation in 1862 under Act No. XIV of 1859. The High Court, however, on appeal took a different view, remarking:—"We take it therefore as settled law that when **[372]** the defendant gets into possession under an invalid alienation made by a widow his possession is not adverse against the reversioner until the widow's death, but when the defendant comes into possession by an act of trespass that the title he acquires is good as against the representative of the inheritance for the time and consequently against the reversioner." The Court further considered the argument that a suit by the plaintiff's mother to impeach the alienation would have been barred after twelve years from her sister's death and that therefore the plaintiff would be barred. The Court, however, rejected that argument, holding that the title which the alienee acquired against the plaintiff's mother by the lapse of twelve years would not be higher than that which might have been created by a conveyance from her which would not be binding on the plaintiff. It was therefore held that there was no bar of limitation against the plaintiff.

In *Cursandas Govindji* v. *Vundravandas Purshotam* (2) there was no complication of any kind. The plaintiff reversioner sued within twelve years from the death of the survivor of the two widows of the last male owner, and the Court held he was not time-barred, remarking that as long as either of the widows lived, the plaintiff had no right of action and could not sue for possession. This case was followed and approved in *Mukta* v. *Dada valad Supadu* (3).

Ramkali v. *Kedar Nath* (4), is undoubtedly a strong case. The facts in it resemble very much those in *Lachhan Kunwar* v. *Anant Singh* (5), and are that a separated Hindu died in 1862 leaving a widow and daughter, but no son. The estate descended to the widow, but possession never reached her, as a nephew of her husband (who had no title whatever as long as the widow and daughter lived) took possession of the property, and retained possession for twenty-five years up to the death of the widow in 1887. The daughter then sued for possession, and it was held by the Court that art. 141 of the second schedule to the Act No. XV of 1877 applied, that the plaintiff had twelve years from **[373]** the death of the widow in 1887 within which to sue, and that the suit was not time-barred, as the limitation period began to run from the death of the widow. It is not easy to reconcile the decision in this case with that in *Hari Nath Chatterjee* and in *Lachhan Kunwar* and others of the cases cited above, and possibly the decision may have to be reconsidered.

In *Drobomoyi Gupta* v. *Davis* (6), the facts are that a Hindu widow created a peculiar kind of tenure in favour of certain tenants and died in 1861. She was succeeded by her two daughters, the survivor of whom

(1) 13 M. 512. (2) 14 B. 482. (3) 18 B. 216.
(4) 14 A. 156. (5) 22 I.A. 25. (6) 14 C. 323 (343, 344).

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died in December 1880. The plaintiffs sued as reversioners (daughter's sons) in 1884 for possession of the land by ejectment of the tenure holders. It appeared that the plaintiff's predecessors, the two daughters, had in 1873 taken proceedings against the tenure holders, seeking to oust them on the ground that the instruments which constituted the tenure were forged. That suit failed. It was held that the reversioners were barred by limitation. There was also a question of *res judicata*, but the Court refused to adjudicate on it. On the question of limitation—and this is the reason why the case was cited here by the appellant—the Court observed that the possession of the tenure holders was not adverse to the widow, and if it could be shown that the daughters had ratified the settlement, the possession would not have been adverse to them either. But as the daughters, instead of ratifying the settlement, did everything they could to upset it, and impugned the documents constituting it as forgeries and denied that they were bound by them even if genuine, the Court held that the possession of these tenure holders was adverse to the daughters and to their successors the plaintiffs.

From the above it will be seen that, with the exception of the case of *Ram Kali* v. *Kedarnath* (1), all the cases of this second class have been decided in accordance with some one or other of the four rules set forth above.

Now, applying the rules of law laid down in the cases above cited to the appeal before me, I remark that there is not in **[374]** this case any adverse possession by a stranger or trespasser against the true heir, as there was in the cases of *Nobin Chunder*, *Babu valad Ibrahim*, *Lachhan Kunwar* and *Ram Kali*. Nor is there any adverse decree, as in the case of *Hari Nath Chatterjee* and *Drobomoyi Gupta*. There is here an alienation, possibly invalid, created by the widow shortly before her death in 1857, and there is the fact that the next set of female heirs, the daughters, between 1857 and the death of the survivor of them in 1890, made no attempt to set aside the alienation. Had they made such an attempt and failed, I certainly should hold that the decree in their suit would, in the absence of fraud or collusion or the like, be binding on the reversioners, the plaintiffs. It may be that a suit by the daughters would have been barred by limitation after 1869. It is unnecessary for me to decide that point. But, assuming that it would have been so barred, is the suit by the present reversioners also barred? The contention is that the reversioner's cause of action was barred under Act XIV of 1859. If that were so, it would not be revived by art. 141 of the second schedule to the Limitation Act, 1877. I am of opinion that the suit is not so barred. This is not a case in which, as in *Nobin Chunder's* case, it could be held that the cause of action accrued once and for all on the commencement of a wrongful possession, but is one of an alienation created by a female heir while in lawful possession. I take it that during the period between 1857 and 1890 the daughters, not having taken any steps to set aside the alienation, must be considered to have acquiesced in and ratified it, and the title which the alienee might acquire against them by twelve years' adverse possession of their interests in the property under such acquiescence or ratification, being possession only of the limited interest of a Hindu female heir, would not in my opinion be adverse to nor bar the reversioners. The reversioners had no title to sue for possession of the property during the life-time of

(1) 14 A. 156.

the female heirs, and there is no law compelling reversioners to sue to set aside invalid alienations made by a female heir in possession, [375] such alienation not being binding on the reversioners. It would be different on the authorities if the female heir while in possession was dispossessed by a trespasser, or if such heir never got possession. In such a case the reversioner would be bound by the adverse possession obtained by the trespasser, if prolonged beyond the statutory limit, as also he would be bound by a decree adverse to the female heir affecting the property. But in the present case I am clearly of opinion that the suit is not barred by any rule, there being no adverse possession by a trespasser nor any adverse decree of Court affecting the property. I would therefore set aside the finding of the Subordinate Judge on the first issue and also his decree founded on that finding dismissing the suit, and, as his decree proceeds on a preliminary point, I would, under s 562 of the Code of Civil Procedure, remand the record to him for trial of the remaining issues.

Appeal decreed and cause remanded.

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BAKHSHI KISHEN PRASAD AND OTHERS (*Plaintiffs*) *v.* THAKUR DAS AND OTHERS (*Defendants*).* [14th April, 1897.]

Muhammadan law--Shias—Marriage between a Muhammadan woman and a Christian—Invalidity of such marriage.

A Muhammadan woman of the Shiah sect cannot contract a valid marriage according to Muhammad anrites with a Christian.

THE suit out of which this appeal arose was one for redemption of a mortgage of a 9 biswa share in a certain village. The plaintiffs alleged that on the 8th of January 1865, Mussammat Husaini Begam usufructuarily mortgaged to the defendants' ancestors Ganga Bishan and Mathura, Das a 9 biswa share in mauza Rachora together with Naglas Mohari, Sumerpur and Kachhia Nain, the mortgage being usufructuary for principal and interest; that after the death of Husaini Begam the entire mauza devolved upon her husband Mr. Linnæus Gardner, who, on the 21st December 1838, hypothecated the entire mauza to Bakhshi Nand Kishore and [376] Dwarka Das; that on the 24th of June 1874 Nand Kishore and Mussammat Chamna, the widow of Dwarka Das obtained a decree against Linnæus Gardner, on the hypothecation bond for the sale of the entire mauza; that in execution of this decree the mauza was sold and was purchased by Nand Kishore and Mussammat Teja, mother and representative of the other mortgagee, who obtained possession; that subsequently Mussamat Teja transferred her half share to Kishore Lal, one of the plaintiffs, and Nand Kishore died and was succeeded by the remaining plaintiffs as his heirs; that the mortgage in favour of the defendants had been fully satisfied by the usufruct, but that if anything remained due they were willing to pay the necessary amount.

The defendants resisted the suit upon various grounds, *inter alia* that Linnæus Gardner was not the legal heir of Husaini Begam. The

* First Appeal No. 239 of 1895, from a decree of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Aligarh, dated the 21st September 1895.

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ground of this contention was that Husaini Begam, being a Muhammadan of the Shia sect, could not, although she had gone through the ceremony of marriage with him according to the Muhammadan ritual lawfully become the wife of Linnæus Gardner, he being a Christian. On this point an issue was framed by the Court of first instance (additional Subordinate Judge of Aligarh) and was decided in the negative. The Court of first instance accordingly dismissed the suit. The plaintiffs appealed to the High Court.

Mr. *Amiruddin* and Babu *Ratan Chand*, for the appellants.

Babu *Jiwan Chandar Mukerji*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit for redemption of a mortgage of a nine biswa share made by one Husaini Begam in 1865 in favour of the predecessors in title of the defendants. Husaini Begam was a Muhammadan lady of the Shiah persuasion, who had gone through the ceremony of marriage according to Muhammadan rites with Mr. Linnæus Gardner, who was a Christian. The plaintiffs derive their title under a mortgage made in favour of their ancestor in 1868 by the said Linnæus Gardner after the death of Husaini Begam. The plaintiffs obtained a decree upon that mortgage, and in execution thereof caused the [377] mortgaged property, which included the nine biswas now claimed, to be sold at auction and purchased it themselves. It is by virtue of this purchase that they have advanced the present claim. The defendants were not joined as parties to the suit brought upon the mortgage of 1868. They resisted the present claim, on the ground, among others, that the plaintiffs had no title to redeem, inasmuch as their mortgagor Linnæus Gardner was not the legal heir and representative of Husaini Begam, his alleged marriage with that lady being void under the Muhammadan Law. This plea has been sustained by the Court below, and the claim has been dismissed.

The first contention raised in this appeal has reference to the correctness of the finding of the lower Court against the validity of the marriage of Linnæus Gardner with Husaini Begam. The Subordinate Judge has based his decision upon passages to be found on pages 30 and 40 of Baillie's Digest of Muhammadan Law, Imameea Code. It is there laid down that if the wife of a Kitabee should embrace the faith of Islam, that circumstance would cancel the marriage. The author infers from this that a Muhammadan cannot be legally married to anyone who is not of that faith. At page 40 it is stated that a Muhammadan woman cannot enter into a *moota* contract with any other than one of her own religion. Since a *moota* or temporary marriage cannot be entered into by a Muhammadan woman with any one other than a Muhammadan, it follows as a natural inference that a permanent marriage valid according to Muhammadan Law cannot be contracted under similar circumstances. No authority to the contrary has been shown to us on this point. We think that the decision of the Court below must be upheld. As the alleged marriage of Linnæus Gardner with Husaini Begam was thus an invalid marriage, the property left by that lady could not be inherited by him, according to Muhammadan Law.

It is next contended that under a custom prevailing in the family to which Husaini Begam belonged, such a marriage was regarded as valid. The evidence as to this is in our opinion [378] insufficient to establish the custom set up, and does not justify our acting upon it.

The defendants mortgagees were not bound to surrender the mortgaged property to anyone who could not establish a title to the equity of redemption as against them. As the person from whom the plaintiffs derived title had, according to the above finding, no right to the property mortgaged to the defendants, the plaintiffs acquired no higher title than that possessed by their mortgagor, and they had no right to claim redemption.

It was urged on behalf of the appellants that the defendants mortgagees were by their conduct precluded from denying the title of the plaintiffs. This contention was based on the fact that in 1872 the defendants brought two suits upon two simple mortgages executed by Husaini Begam in which they described Linnæus Gardner as the heir and legal representative of Husaini Begam, and it is stated that by reason of the defendants so describing Linnæus Gardner the plaintiffs were induced to purchase his interest in the property now in question. Had it been shown that it was in consequence of the description of Linnæus Gardner above referred to that the plaintiffs purchased the property, the provisions of s. 115 of the Indian Evidence Act might have applied, and the defendants might have been held estopped from denying the plaintiffs' title, but anything which took place in 1872 could not have induced the predecessors in title of the plaintiffs to take a mortgage of the property from Linnæus Gardner in 1868, or the plaintiffs to purchase that property in execution of the decree obtained on that mortgage. In our opinion therefore the plea of estoppel cannot be sustained. We affirm the decree below and dismiss the appeal with costs.

There are objections under s. 561 of the Code of Civil Procedure on behalf of the respondents, as to the disallowance of costs to the respondents by the Court below. Those objections are in our opinion untenable.

It appears that in *dakhil kharij* proceedings the defendants stated that until the plaintiffs brought a suit for redemption they [379] would not be entitled to obtain possession of the property. In those proceedings they did not deny the plaintiffs' title. Under these circumstances the Court below exercised a proper discretion in not allowing costs.

We dismiss the objections.

Appeal dismissed.

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FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BALMAKUND AND ANOTHER (*Plaintiffs*) *v.* MUSAMMAT SANGARI AND ANOTHER (*Defendants*).* [15th April, 1897.]

Civil Procedure Code, s. 43—Act No IV of 1882 *(Transfer of Property Act), s. 85—Cause of action—Rights* inter se *of two mortgagees of the same property from the same mortgagor.*

Two persons each held a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of

* Second Appeal No. 183 of 1894, from a decree of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 14th October 1893, confirming a decree of Maulvi Mazhar Hasan, Subordinate Judge of Aligarh, dated the 24th December 1892.

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which they had the mortgaged property put up for sale, and each purchased it at the sale under his decree respectively. Neither mortgagee made the other a party to the suit on his mortgage. The representative of one of the mortgagee decree-holders, Musammat Sangari, got possession of the mortgaged property and held it as against the other mortgagee decree-holder or his representatives. Thereupon the representatives of the other mortgagee brought their suit for possession of a moiety of the property, or in the alternative for redemption of the other mortgage.

Held that such suit was not barred either by the provisions of s. 43 of the Code of Civil Procedure or by reason of those of s. 85 of the Transfer of Property Act, 1882.

[R., 21 A. 301 ; 22 A. 307 (310) ; 30 B. 156=7 Bom. L.R. 811 ; 7 A.L.J. 627=6 Ind. Cas. 226 (227) ; 10 Ind. Cas. 32 (33) ; 64 P.R. 1908=132 P.W.R. 1908.]

THE facts of this case are fully stated in the judgment of KNOX, J., as also in those of BANERJI, J. and of BURKITT, J.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Durga Charan Banerji* and Babu *Satya Chandar Mukerji*, for the respondents.

JUDGMENT.

[380] KNOX, J.—One Jhamman Singh, on the 23rd of January, 1894, executed two separate mortgage deeds over a $3\frac{3}{4}$ biswa share of zamindari property situate in mauza Ankheri. One of these was in favour of Paramsukh and the second in favour of Puran Mal.

On the 22nd of January, 1886, each of the mortgagees, as represented by their heirs, instituted a separate suit against Jhamman Singh for recovery of the mortgage money and for enforcement of his lien over the mortgaged property. In each case the other mortgagee was made no party to the suit.

The suit brought by the heirs of Paramsukh terminated in a decree on the 1st of March, 1886, and that brought by the heirs of Puran Mal in a decree dated the 5th of April, 1886.

Sangari, the heir of Puran Mal, brought the property to sale on the 20th of July, 1888, and purchased it. The heirs of Paramsukh, the appellants, did the same on the 20th of April 1889, and also themselves purchased it. Musammat Sangari had, however, been first in securing mutation of names in her favour in the Collector's records and in getting possession over the property, and she applied for partition. The appellants objected, but as they were not in possession, their objection was disallowed.

They accordingly instituted the present suit claiming that a decree might be given declaring their lien to be prior to that of Musammat Sangari, or that a moiety of the property might be awarded them, or that they might be allowed to redeem the mortgage, subject to the payment of Musammat Sangari's lien. The Judge held that, as Balmakund in his first suit could, and should, have made Mussammat Sangari a party to the case, and settled the question of proof and of priority and of his right to redeem, and as he had not done so, he could bring no second suit for the purpose under s. 43 of the Code of Civil Procedure. He based his decision to this effect upon an unreported decision of this Court in F.A. No. 190 of 1889, and dismissed the appellants' suit.

The appellants then came to this Court contending that their suit was not barred by s. 43 of the Code of Civil Procedure. **[381]** The Division Bench of this Court considering that this point had been dealt with differently in two unreported decisions of this Court, *viz.*, F. A. No. 190 of 1889, decided on the 22nd of June, 1891, and S. A.

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No. 1042 of 1892, dated the 20th of July 1895, referred the point for decision by a Full Bench of this Court.

It is admitted that Jhamman is not a necessary party to this suit. We are unanimously of opinion that the suit is not barred by s. 43. That section is one which has no reference to array of parties. We are not now concerned with the former suit instituted by the appellants. The contention was pressed upon us that as s. 85 of the Transfer of Property Act required that in the first suit brought by the appellant Musammat Sangari should have been joined as a party, and as the appellants were entitled when they brought their first suit both to the remedy against Jhamman Singh, *viz.*, recovery of the mortgage money and enforcement of their lien in default, and to the remedy against Musammat Sangari, *viz* , redemption of the mortgaged property, subject to the payment of what was due to Musammat Sangari in respect of their cause of action, and as they omitted to sue for the latter remedy they cannot now sue for it.

This contention is based upon a misconception of the term 'cause of action.'

The appellants had two separate causes of action at the time they instituted this suit in the Court of the Subordinate Judge of Aligarh, namely, that against Jhamman Singh and that against Musammat Sangari. The object with which s. 85 was specially enacted was to enable the various incumbrances on one property (and each incumbrance represents a separate cause of action) to be brought into one suit and so save multiplicity of actions. It was never intended to, and could never operate as a section fusing all causes of action arising out of each incumbrance into one consolidated cause of action. The provisions of s. 85 of the Transfer of Property Act and of s. 43 of the Code of Civil Procedure in no way govern the present suit.

I would therefore dismiss Jhamman Singh from the suit.

[382] I would allow the appeal as against Musammat Sangari, and, setting aside the judgment and decree of the lower Court on the preliminary point, would remand the case to the Court below with directions to restore it to its file of pending appeals and dispose of it according to law.

BANERJI, J.—The question we have to determine upon this reference is whether the suit of the plaintiffs appellants offends against the 43rd section of the Code of Civil Procedure. The facts out of which the question has arisen are these. One Jhamman Singh executed two simple mortgages of the same property on the 23rd of January, 1874, one in favour of Param Sukh and the other in favour of Puran Mal. In 1886, the legal representatives of the two mortgagees, who had in the meantime died, brought two suits for sale, one in respect of each mortgage, and a decree for sale was made in each suit. Neither plaintiff joined the other mortgagee as a party to his suit. Musammat Sangari, the widow and legal representative of Puran Mal, caused the property now in suit, which was a part of the mortgaged property, to be sold in execution of her decree on the 20th of July, 1888, and purchased it herself. Subsequently, on the 20th of April, 1889, the legal representatives of the other mortgagee caused the same property to be sold in execution of their decree, and the present plaintiffs became the purchasers. Musammat Sangari, however, obtained possession. Thereupon the present suit was brought. The plaintiffs alleged that the mortgage in favour of Param Sukh had priority over the other mortgage, and therefore they alone were entitled to possession of the property, and that in any case they were entitled to

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half the property. They further urged that as the legal representatives of Param Sukh were not parties to Sangari's suit for sale the plaintiffs were entitled to redeem the mortgage made in favour of Sangari's husband, Puran Mal. The plaintiffs accordingly sued for possession, and prayed that in the event of a decree for possession not being granted a decree should be made in their favour for redemption of Puran Mal's mortgage.

[383] The lower appellate Court has dismissed the claim for possession upon the finding that Param Sukh's mortgage was not prior to the other mortgage. It has dismissed the claim for redemption on the ground that as the representatives of Param Sukh were bound to join the other mortgagee as a party to their suit for sale and to seek to redeem the mortgage held by him, the present claim is barred by the provisions of s. 43 of the Code of Civil Procedure. It is the correctness of this last ruling of the learned Judge below which has been questioned in this appeal.

In my opinion the 43rd section of the Code of Civil Procedure is no bar to the plaintiff's suit for redemption of the mortgage held by Puran Mal.

That section provides against what is called the splitting of a cause of action, and is founded on the maxim that no one shall be twice vexed for one and the same cause. (See Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 490.) The section in my opinion forbids the institution of a second suit against the same defendant or his representatives in interest upon the same cause of action which was the foundation of the first suit. As observed by their Lordships of the Privy Council in *The Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya* (1) with reference to the corresponding section of Act No. VIII of 1859,—"that section does not say that every suit shall include every cause of action or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought," that is, as s. 43 of Act No. XIV of 1882 sets forth, "the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." It is clear that in order that the said section may be applicable two things are essential: first, that both the suits must arise out of the same cause of action; and, secondly, that they must be between the same parties or between parties under whom they or any of them claim. Unless the cause of [384] action be the same, there cannot be an omission or relinquishment of any portion of the claim which the plaintiff is entitled to make in respect thereof, and unless the defendant be the same person or his representative in interest, no one will be twice vexed for the same cause. A plaintiff's cause of action is not only the right which he asserts, but the infringement of that right by the defendant. Where the plaintiff's right is infringed by more persons than one and by different acts done separately by each of them, the plaintiff has a separate cause of action against each of those persons. The omission therefore to implead one of them in a suit brought against another cannot bar a subsequent suit against the person not so impleaded. Section 43 appears in a Chapter of the Code which relates to the frame of a suit and not to the array of parties, and this circumstance also shows that it has no application where the parties to the two suits are not the same persons or their representatives

(1) 12 I.A. 116.

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in interest. This view is supported by observations contained in the ruling of the Calcutta High Court in *Sabeer Khan* v. *Kalli Doss Dey* (1).

It is contended on behalf of the respondent that, according to the ruling of the majority of the Full Bench in *Matadin Kasodan* v. *Kazim Husain* (2), a subsequent mortgagee who brings a suit for sale must redeem the prior mortgage in order to obtain a decree for sale, and that the result of this ruling is that the cause of action of a subsequent mortgagee in a suit for sale brought by him is the same both against his mortgagor and the prior mortgagee. I am unable to agree with this contention. S. 85 of Act No. IV of 1882 no doubt requires that a mortgagee bringing a suit for sale must join as a party to his suit every person who has an interest in the mortgaged property, of whose interest he has notice. As a prior mortgagee is a person who has an interest in the mortgaged property, he is a necessary party to the suit for sale brought by a puisne mortgagee, provided that the latter has notice of the prior mortgage. The omission to join such a prior mortgagee in the subsequent mortgagee's suit entails, according to [385] the ruling of the Full Bench in *Matadin's* case, the dismissal of the suit. But it does not bar the subsequent institution of a properly framed suit against the prior mortgagee for redemption of the mortgage. Such a bar, if it existed, must be sought elsewhere than in the Transfer of Property Act. It is urged that s. 43 of the Code of Civil Procedure imposes the bar. But in my opinion that section, providing as it does against the splitting of causes of action, cannot apply unless the cause of action for both the suits is the same. A puisne mortgagee's cause of action as against a prior mortgagee to redeem the prior mortgage is not the same cause of action that he has against the mortgagor for the sale of the mortgaged property. The cause of action for the claim for redemption is the plaintiff's title as subsequent mortgagee and the refusal of the prior mortgagee to grant redemption. The cause of action for the claim for sale is his title as mortgagee (and it is immaterial whether he is the first mortgagee or a subsequent mortgagee) and the refusal of the mortgagor to pay the mortgage money. These causes of action are certainly not identical, and it is not right to say that a subsequent mortgagee's suit to redeem a prior mortgage and to foreclose the right of redemption of his mortgagor is founded on the same cause of action.

In the present case Musammat Sangari ought undoubtedly to have been joined as a party to the suit brought by the legal representatives of Param Sukh, and for this non-compliance with the provisions of s. 85 of Act No. IV of 1882, their suit should, according to the ruling of the Full Bench referred to above, have been dismissed. They, however, obtained a decree against their mortgagor. The circumstance of their not joining in that suit persons who were necessary parties to it could not preclude them, or the plaintiffs, who stand in their shoes, from bringing the present suit against Musammat Sangari, who was not a party to the first suit, and will not therefore be subjected to the vexation of a second suit. Moreover, as I have shown above, the cause of action against her is not the same as that against the [386] mortgagor. The present suit is not therefore obnoxious to the bar of the former suit under s. 43 of the Code of Civil Procedure, or under any other rule of law, and it has been improperly dismissed as against Musammat Sangari.

As against Jhamman Singh, defendant, the plaintiffs had no cause of action for their present claim. He has ceased to have any interests in the

(1) 1 W.R. 199.

(2) 13 A. 432.

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property in question, those interests having passed to the other parties to the suit. He was not therefore a necessary party to the plaintiff's suit, and the decree for the dismissal of the suit as against him must be sustained.

I would allow the appeal against Musammat Sangari and remand the case to the Court below under s. 562 of the Code of Civil Procedure for trial on the merits. Costs here and hitherto follow the event.

BURKITT, J.—In this case, two persons held each a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of which they had the mortgaged property put up for sale and each purchased it at the sale under his decree. The respondent, Musammat Sangari (widow and representative of one of the mortgagees decree-holders) took prompt measures to obtain the benefit of her purchase, got herself put into possession of the property and successfully resisted all effort of the rival mortgagees decree-holders auction purchasers to oust her. The rival mortgagees decree-holders auction purchasers have now instituted this suit in which they have impleaded all necessary (and one unnecessary) parties. They asked for three reliefs. The first has been abandoned and need not be mentioned. In the second relief, they asked for possession of a moiety of the property, and in the third, they in the alternative asked to be allowed to redeem.

The Court of first instance dismissed the suit. The plaintiffs appealed, urging that theirs was the prior mortgage and that they were entitled to redeem.

[387] The District Judge found that the appellants were not the prior mortgagees, and on the question of redemption he held that, as the appellants had not made the respondent Musammat Sangari a party, to their suit for sale on their mortgage they were debarred by s. 43 of the Code of Civil Procedure, from instituting this suit. He came to that decision on the strength of an *obiter dictum* in an unreported case in this Court.

In second appeal to this Court, the appellants contend that the learned District Judge was wrong in his decision on s. 43 of the Code of Civil Procedure.

The respondent Jhamman, the original mortgagor, has been again quite unnecessarily impleaded as a respondent. He now has no possible interest in the property comprised in the mortgages. I think he should be dismissed from the suit with costs.

At the hearing of this appeal, it was admitted by the learned advocate for the respondent Musammat Sangari, that the suit as framed was not in any way barred by s. 85 of the Transfer of Property Act. But he supported the ruling of the Court below that the suit was barred by the provisions of s. 43 of the Code of Civil Procedure. His argument, as I understood it, was that the appellants when instituting their suit for sale on their mortgage ought, under s. 85 of the Transfer of Property Act to have impleaded the present respondent, Musammat Sangari, who also held a mortgage of which they had notice over the property they sought to bring to sale. So far the argument of the learned advocate is sound. As a condition precedent to obtaining a decree for sale s. 85 of Act No. IV of 1882 does make it imperative on a mortgagee to implead every person having an interest in the property comprised in the mortgage of whose interest the plaintiff mortgagee has notice. The appellants certainly ought not to have got their decree, nor should the respondent Musammat Sangari, who was

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in pari delicto, have obtained hers. Next, the learned advocate referring to the rule established in this Court by the case of *Matadin Kasodhan* [388] v. *Kazim Husain* (1) that a puisne mortgagee seeking to bring to sale the mortgaged property must redeem a prior incumbrance and cannot sell subject to it, contended that among the remedies which the appellants had on their cause of action when suing their mortgagor for sale of the mortgaged property was one to redeem the prior incumbrance, and that, as they had not impleaded the person against whom that relief could be granted, they were barred from instituting this suit by s. 43 of the Code. To that contention I am unable to accede. Section 43 is, in my opinion, a provision as to the cause of action, and its object is to prevent the same party or his representatives from being more than once sued on the same cause of action, or on any part of it. As against their mortgagor, Jhamman, the appellants put in suit the whole of the cause of action they had against him, when they, alleging the execution of the mortgage and the failure of the mortgagor to pay the amount due on it, asked for a decree for sale of the mortgaged property in default of payment by the mortgagor. They in that way exhausted their whole cause of action against their mortgagor and did not omit or relinquish any part of it so as to subject themselves to the penalty provided by the second clause of s. 43. It is true, no doubt, that being, as found by the lower appellate Court, puisne mortgagees they had a cause of action against the respondent Musammat Sangari for redemption, and for that reason, and also because of s. 85 of the Transfer of Property Act, they might have impleaded her and redeemed her prior mortgage. But that matter does not bring the case within s. 43 of the Code of Civil Procedure. The appellants' cause of action as against their mortgagor Jhamman was not the same cause of action as that as against the respondent Musammat Sangari, their rival mortgagee. Section 43 nowhere prescribes that where one person has two distinct causes of action, different in their nature and in their incidents, respecting the same property, one against one person and other against another person, he is bound to join those causes in one suit. The section lays down no rule as to who is to be [389] impleaded as a defendant, and does no more than provide that the plaintiff must include in the relief he asks for in his plaint the whole claim he is entitled to make in respect of his cause of action against the defendant. Here, as I have shown above, the appellants did, in their suit against their mortgagor, make the whole of the claim they were entitled to make on their cause of action against him. It is the wording of s. 85 of the Transfer of Property Act, and not that of s. 43 of the Code of Civil Procedure, which rendered it incumbent on them to have impleaded the respondent and to have joined their cause of action against her in their suit against their mortgagor. But their omission to do so does not bring their present suit within the purview of s. 43 of the Code of Civil Procedure.

I would therefore allow this appeal. I would dismiss the respondent, Jhamman, from the suit with costs as an unnecessary party, and, holding that the suit was not barred by s. 43 of the Code of Civil Procedure, I would remand the record to the lower appellate Court under s. 562 of the Code of Civil Procedure for a decision on the issues remaining untried. Costs of this appeal to follow the event.

BLAIR, J.—I concur in the order proposed by my brother BURKITT for the reasons on which it is based.

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AIKMAN, J.—I concur in the conclusion arrived at by my learned colleagues, and in the judgment of my brother Banerji. It is the more satisfactory that we have been able to arrive at this conclusion, because, if it were otherwise, the respondent Sangari would be benefiting by the failure to comply with the provisions of s. 85 of the Transfer of Property Act. I also concur in the order proposed.

*[The order of the Court is:—

That the appeal should be allowed. The respondent, Jhamman, dismissed from the suit and appeal with costs, if any, incurred by him.

That the judgment and decree of the lower Court being set aside on the preliminary point, the record is remanded under s. 562 to the lower Court with directions to readmit the appeal on its file of pending appeals and to dispose of it according to law. Costs here and hitherto to follow the event.]

Appeal decreed and cause remanded.

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[390] APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MANNU.† [13th July, 1897.]

Criminal Procedure Code, ss. 172, 161, 162, 167.—Police diaries—What Police diaries should contain—Statements recorded under s. 161, of the Criminal Procedure Code—Whether such statements may form part of the special diary—Act No. I of 1872 (Indian Evidence Act), ss. 39, 145, and 161.

A Sessions Judge, although he has power in any particular case which is before him to send for the Police diaries connected with the case, if he thinks it necessary to peruse them, has no authority to issue a general order that in every case committed for trial to the Court of Session, and in every criminal appeal, the Police diaries shall be submitted to the Court simultaneously with the Magistrate's record of the case. Such an order is illegal.

In no case is an accused person entitled as of right to a copy of any statement recorded by a Police officer in the special diary prepared under the authority of s. 172 of the Code of Criminal Procedure.

The special diary may be used by the Court to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused; but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained.

The special diary may also be used by the Court for the purpose of contradicting the police officer who made it, and the special diary may be used by the Police officer who made it, and by no witness other than such officer, for the purpose of refreshing his memory.

If the special diary is used by the Court to contradict the Police officer who made it, or by the Police officer who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person or his agent is entitled to see the particular entry which has been referred to and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry so used, but no more.

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* N.B.—The portion in rectangular brackets forms a portion of the judgment. This is ommitted in I. L. R. ED.

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So *held* by the Full Bench.

[391] *Per* EDGE, C.J., KNOX, BLAIR and BURKITT, JJ.—A Police officer investigating a case may lawfully reduce into writing in the special diary the full and unabridged statement made to him by a person whom he is examining or has examined under s. 161 of the Code of Criminal Procedure, and if he does so, his record of such statement is part of the special diary and is just as much privileged as any other entry in the diary.

All statements made under s. 161 of the Code of Criminal Procedure to a Police officer and reduced into writing by him should be reduced into writing in the special diary and not elsewhere.

Per BANERJI, J., and AIKMAN, J. Statements recorded under s. 161 of Code of Criminal Procedure by a Police officer making an investigation were not intended by the Legislature to be entered in the special diary, and if they are so entered do not form an integral part of the diary and are not privileged, but the accused person or his agent is entitled to see them.

A mere summary, however, of facts ascertained by an investigating officer from persons examined by him, not being a report of their actual statements, may properly find a place in the special diary.

The following cases were referred to.—*The Empress* v. *Kali Churn Chunari* (1); *Kallu* v. *The Queen-Empress* (2); *Queen-Empress* v. *Nasir-ud-din* (3); *Queen-Empress* v. *Jhuboo Mahton* (4); *In the matter of Mahomed Ali Hadji* v. *The Queen-Empress* (5); *Bikao Khan* v. *The Queen-Empress* (6); *Sheru Sha* v. *The Queen-Empress* (7); *Queen-Empress* v. *Rudr Singh* (8) and *Reg.* v. *Uttamchand Kapurchand* (9).

[F., 4 A.L.J. 811 (813) = A.W.N. (1908) 22 = 7 Cr.L.J. 3; **Rel. on.**, 13 Cr.L.J. 65 (90) = 16 C.W.N. 145 (179) = 13 Ind. Cas. 721 (746); **R.**, 21 A. 159 (161); **Con**., 11 Cr.L.J. 117 (120) = 5 Ind. Cas. 357 (361) = 13 O.C. 7 (16).]

THIS was a reference to a Full Bench raising various points in connection with the preparation and use of Police diaries.

Mr. *D. N. Banerji* appeared at the request of the Court to argue the case from the point of view of the accused.

The Government Advocate (Mr. *E. Chamier*) and the Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C.J.—This case raises not only the question as to whether the appellant was or was not guilty of the offence of which he was convicted, but important questions as to the use which may or may not legally be made of diaries made by Police officers under s. 172 of the Code of Criminal Procedure, and as to what those diaries may contain. I propose first to consider the latter questions.

[392] In the course of the arguments before us the following cases were cited: *Reg.* v. *Uttamchand Kapurchand* (9); *The Empress* v. *Kali Churn Chunari* (1); *The Empress* v. *Jhuboo Mahton* (4); *Queen-Empress* v. *Sitaram Vithal* (10); *Bikao Khan* v. *The Queen-Empress* (6); *Queen-Empress* v. *Madho* (11); *Sheru Sha* v. *The Queen-Empress* (7); *Queen-Empress* v. *Nasir-ud-din* (3); *Queen-Empress* v. *Taj Khan* (12); *Queen-Empress* v. *Nand Lal* (13); *Kallu* v. *Queen-Empress* (2) and *Queen-Empress* v. *Rudr Singh* (8). Regulation XX of 1817; Act No. XXV of 1861; Act No. X of 1872; Act No. X of 1882; Act No. I of 1872; Field's Edition of the Indian Evidence Act, 1872; Taylor on Evidence and *The Queen* v. *Lilluman* (14) were also referred to.

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(1) 8 C. 154. (2) 17 P.R. 1894, Cr. (3) 16 A. 207.
(4) 8 C. 789. (5) 16 C. 612, note. (6) 16 C. 610.
(7) 20 C. 642. (8) 16 A.W.N. (1896) 193. (9) 11 B.H.C.R. 120.
(10) 11 B. 657. (11) 15 A. 25. (12) 17 A. 57.
(13) 14 A.W.N. (1894) 155. (14) L. R. (1896) 2 Q. B 167.

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Section 172 of the Code of Criminal Procedure is as follows:—"Every Police officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

"Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police officer who made them to refresh his memory, or if **[393]** the Court uses them for the purpose of contradicting such Police officer, the provisions of the Indian Evidence Act, 1872, s. 161 or s. 145, as the case may be, shall apply."

It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a Court or by an accused person or his agents of the diaries which are kept by Police officers under s. 172 of the Code of Criminal Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case, and have done so without having asked the Police officer who made the special diary or any witness in the case one word as to the truth of these statements, and consequently without having afforded to the prosecution or the accused, as the case was, any opportunity of explaining or of contradicting such statements. Such a use of a special diary by a Court is entirely illegal. I have met with cases which were decided exclusively upon the entries contained in special diaries and not upon any evidence which was before the Court. A Criminal Court is entitled to "send for the Police diaries of a case under inquiry or trial before it, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial." Such Criminal Court may permit the Police officer who made the special diary to look at it for the purpose of refreshing his memory or may use the special diary for the purpose of contradicting such Police officer. Where the Police officer who made the special diary is allowed to refresh his memory and does look at an entry in the diary for the purpose of refreshing his memory, the provisions of s. 161 of the Indian **[394]** Evidence Act, 1872, apply, and the accused or his agent is entitled to see such entry in the special diary and to cross-examine such Police officer thereupon. There is no provision in s. 172 of the Code of Criminal Procedure enabling any person other than the Police officer who made the special diary to refresh his memory by looking at the special diary, and the necessary implication is that a special diary cannot be used to enable any witness other than the Police officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The Criminal Court, but not an accused person or his agent, unless the Police officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contradicting the Police officer who made it, but before doing so the Court must comply with the specific enactment of s. 145 of the Indian Evidence Act, 1872, and call the attention of the Police officer to such parts of the special diary as are to be used for the purpose

of contradicting him, otherwise such a use of the special diary would be illegal. There is no provision in s. 172 of the Code of Criminal Procedure enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police officer who made it. S. 145 of the Indian Evidence Act, 1872, does not either extend or control the provisions of s. 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police officer who made it that s. 145 of the Indian Evidence Act, 1872, applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or any part of its contents to any other **[395]** witness. No reading of s. 172 of the Code of Criminal Procedure consistent with the rules of construction and a knowledge of the English language is possible by which the special diary is to be used to contradict any person except the Police officer who made it. It is not enacted in s. 172 of the Code of Criminal Procedure by reference to s. 145 of the Indian Evidence Act, 1872, or otherwise that if the special diary is used by the Court to contradict the Police officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case.

The power of the Criminal Court to use the special diary is not limited to the use of it for the purpose of enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him. The Court may also use the special diary not as evidence of any date, fact or statement referred to in it, but as containing indications of sources and lines of inquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused. Should the Court consider that any date, fact or statement referred to in the special diary is or may be material, it cannot legally accept the special diary as evidence, in any sense, of such date, fact or statement, and must in law, before allowing any date, fact or statement referred to in the special diary to influence its mind, have such date, fact or statement established by legal evidence. It is the Court which is entitled to use the special diary for the purpose of seeking for sources and lines of inquiry and for the names of persons who may be in a position to give material evidence. Neither the accused nor his agent is entitled under s. 172 of the Code of Criminal Procedure to see the special diary for any purpose unless it has been used by the Court for enabling the Police officer who made it to refresh his memory or for the purpose of contradicting him.

[396] It has, however, been contended before us here, and there is authority for the contention, that if the special diary contains any statement made by any person who was examined by the Police officer who was making, under chapter XIV of the Code of Criminal Procedure, an investigation in the case, the privilege provided for the special diary by s. 172 of that Code is gone, and that the accused or his agent is entitled to see the entry of such statement in the special diary. That is, in my opinion, an unsound proposition. It is unsound as being contrary to the express enactment of s. 172 of the Code of Criminal Procedure, and it is unsound as being contrary to public policy. Section 172 of the Code of Criminal Procedure provides for the two events, on the happening of either of which the accused or his agent is entitled to see the special diary: and it

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enacts that, except on the happening of one of those events, "neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court." In my opinion the plain meaning of s. 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police officer who made it to refresh his memory or is used for the purpose of contradicting him. In face of the fact that the Legislature has thought it right to enact that there shall be two exceptions to the privilege accorded to the special diary, I cannot as a lawyer read a third exception into the section, and I have no power to legislate. The privilege attaching to the special diary is a privilege conferred upon the special diary, not by Judges, but by the Legislature, and must be maintained by Courts of justice in its integrity whether or not Judges consider that it is reasonable that to the special diary and its contents should be accorded such privilege. It is a privilege which cannot depend upon the question as to whether the Police officer who made the special diary did or did not **[397]** insert in the special dairy extraneous matter, nor can it depend upon the question as to whether or not the Police officer made the special diary in the particular form which is approved of by the Court.

It must not be assumed from what I have said that I consider that it is unreasonable that the special diary and its contents should be privileged from inspection by an accused person or his agent. In fact I consider that there are sound reasons of public policy why the fullest protection from inspection by any one other than the Judge or the Magistrate before whom the case is should be accorded to the special diary, and to everything which is contained in it. It is of vital interest to the public that the commission of crimes should be repressed, and that those who commit criminal offences should be detected and should be brought to justice. It is also of vital interest to the public that innocent persons should not be convicted. Any one of the public may be the victim of a crime, or may be unjustly charged with the commission of a crime. The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the Police, and until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false, or misleading, which was obtained from day to day by the Police officer who was investigating the case, and what were the lines of investigation upon which such Police officer acted. A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the special diary, **[398]** but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It must be always remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly. It must happen that a Police officer, who is investigating a criminal case, receives some true information, some false information, and some misleading information, and it must happen that such Police officer forms, no doubt sometimes prematurely, a theory about the case, to which having committed himself

he probably adheres. An ordinary knowledge of the infirmities of human nature and a knowledge of what does in fact take place in some cases teach us that in many cases the inclination of a Police officer, who in his early investigation of a criminal case has committed himself honestly or dishonestly to a theory as to the case, is to work the case so as to support that theory, whether the vindication of justice is to be the result or not. It is consequently essential that the Magistrate or the Judge, who has to hold the scales of justice evenly between the Crown and the accused, should have some means of ascertaining what was the information obtained by the Police officer each day in the course of the investigation and what were the lines upon which the investigation proceeded. It is also necessary in the interests of the public that Magistrates of Districts and District Superintendents of Police should have some means of informing themselves of the proceedings of the Police within their districts in the investigation of crimes and of ascertaining what information, whether derived from personal observation or from statements made to the Police officer making an investigation under chapter XIV of the Code of Criminal Procedure, such Police officer has obtained. The Legislature of India has done all that can be done by way of enactment to provide such a means and source of information for the **[399]** Magistrate and the Judge, and the Local Government of these Provinces and of Oudh, by requiring that a counterpart of the special diary for each day shall each day be sent to the Magistrate of the District, has done all that it can do to safeguard the daily entries in the special diary from being subsequently suppressed or from being tampered with. But I regret to say that some Sessions Judges by their procedure and by their misunderstanding of the use which may legally be made of special diaries have done much to frustrate the intention of the Legislature, and unintentionally to encourage the Police to evade the law and to keep out of the special diaries, and to suppress information which, rightly or wrongly. the Police officer considers to be opposed to the theory which he has adopted and upon which he has conducted his investigation. Where statements made under s. 161 of the Code to a Police officer are reduced into writing elsewhere than in the special diary, they are liable to be suppressed or to be tampered with. Quite recently, and since the argument in this case was concluded, an appeal against a conviction came before me in a case in which a statement made under s. 161 to a Police officer and reduced into writing by him, but not in the special diary, was subsequently tampered with by inserting in it false matter incriminating a man who was subsequently put upon his trial and was properly acquitted. For the results which ensue, and which are to be seen in miscarriages of justice, the Police are not in my opinion solely to blame. The result is that true cases fail and, I fear, false cases sometimes succeed. If the special diary or any thing which it contains is to be subject to the inspection of an accused person or of his agent, it is hopeless to expect that the Police officer making the investigation will insert in it information obtained by him, but which, rightly or wrongly, although honestly, he believes to be injurious to the case for the prosecution, or to be misleading or to be false. Further, so long as **[400]** Magistrates and Judges allow their minds to be influenced by, and decide cases upon, information contained in special diaries which has not been established by legal evidence and has not been tested and sifted by the examination of witnesses, it is hopeless to expect that Police officers will

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resist the temptation to keep out of the special diaries information which, if inserted in them, would, in the opinion of such Police officer, be likely to mislead the Magistrate or the Judge. Such information may be suppressed with the honest intention of procuring the conviction of an accused person whom the Police officer believes to be guilty, or it may be suppressed with the dishonest intention of shielding a guilty person or of procuring the conviction of an innocent person. The considerations to which I have referred have led me to the conclusion that it is a matter of public policy that the limited privilege and protection from inspection which the Legislature has accorded to special diaries should not be curtailed or encroached upon, and that all statements made under s. 161 of the Code of Criminal Procedure to a Police officer and reduced into writing by him should be reduced into writing in the special diary and not elsewhere.

As I understand it, the view which has been entertained by some Judges elsewhere is that a Police officer who is investigating a criminal case has no power to obtain from any person any statement relating to the commission of the offence except under s. 161 of the Code of Criminal Procedure, and that if such Police officer does obtain any such statement and voluntarily reduces it into writing, the accused or his agent is entitled to see the writing whether it be contained in or forms part of the special diary or not. Indeed the contention for the appellant in this case went further. It was contended that if such Police officer inserted in the special diary in any guise even a mere summary of what a person examined by him had stated the accused or his agent was entitled to see such summary. It **[401]** was frankly admitted that, if that contention was well-founded and the privilege of special diaries was to be maintained, all allusion to persons from whom the Police officer had received information should be confined to a mere statement that the Police officer had examined, for example, A, B, C, and D, or possibly should be confined to a mere statement, for example, that the Police officer had examined A, B, C and D, that it appeared that X had murdered Y. Neither of such entries would contain any information of any practical use to the Magistrate or the Judge, and the latter of such statements, although it might express the honest conclusion of the Police officer might be entirely misleading. It frequently happens that a Police officer examines 40, 50 or more persons in the course of an investigation: some, indeed many, of such persons may have no evidence to give, others may be in a position to give material evidence, but may deny all knowledge of what occurred, others may be able to speak merely from hearsay, others may have been eye-witnesses and may speak the truth, whilst others may wilfully give false or misleading information. A mere schedule of the names and addresses of the persons whom the Police officer had examined could not afford to the Magistrate or to the Judge the slightest indication as to which of the above categories included the several persons examined by the Police officer, and in most cases it would be impracticable and a mere waste of public time for the Magistrate or the Judge to summon and examine all the persons whose names were included in the schedule. An entry that the Police officer had examined A, B, C, D, and E, and that it appeared that X had murdered Y might be true as expressing the opinion of the Police officer, but it would afford no indication of the reason why, for example, C, D, and E, had not been sent up as witnesses, although the fact might be that C had given private information on condition that his name should not be disclosed as that

of an informer, that D knew absolutely nothing about the matter, and that E had [402] made a palpably false statement. It is obvious to my mind that a special diary to be of any practical use to a Magistrate or a Judge must contain much more information as to what was stated by the persons who were examined by the Police officer, and if it is to contain further information, I cannot conceive any good reason why it should not contain a full reproduction of the statements made by the persons examined.

A Police officer is not compelled to reduce to writing any statement made to him by a person whom he examines: he is, however, compelled to insert in the privileged special diary "a statement of the circumstances ascertained through his investigation." It would be no evasion of the law as enacted by the Legislature for such Police officer to enter in the following manner in the special diary the statements made to him by persons whom he had examined: "On the 12th of August I examined A, B, C, D, and E. The following is a statement of the circumstances ascertained through my investigation: A, at 10 o'clock A.M., on August 11th saw X kill Y with an axe. B, when returning from his paddy-field to the village at 9-45 A.M. the same day, heard X using threatening language to Y. X admitted to C at 11 A.M. the same day that he had killed Y on account of a dispute as to a field. X had borrowed the axe from D at 7 o'clock that morning to cut wood. E states that he saw A murder Y at 9 o'clock on the evening of the 10th of August. That statement is false; it can be proved that E was in custody 20 miles away on the 9th and 10th, and was not released until the morning of the 11th of August." The skeleton entry which I have given as an illustration could be enlarged by the Police officer so as to give the statements of A, B, C, D, and E in full, and still be merely "a statement of the circumstances ascertained through his investigation," and could in no possible view of the law be treated as an evasion of the law, such a statement would in my opinion be in compliance [403] with s. 172. What possible difference in principle can there be between a statement so made and a statement giving in direct narrative form what A, B, C, D, and E had said respectively in answer to the inquiries of the Police officer? I can see none.

S. 172 of the Code of Criminal Procedure is not the only section in that Code which, carefully read, shows that the special diary should contain at least a precis or a summary of the statements made to the Police officer making an investigation in a criminal case. The Police are not permitted to detain an accused person in custody longer than 24 hours. It is by s. 167 of the Code of Criminal Procedure enacted that "whenever it appears that any investigation under this chapter cannot be completed within the period of 24 hours fixed by s. 61, and there are grounds for believing that the accusation is well-grounded, the officer in charge of the Police station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate." "The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction." "A Magistrate authorizing

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under this section detention in the custody of the Police shall record his reasons for so doing." "If such order be given by a Magistrate other than the District Magistrate or Sub-Divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate."

[404] If the entries in the special diary are not to contain the statements or even summaries of the statements of the persons who have been examined by the Police officer making the investigation, what information will "a copy of the entries in the diary" afford to the Magistrate upon which he can decide whether or not he should authorize the detention of the accused person in custody, or upon which he could form an opinion as to whether or not further detention was unnecessary. It is upon these entries in the special diary that the Magistrate is to decide and to form his opinion as to whether or not the accused person is to be detained in custody. There is not one word in s. 167 to suggest that any statement reduced into writing elsewhere than in the special diary is to be forwarded to the Magistrate.

If the special diary is to be of any practical use in aiding a Magistrate or Criminal Court in a criminal inquiry or trial, or is to be of any use in enabling a Magistrate to decide, under s. 167 of the Code of Criminal Procedure, as to whether an accused person should or should not be detained in custody, the special diary must contain at least a summary of the statements made by the persons who had been examined under s. 161 of the Code by the Police officer making the investigation. Few people would, I imagine, suggest that a mere summary of a person's statement could be regarded by a Magistrate or by a Judge as affording as satisfactory or as complete a source of information as the unabridged statement of such person would afford. The summary would merely represent what the Police officer considered to be the effect of the person's statement to him. The unabridged statement, if correctly taken down, would give what the person making the statement had in fact said. Common sense suggests that when the Legislature enacted in s. 172 that the special diary might be used by a Magistrate or by a Judge in an inquiry **[405]** or in a trial in a criminal case, and enacted in s. 167 that "a copy of the entries" in the special diary should be sent to the Magistrate who had to decide whether or not an accused person should be detained in custody, the Legislature intended that the information to be afforded by the special diary should be as complete as possible, so far as the purposes for which the special diary might be lawfully used were concerned. And this, in my opinion, compels the conclusion that the Police officer who is making an investigation under Chapter XIV of the Code of Criminal Procedure may lawfully reduce to writing in the special diary the full and unabridged statement made to him by a person whom he is examining or has examined under s. 161 of the Code. A consideration of s. 172 of the Code, in my opinion, compels the conclusion that the special diary, including every entry in it, is absolutely privileged from inspection by an accused person or his agent unless the special diary is used by the Police officer who made it to refresh his memory, or is used by the Court to contradict the Police officer who made the special diary. A consideration of the principles of public policy leads me to the same conclusion. From s. 39 of the Indian Evidence Act, 1872, may be inferred how much—and how much only—of the special diary may be seen by an accused person or his agent when the special diary is used to refresh his memory by the Police officer who made it or is used by the Court

to contradict such officer. In such case the accused person or his agent is in law entitled to see only the particular entry used and so much of the special diary as is in the opinion of the Court necessary in that particular matter to the full understanding of the particular entry so used, and no more. In such cases the Court must be careful to see that the discretion entrusted to it in deciding what may or may not be seen by the accused or his agent is not abused, remembering that the [406] discretion is to be a judicial discretion, and is not to be influenced by a mere arbitrary fancy.

In no case is an accused person or his agent entitled, in my opinion, to a copy of the special diary or of any part of it. The special diary is, except in the two events to which I have referred, privileged from inspection by an accused person and his agent, and on the happening of one of those events the sole right conceded by the Legislature to an accused person and his agent is the limited right of inspection which I have mentioned.

The Legislature must have had some object in view in according to special diaries a protection, except in two events, from inspection by an accused person or his agent. It could not have been the intention of the Legislature that such object should be obtained only when it should appear to the Magistrate or to the Judge concerned with the particular case that the Police officer had kept his special diary in the manner approved of for the time being by such Magistrate or Judge, and should be defeated if the special diary happened to have been kept in a manner which did not meet with the approval of the particular Magistrate or Judge. One main object of all legislation is to ensure uniformity in the law and its application, and not to ensure the confusion which would result from leaving judicial officers a free hand to follow the bent of their individual fancies as to what the law ought to be or ought not to be. It appears to me that when Judges attempt to construe s. 172 of the Code of Criminal Procedure and decide that a statement made under s. 161 of that Code to a Police officer and reduced by him into writing in the special diary is not, and is not to be deemed to be part of the special diary, it is the duty of such Judges to explain precisely and clearly how a Police officer making an investigation under Chapter XIV of the Code of Criminal Procedure is to comply with the requirements of s. 172, and to make his special diary, so [407] that it may be in accordance with the provisions of s. 172, and that it may be of any practical use to a Magistrate under s. 167 or to a Court under s. 172 of the Code, and still maintain the privilege which is accorded to it by the Legislature and particularly to explain in what form the "statement of the circumstances ascertained through his investigation" is to be entered, and to what extent, if at all, and in what form, such "statement of the circumstances ascertained through his investigation" may include statements made to him under s 161. I maintain without hesitation that no such explanation can be given which will be consistent with a decision according to which a statement made under s. 161 to the Police officers and reduced into writing in the special diary is not to be deemed to be part of the diary. When Judges have to construe an Act of the Legislature, it is their duty so to construe it, if it be possible, as to make the provisions of the Act consistent with each other, to give effect, not to their own ideas as to what ought to be the law, but to the expressed intention of the Legislature, and not to construe it, as in this case, so as to make the protection accorded by the Legislature to special diaries depend upon the capacity, capability, ignorance or negligence of a Police officer or upon the idiosyncracies of a Magistrate or a Judge. It is the

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duty of Judges when construing an Act of the Legislature to attempt to ascertain what was the intention of the Legislature, and to give effect to it, and not to seek for some pretext for defeating an intention of the Legislature which does not meet with their approval.

Those who recognise the self-evident truth of the proposition that the intention of the Legislature was that it is only on the happening of one or other of the two events especially provided for in s. 172 of the Code of Criminal Procedure that the special diary or any part of it should be open to the inspection of an accused person or of his agent, **[408]** but are desirous, whatever may have been the intention of the Legislature, that accused persons and their agents should have inspection of statements made under s. 161 of the Code to a Police officer and reduced by him into writing in the special diary are forced to adopt the contention that such a statement does not form part of the special diary, although it happens to be entered in it. There are, no doubt, some decisions to support that contention; but those decisions are not binding upon this Bench, and it was, in fact, partly in consequence of one of those decisions that this case was referred to the Full Bench, not to decide whether this Full Bench is bound by it (it could not be suggested that it is), but to ascertain how far, if at all, that decision was a correct exposition of the law to be followed in these Provinces. It has not been pointed out to us that in any of the decisions to which I am referring, and which we are invited to follow because they were decisions of High Courts, any of the questions which it is necessary to consider to enable us to arrive at a correct construction of s. 172 of the Code of Criminal Procedure and to ascertain what was the intention of the Legislature were considered. In the Indian Law Reports, 8 Calcutta, there are two conflicting decisions bearing on this subject, the earliest of which, in my opinion, is correct and is consistent with sound principles, that decision was ignored and the other decision in that volume was followed in the Calcutta Court. On the other hand, amongst others, the able, weighty and instructive Judgment of Sir Meredyth Plowden and Mr. Justice Roe in *Kallu and others* v. *Queen-Empress*, (1) deserves careful consideration. A decision is valuable or the reverse in proportion to the consideration which was given to the questions involved in it, and to the reasons expressed for the conclusion arrived at by the Judge or Judges who were parties to it. The practical question is—has the Legislature, which has enacted that special diaries shall **[409]** be kept and has accorded to those diaries limited protection for inspection by an accused person or his agent, anywhere enacted that when a Police officer making an investigation under Chapter XIV of the Code of Criminal Procedure voluntarily—there is no compulsion—reduces into writing under s. 161 of that Code, a statement made to him, he shall not make such reduction into writing in the special diary or shall make it elsewhere? Unless the Legislature has so enacted, there is no foundation in law for the proposition that such a statement when entered in the special diary is not part of the special diary or must not be treated as part of the special diary. In fact, the Legislature has nowhere enacted that any statement made to such Police officer under s. 161 of the Code of Criminal Procedure shall not be reduced into writing in the special diary, or when reduced into writing shall not be or be deemed to be part of the special diary. On the contrary,

(1) 17 P.R. 1894 Cr.

the Legislature has in my opinion plainly indicated by s. 167 and s. 172 of that Code that such statement if material, or so much of it as is material, shall appear in the special diary, and shall form part of it. The Legislature has—and I think wisely—not conferred upon Judges power to make rules for the making of special diaries, or as to what is and is not to be entered in them or to form part of them. Judges have no power to legislate, except the *quasi*-Legislative power of making rules in certain cases; and it appears to me that were we to decide that statements made to Police officers under s. 161 of the Code of Criminal Procedure shall not be entered in the special diaries, or if entered in them shall not be deemed to be parts of the special diaries, we should be attempting to usurp the functions of the Legislature, and therein would be forgetting our duties as Judges—duties which it appears to me are better understood on the Bench in England than they are here.

It was contended by Mr. *Dwarka Nath Banerji* that "natural justice" requires that when a Police officer reduces, **[410]** under s. 161 of the Code, into writing the statement of any person, the accused should be allowed to see the statement so taken down. No doubt it would be convenient for an accused person to be put in possession of all the information as to the case which a Police officer had obtained. It would be particularly convenient and useful, for example, that an accused person should know beforehand what line of defence he had better adopt, and whether or not it would be reasonably safe to try on a false *alibi*, without incurring the risk of the prosecution being in a position to call and calling rebutting evidence. An accused person can in England obtain a copy of any deposition taken in his case before a Magistrate; an accused person has the same privilege here. In England, if the prosecution intends to call at a trial at Assizes or at Quarter Sessions as a witness to facts in support of the direct case for the prosecution, a person who has not been called before the committing Magistrate, it is the customary, but not the obligatory, practice for the prosecuting solicitor to give to the accused or to his solicitor a short summary of what such person is expected to depose to, but no such practice existed with regard to rebutting evidence, although the prosecution might be prepared with such rebutting evidence before the trial. In my opinion Her Majesty's Judges in England are fully as anxious as are Her Majesty's Judges in India that accused persons should have a fair trial and should be afforded every legitimate opportunity for, and means of, defending themselves; but I never heard it suggested in England that the prosecution should prepare the brief for the defence, or should supply the defence with a copy, or a summary, of the evidence of a person from whom the Police had obtained information which was considered to be unreliable or immaterial and which consequently the prosecution did not propose to put before the Court, or should supply the defence with any information which had been obtained for the purpose of proving, if the necessity should **[411]** arise, a rebutting case. I confess that I regard with extreme suspicion an argument based on "natural justice." When "natural justice" is appealed to in support of an argument, I generally find that the argument cannot be supported, and that the "natural justice" argument is an argument which is employed to divert a Judge's attention from the true principles to be applied, and to lead him into following some bent or bias of his own mind. Men hold different opinions as to what is natural justice. Many communists honestly believe that "natural justice" requires that there should be an equal division of all personal property

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amongst the people; other people honestly believe that the personal property which a man by his own brains and exertion has acquired he should be allowed to keep for his own enjoyment.

Probably there is no Sessions Judge in these Provinces who, as a Magistrate, was observant of what takes place at a police investigation who will not recognise the truth of the description which is contained in the following passage which I quote from a judgment which was delivered in *The Queen-Empress* v. *Nasir-ud-din* (1), by my brother Knox, and was concurred in by my brother Burkitt. The passage is as follows:—"Still more extraordinary is a permission given before the case came on for trial by which the accused were granted copies of statements recorded by the Police during the investigation. Such statements are recorded by Police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage, and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from by-standers. Over and **[412]** above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel." And yet it is of such statements, reduced into writing under such circumstances, that it is contended that the accused and his agent should have inspection and should have copies. One can easily understand how such copies would be paraded before a jury as having been furnished by the prosecution as correct representations of what witnesses had said to the Police officer, and what might be the effect on the jury. Most Sessions Judges would be able to understand the position; but it may be doubted whether the ordinary jurors in these Provinces would. Whether more confidence can be reposed in jurors elsewhere I am not in a position to say.

Before concluding this judgment I must again point out that it is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diaries as being in any sense legal evidence for any purpose, except for the one solitary purpose of contradicting the Police officer who made the special diary when they do afford such a contradiction; and even in that case they are not evidence of anything except that such Police officer made the particular entry which is at variance with his subsequently given evidence; they are not evidence that what is stated in the entry was true or correctly represents what was said or done.

As the Courts have, owing to the illegal use by some Magistrates and Sessions Judges of special diaries, been deprived to some extent in many cases of the valuable assistance which it was intended by the Legislature that a special diary should **[413]** afford to competent Magistrates or to competent Judges in enabling them to obtain clues to evidence which is not before them, and which it is desirable in the interests of justice

(1) 16 A. 207.

should be obtained and recorded, it is advisable to say that Magistrates and Sessions Judges who in the future abuse their right to have the special diaries before them, or who make an illegal use of the special diaries, will, in these Provinces, be reported to the Local Government as persons who are unfit to hold responsible judicial posts. Magistrates and Sessions Judges should remember that they hold responsible offices of great trust under the Government, that they receive their salaries as the consideration for the honest performance of the duties imposed upon them, and that their appointments to such offices do not confer upon them a right to apply as law that which has no other basis than their own fancy as to what the law ought to be. If the conscience of a Magistrate or of a Judge forbids him to apply the law as it is or to make himself to the best of his ability acquainted with the law or procedure to be applied in a case before him, that same conscience should suggest to him that he should vacate his office and seek a livelihood in some other walk of life. I have been compelled to make these observations by my recollection of the illegal procedure of more than one Sessions Judge.

As to the merits of the appeal before us, I am of opinion that there is a reasonable doubt of the guilt of the appellant. I would allow the appeal, and acquitting the appellant direct that the appellant be at once discharged.

On behalf of the Court I must express to Mr. *Dwarka Nath Banerji* our thanks for the very able argument which he has addressed to us on behalf of the appellant, he having appeared on behalf of the appellant at the request of the Court.

BLAIR, J.—I entirely concur in the order proposed by the Chief Justice and have nothing to add to the conclusions upon the matters referred to us at which he has arrived, or to the [414] reasoning by which those conclusions are supported. But I desire to add a word to prevent possible misconstruction in the future. It has been shown, I think, conclusively by the judgment of the Chief Justice that statements taken down under s. 161 of the Code of Criminal Procedure are within the true intent and meaning of s. 172 of the same Act included in the category of the matters which an investigating Police officer should under the provisions of that section insert in the diary. But it must not be inferred that in my opinion such latter section contains an exhaustive list of the matters which may with propriety be so entered. There is much which may tend to the furtherance of the objects for which the diary has been instituted which would not fall within the language of that section, but which may with great advantage be entered in the diary, and when so entered would in my judgment be within the exemption from exposure extended to the diary by law. I know no canon of construction which justifies a narrower and more restrictive interpretation of s. 172, nor am I aware of any authority by which a document protected from disclosure for reasons of public policy, can be divested of such protection simply because it may contain redundant or irrelevant matter.

KNOX, J.—I have read and carefully considered the judgment just delivered by the learned Chief Justice. I have only to say that I concur fully in every word that is laid down therein and in the reason by which those results have been arrived at.

The views just expressed concerning the use of Police diaries are substantially the views that I have held for years past, and I have heard nothing in the very careful and able argument of this case addressed to

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us by Mr. D. *Banerji*, which leads me to hold otherwise now. I have also read what my brother Burkitt has written, and agree with what he is about to say.

I would allow the appeal.

[415] BURKITT, J.—I fully concur in the exhaustive exposition of the law as to the preparation of Police special diaries and their protection from inspection which has just been pronounced by the learned Chief Justice. I have nothing to add to what has been so clearly laid down in that judgment. All I desire to say respecting it is that to me there is nothing new in the principles and the rules of law therein enunciated. For more than thirty years, as a Subordinate Magistrate, a Magistrate of a district, and a Sessions Judge successively, in these Provinces and latterly as a Judge of the final Court of appeal in another Province, and now as a Judge of this High Court, I have always understood the law as to special diaries to be that which it has now been declared to be by the learned Chief Justice, and I invariably acted upon that view. Indeed until quite recently I did not imagine that the matter was one as to which, in these Provinces at least, there was any diversity of opinion.

There is one matter not touched on in the judgment as to which I desire to say a few words. The remarks I am about to make have the concurrence of all the members of this Bench. It has come to my notice, and to that of other members of the Bench, that some Sessions Judges in these Provinces have taken it upon themselves to issue a general order directing the Police diaries in every case committed for trial to the Court of Session and of every criminal appeal to be transmitted to them simultaneously with the Magistrate's records of the cases. It is hardly necessary for me to point out that such an order is illegal. The law nowhere empowers a Sessions Judge to issue such a general order. It authorizes him to send for the diaries of a case under trial before him, if he thinks it necessary in that case to peruse the diaries; but the order must be one *ad hoc*, confined to a case actually pending before the Sessions Judge, and not a general order as to all cases. Such a general order is not warranted by **[416]** law, and the Police authorities would be justified in refusing to obey it.

As to the appeal in which this reference has arisen, I would concur in acquitting and in directing the release of the appellant.

AIKMAN, J.—I have had the privilege of reading the able and exhaustive judgment of the learned Chief Justice in this case.

I entirely concur in his remarks regarding the misuse which is too often made of Police diaries by Courts. I also agree in the opinion he has expressed in regard to the extent to which accused persons or their agents are entitled to have recourse to Police diaries which have been used by a Police officer to refresh his memory, or by a Court for the purpose of contradicting the Police officer. I also agree in thinking that neither the accused nor his agents are entitled as of right to have copies of statements of witnesses which have been recorded by the Police.

The main question, however, which was discussed at the bar when this appeal was argued was whether the accused or his agents are entitled to see statements, recorded by the Police, of witnesses who are called for the prosecution.

That this is a question of no small difficulty is evident from the contradictory answers which have been given to it by learned Judges who have considered it. As instances of these contradictory views I may refer

to the judgment of Trevelyan and Rampini, JJ., in the case *Sheru Sha* v. *The Queen-Empress* (1) and the judgment of Sir Meredyth Plowden in the case of *Kallu* v. *Queen-Empress* (2).

I must admit that I have been impressed with much of the reasoning of the learned Chief Justice and of Sir Meredyth Plowden in the case just mentioned. But after a long and anxious consideration I find myself compelled to adhere to the opinion at which, in concurrence with Mr. Justice Blennerhassett, I arrived in the case *Queen-Empress* v. *Rudr Sing* (3), in which we held that an accused person is entitled to see previous statements of witnesses **[417]** called to give evidence against him which have been recorded by the Police in the course of the investigation. Following the Calcutta case quoted above, we held that it made no difference to the accused's right whether the statements were recorded separately from the diary, or were included in it.

From the fact that learned Judges have arrived at diametrically opposite conclusions on the question at issue, it must, I think, be admitted that the intention of the Legislature has not been so clearly expressed as to put the matter beyond doubt. This being so, I think it is open to a Judge to consider whether *a priori* there is any reason why the Legislature should make these statements privileged.

"The object of a trial in every case" said Mr. Justice Nanabhai Haridas in the case *Reg.* v. *Uttamchand Kapurchand* (4) "is to ascertain the truth in respect of the charge made. For this purpose, it is necessary that the Court should be in a position to estimate at its true worth the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless for reasons of public policy. the law expressly requires its exclusion."

Now, an accused is entitled to show the Court, if he can, that the witnesses who are giving evidence against him are unworthy of credit. One of the ways in which the law allows the credit of a witness to be impeached is "by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted" [*vide* s. 155 (3) of the Evidence Act]. It requires no argument to show that if a witness who is giving evidence against an accused person is proved to have made statements differing materially from the evidence he gives in Court, the value of his testimony is seriously impaired, for it is clear that either he or his memory is not to be trusted. It appears to me, then, to be *a priori* improbable that the Legislature would throw any obstacle in the way of an accused person showing that a witness who is called for the prosecution, has previously told a materially different story.

[418] Suppose the following case, which is not an exaggerated instance of the discrepancies sometimes found between evidence given in Court and statements made to the Police. A prisoner named Ram Bakhsh, is on his trial for murder. The brother of the deceased is called as a witness for the prosecution and deposes that in the early morning, as he was returning from watching his fields to the house in which he and his brother lived, he saw the prisoner rush out of the house, and when he entered it found his brother lying on his bed with his throat cut. In the possession of the Police is a statement of this witness, recorded at the outset of the investigation to the following effect:—"I was watching my field in the early morning when my nephew came running from the village

(1) 20 C. 642.
(2) 17 P. R. 1894, Cr.
(3) 16 A.W.N. (1896) 193.
(4) 11 B. H.C. R. 120.

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crying, and told me his father (my brother) had been murdered. I at once went home and found my brother lying on his bed with his throat cut. I suspect Ram Bakhsh of having committed the murder, as my brother and he had a quarrel two days previously." If there is in the possession of the prosecution or of the Police, which comes to the same thing, such a statement, is there any reason why it should be withheld from the accused or his advisers? I must confess I see none. Of course, if the Legislature has declared clearly that it shall be withheld, there is an end of the matter. I am for the present only discussing the question whether it is likely that the Legislature should forbid the inspection by the accused of statements of witnesses, previously recorded by the Police, when these witnesses are giving evidence in Court for the prosecution. It must be remembered that even if the accused is allowed to see these previous statements, and if a different story is told therein from that deposed to by the witnesses in Court, this will not of itself benefit him, for it is only by *proof* of previous inconsistent statements that the credit of a witness can be shaken, and the production of these statements is no *proof* that the witnesses said what is recorded in them. That has to be proved by the evidence of persons who heard the witnesses make those statements. I would also remark here that, even if the Police have made no record of previous statements **[419]** of the witnesses for the prosecution, or if a record was made and it be held that an accused is not entitled to see that record, that will not prevent the accused from proving *aliunde*, if he can, that a witness has made a statement which is inconsistent with the evidence he is giving in Court. If, however, the accused or his agent be allowed to see what a witness for the prosecution is recorded to have previously said to the Police, this may materially aid him in his endeavour to prove that the witness is untrustworthy; and I see no reason why this assistance should be withheld from him.

I am clearly of opinion that there is no bar whatever to the accused seeing previous statements of witnesses called for the prosecution recorded by the Police under s. 161 of the Code of Criminal Procedure, and not incorporated in the diary. The most difficult question is whether statements of such witnesses can be seen when incorporated in the diary.

The learned Chief Justice has demonstrated that the diary was never intended to be a bald record of the investigating officer's movements, and of the names of the witnesses he has examined. I am quite unable to go the length contended for by the learned counsel who argued the case on behalf of the appellant, and hold that even a summary of facts ascertained by the investigating officer from the examination of a number of witnesses is not protected. But I regret I am equally unable to concur with the learned Chief Justice in holding that the special diary "no matter what it may contain" is absolutely privileged, unless under the circumstances stated in the concluding portion of s. 172.

According to s. 172, the diary over which the cloak of privilege is thrown by the section is to contain a record of the proceedings of the investigating officer. Amongst the things to be entered by him in his diary is "a statement of the circumstances ascertained through his investigation." It may in some cases be difficult to draw the line between what is "a statement of the circumstances ascertained through the investigation" and the statement of a witness recorded by the Police officer in his diary. But **[420]** I think that, as a rule, a Court would have no difficulty in saying what was the statement of a witness and what was a statement

by the Police officer of circumstances ascertained through his investigation. The latter would be privileged; the former, I hold, would not be.

It never could be contended that an accused or his agent is entitled to ransack a special diary on the chance of discovering something that might tell in his favour. It is perfectly right, said Eyre, C.J., in a case cited by Field in his Law of Evidence (5th edition, p. 580) "that all opportunities should be afforded to discuss the truth of evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed." I do not see how this rule would be offended against by allowing a prisoner to see previous statements of witnesses who are actually giving evidence against him in Court. If, then, there is in the diary what is, in the opinion of the Court, the record of a statement made to the Police by a witness who gives evidence in Court, then in my humble opinion the Court should allow the accused or his agent to see that record, taking the necessary precautions that no other part of the diary is disclosed. If such statements were intended by the Legislature to form part of the diary, no doubt they are privileged. But it is not clear to me that that was the intention of the Legislature. The provisions of the law in regard to the recording of statements of witnesses by the Police are to be found in ss. 161 and 162 of the Code of Criminal Procedure. It is not until we come to s. 172 of that Code that we find the enactment of the Legislature in regard to what the diary is to contain, and in regard to the privilege which a diary framed in the manner described in the first paragraph of that section enjoys. Had the Legislature intended that the record of the statements of witnesses, which, according to s. 161, a Police officer may make if he chooses, was to form a part of the diary, it would, I think, have expressed [421] this intention. The facts that it has not is to my mind an indication that the view of Mr. Justice Field expressed in the case of *Jhubboo Mahton* (1) is right, namely, that the particulars required to be entered in the diary do not include statements of witnesses recorded under s. 161. Consequently these statements are not, to use the expression of Mr. Justice Field, "an integral portion of the diary," and are not in my view protected by the second paragraph of s. 172. That protection was necessary, inasmuch as a diary framed as prescribed in the first paragraph of the section might contain information which it would be contrary to public policy to disclose. But how it would be contrary to public policy to disclose what a witness who is giving evidence in Court had previously said to the Police in regard to the charge under investigation, I fail to see. Such a disclosure might militate against the securing of a conviction. But if a witness has made inconsistent statements it is in the interest of justice, and therefore of the highest public policy, that this should be known. It must not be forgotten that the Legislature has declared that a person examined by a Police officer who is investigating a case "shall be bound to answer truly all questions relating to such case put to him by such officer," save when the answer would tend to expose him to a criminal charge or to a penalty or forfeiture.

The provisions of s. 145 of the Evidence Act are in my opinion material in considering the question under discussion. That section runs

(1) 8 C. 739 (742, 743).

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as follows :—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. It has already been mentioned that one of the modes in which according to the Evidence Act the credit of a witness may be impeached is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted : [422] and, as we have just seen, s. 145 gives the right to cross-examine a witness on previous statements made by him and reduced into writing when these previous statements are relevant to the matter in issue. The Evidence Act (No. I of 1872) was passed before the Code of Criminal Procedure of 1872. It seems to me that if the Legislature had intended that accused persons should have no right to see previous statements of witness who give evidence against them so as to be able to cross-examine on them as provided in s. 145 of the Evidence Act, it would have clearly declared such statemenis to be privileged, either in Act No. X of 1872 or Act No. X of 1882 or Act No. X of 1886.

The last Act contained a section dealing specially with statements of persons made to Police officer during the course of an investigation. S. 162 of Act No. X of 1882 had declared that such statements if reduced into writing were not to be used as evidence. Act No. X of 1886 qualified this by enacting that such statements if reduced to writing were not to be used as evidence against the accused. It has been held that these statements may be used in evidence on behalf of the accused : why then should he not be allowed to see them if reduced into writing by the Police ?

But though I hold that an accused should be allowed to see what has been said previously in regard to the case under trial or inquiry, by a witness who is giving evidence against him in Court, it has to be remembered that the mere production of a statement recorded by the Police inconsistent with evidence given in Court does not impeach a witness' credit. It has to be proved to the satisfaction of the Court that the witness did in point of fact make previously a statement inconsistent with his evidence given in Court. I am glad that the Chief Justice has given prominence to the remarks of my brother Knox in the case *Queen-Empress* v. *Nasir-ud-din* (1) as to the manner in which statements of witnesses are often recorded by investigating Police officers. We know that mistakes sometimes creep into the record of the evidence of [423] a witness given in Court. This liability to mistake is intensified when the witness' statement is recorded amidst all the difficulties so well described by my brother Knox, even where the investigating officer honestly desires to take down what the witness says, and has no desire to make the witness' statement fit into any pre-conceived theory of his own. When the writer of a statement recorded under s. 161 of the Code of Criminal Procedure is called to prove it, he will naturally stick to what he has written, and assert that the witness did make the statement as recorded. But when a witness denies that he made a statement which is materially inconsistent with the evidence he gives in Court, the Court, before it allows its opinion as to the witness' credibility to be affected, must, I repeat, be satisfied that the witness did in fact make the previous inconsistent statement. When the

(1) 16 A. 207.

Court is so satisfied, it must give effect to its opinion. All Criminal Courts in this country know that the case against an accused person is frequently shaken by proof that the witnesses who implicate him in Court have done so as an afterthought. See, for example, the observations of the learned Chief Justice and my brother Banerji at page 61 in their judgment in the case *Queen-Empress* v. *Taj Khan* (1). I have had long experience of the Criminal Courts in this country, and I have no hesitation in saying that many innocent persons would be convicted were it not for proof that the witnesses who implicate them in Court told quite a different story at first. I should on this account be very unwilling to throw any obstacle in the way of an accused or his advisers seeing the record of a previous statement made by a witness for the prosecution, unless there is a clear enactment by the Legislature that the accused shall not see it. And I am unable to find any such clear enactment in the law. The caution with which evidence must be received as to a previous contradictory statement alleged to have been made to the Police does not in my opinion affect the principle as to the accused's right to see the record of the previous statement.

[424] But whether or not it be held that an accused is entitled to see the record of previous statements made by witnesses who are giving evidence against him, there is no doubt that the Court can see them. In his judgment in the case *Kallu* v. *The Queen-Empress*, referred to above, Sir Meredyth Plowden observes that it is competent for the accused "to move the Court, which is presumably impartial and endeavouring to ascertain the truth, to refer to the statements attributed in the diaries to a witness before the Court, and it is open to the Court, if need be, to cross-examine the witness after reference thereto." With this observation I entirely agree. The Court can cross-examine the witness as to his statement recorded in the diary before the statement is proved, but of course it cannot hold the witness to be contradicted by anything in the statement, until it be proved that the witness made the statement. If Courts took advantage of the right given them by law to use Police diaries to aid them in trials and inquiries, and so cleared up all material contradictions appearing between the statements recorded in those diaries and the evidence given in Court, the privilege of seeing the statements would not be of so much moment to the accused or his advisers. But a Court may be pressed for time, or may fail to appreciate the bearing of the statements in favour of the accused, as was the case in *Sheru Sha* v. *The Queen-Empress* (2). I think, therefore that the privilege of seeing the previous statements of witnesses is one which should not be withheld from the accused unless it is quite clear that the Legislature intended it to be withheld, and to my mind it is not clear that this was the intention of the Legislature.

In regard to the particular case before us, I have carefully read the evidence, and I concur with the learned Chief Justice in thinking that the guilt of the appellant is not proved beyond reasonable doubt. I therefore concur in the order proposed.

BANERJI, J.—I, too, regret my inability to concur with the learned Chief Justice on the principal question argued before us, namely, whether an accused person or his agent is entitled to call **[425]** for and see for the purpose of cross-examining and impeaching the credit of witnesses called for the prosecution, previous statements made by the witnesses to a Police officer and reduced by him into writing, if those statements happen to be

(1) 17 A. 57.

(2) 20 C. 642 (649).

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embodied in the special diary prepared by the Police officer under s. 172 of the Code of Criminal Procedure, 1882. In my opinion such statements do not form an integral part of the diary, and are not entitled to the privilege given to a diary by s. 172. My reasons for this conclusion are generally the same as those stated in his judgment by my brother Aikman.

Section 161 of the Code of Criminal Procedure empowers a Police officer making an investigation under Chapter XIV to examine orally any person supposed to be acquainted with the facts and circumstances of the case, and to reduce into writing any statement made by the person so examined. Section 162 provides that such statement, unless it be a dying declaration, shall not be used as evidence against the accused. It has been held by this Court in *Queen-Empress* v. *Taj Khan* (1) that such statement "when legally brought as evidence before the Court" by being duly proved can be used in favour of an accused person. This is in consonance with s. 155 of the Evidence Act, according to which one of the means by which the credit of a witness may be impeached is "proof of former statements inconsistent with any part of his evidence which is liable to be contradicted." Section 145 of the same Act provides that a witness may be cross-examined as to previous statements made by him, *reduced into writing* and relevant to the matters in question, "but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are used for the purpose of contradicting him." If, therefore, the statement made to a Police officer by a witness for the prosecution has been reduced into writing under s. 161 of the Code of Criminal Procedure, and it is intended to contradict the witness by the writing, the attention of the witness must be called to the portion of the writing by which **[426]** it is intended to contradict him, before proof of the written statement can be given. This it will be impossible for the accused or his counsel to do, unless he has access to the writing and is allowed to call for and see it. In my opinion there is no reason for holding that a statement of a witness reduced into writing by a Police officer under s. 161 and not embodied in the special diary of that officer is entitled to the privilege of s. 172. I am not aware of any ruling, and none has been cited to us, in which it was held that an accused person or his agent has not the right to call for and see the record of such a statement. Now, did the Legislature intend to deprive an accused person of that right if the statement of a witness reduced into writing under s. 161 is, instead of being kept separate, incorporated in the diary? If the Legislature has in unmistakable language indicated such intention, a Court is bound to give effect to it. The object of the law of procedure including the law of evidence, is, or ought to be, as observed by Sir Barnes Peacock in *Queen* v. *Nabadwip Goswami* (2) "that the innocent shall be protected and the guilty punished." It is undeniable that an accused person should be afforded every facility consistent with law to establish his innocence. One of the means by which he may establish his innocence is by proving that the evidence brought forward to prove his guilt is not credible, and the credibility of a witness may be shaken by showing that in material particulars he has departed from a previous statement made by him in respect of the same matter. It is impossible to believe that the Legislature ever intended to deprive an accused person of any of the facilities which he might have for proving his

(1) 17 A. 57.

(2) 1 B.L.R. O. Cr. 15 (22).

innocence. I cannot conceive that in the case of a statement reduced to writing under s. 161, but not incorporated in the diary, the Legislature should have given an accused person the right which, in my opinion, he undoubtedly has of calling for and seeing that statement for the purpose of discrediting a witness brought forward to prove his guilt, and should have taken away that right if the same statement happened to be embodied in the diary. I am unable to impute such **[427]** inconsistency to the Legislature. In my opinion it was not the intention of the Legislature that statements reduced into writing by a Police officer under s. 161 should form a part of the diary prescribed in the first paragraph of s. 172; so that the prohibition contained in the second paragraph of that section as to the inspection of a diary by the accused or his agents was not meant to apply to such statements. I am not prepared to go the length of holding that the "statement of the circumstances ascertained through his investigation" by a Police officer, which he is required by s. 172 to set forth in his diary should not include a summary of what he may have ascertained from persons examined by him. The absence of such a summary from the diary is not likely to enable a Court "to discover further evidence or possible sources of evidence, which, if brought before the Court, may throw additional light upon the guilt or innocence of the accused." And this is the purpose for which the diary may, as Mr. Field rightly observes, be legitimately used by a Court (see note to s. 145 of the Evidence Act, 5th Edition, p. 640). There is nothing, however, in s. 172 which authorizes a Police officer to record in his diary the actual statement made by a person examined by him. Such a statement stands on a different footing from what may be called the Police officer's version of what he ascertained from a witness. And such a statement, whether it has been taken down in the direct form or in the oblique narrative, does not in my opinion form an integral part of the diary, and is not entitled to the privilege conferred on a diary by s. 172. That privilege in my opinion extends only to what may legitimately form the contents of a diary. It may therefore extend to the Police officer's version or summary of the statements made to him, but it does not extend to the statements themselves. In this view one has not to read into the second paragraph of s. 172, an exception which is not provided by that paragraph. That section is not so happily worded as it might have been—otherwise the difficulty which we have now to meet would not have arisen, and the misuse of Police diaries by Courts and Magistrates on which the **[428]** learned Chief Justice has animadverted would not have taken place. The conclusion at which I have arrived is fortified by the ruling of McDonnell and Field, JJ., in *The Empress* v. *Jhubboo Mahton* (1); of Mitter and Macpherson, JJ., in *In the matter of Mahomed Ali Hadji* v. *The Queen-Empress* (2); Trevelyan and Hill, JJ., in *Bikao Khan* v. *The Queen-Empress* (3); Trevelyan and Rampini, JJ., in *Sheru Sha* v. *The Queen-Empress* (4); and of my brother Aikman and Mr. Justice Blennerhassett in *Queen-Empress* v. *Rudr Singh* (5). I see no reason for holding that so many learned Judges have come to an erroneous conclusion, a conclusion which, in my humble judgment, will further the administration of justice instead of retarding it, and is not inconsistent with anything contained in the Code of Criminal Procedure.

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(1) 8 C. 739.
(2) 16 C. 612, note.
(3) 16 C. 610.
(4) 20 C. 642.
(5) 16 A. W. N (1896) 193.

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As regards the other matters argued before us and dealt with by the learned Chief Justice, I agree with him. I also concur in the order which he proposes to pass in this particular case.

BY THE COURT.— This appeal is allowed. The conviction is set aside. The appellant is acquitted, and the Court directs that he be at once released.

19 A. 390=17 A.W.N. (1897) 174.

19 A. 428=17 A.W.N. (1897) 103.

APPELLATE CIVIL.

Before Mr. Justice Knox, and Mr. Justice Burkitt.

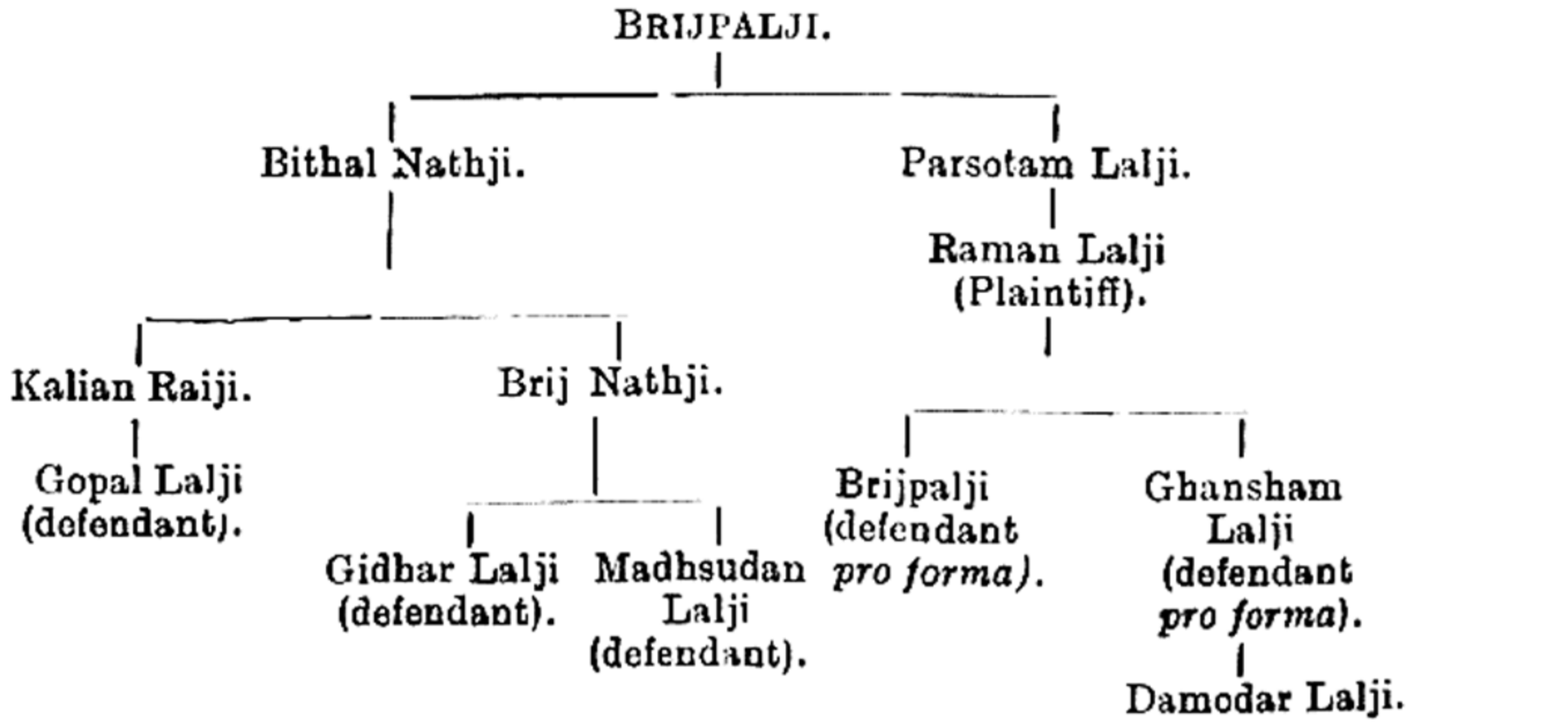
SRI RAMAN LALJI MAHARAJ (*Plaintiff*) *v.* SRI GOPAL LALJI MAHARAJ AND OTHERS (*Defendants*).* [15th April, 1897.]

Trust—Joint trustees of temple—Suit for partition of rights as trustees.

Held that rights as joint trustees to the management of and superintendence of worship at certain temples, none of the trustees having any personal pecuniary interest in the temples or their income, could not be made the subject of partition by a Civil Court, that is to say, that a Civil Court was not competent to grant a decree declaring that each of such trustees in rotation should for a certain definite period enjoy exclusively the rights of management and [429] superintendence. *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1), *Mancharam* v. *Pranshankar* (2), *Limba bin Krishna* v. *Rama bin Pimplu* (3), *Anandamoyi Chaudrani* v. *Baikant Nath Rae* (4), *Pranshankar* v. *Prannath* (5), and *Ram Soondur Thakur* v. *Taruck Chunder Turkoruttun* (6), referred to.

[R., 32 M. 167=19 M.L.J. 59=4 M.L.T. 486=2 Ind. Cas. 341 (342); 12 C.W.N. 98; D., 27 M. 192=13 M.L.J. 341.]

THIS appeal arose out of a suit relating to two temples situated in Muttra and Gokul. The parties to the suit were members of the same family as indicated in the following genealogical table:—



The plaintiff came into Court alleging that he and the defendants were descendants of a common ancestor, as shown in the above genealogical tree, whose two sons Bithal Nathji and Parsotam Lalji were joint managers of the temples in suit, together with other temples and a large amount of property; that the plaintiff was the son of Parsotam Lalji

* First Appeal, No. 104 of 1895, from a decree of Maulvi Aziz-ul-Rahman, Subordinate Judge of Agra, dated the 14th March 1895.

(1) 14 B.L.R. 166. (2) 6 B. 298. (3) 13 B. 543.
(4) 8 W.R. 193. (5) 1 B.H.C.R. 12. (6) 19 W.R. 28.

and the defendants, grandsons of Bithal Nathji; that after the death of the two brothers the plaintiff and Kalian Raiji and Brij Nathji, sons of Bithal Nathji, became owners and managers of the temples and other properties and in possession of the same in the same manner as their ancestors; that on the 4th of March 1888 an agreement to refer to arbitration was entered into between the plaintiff on the one part and Kalian Raiji and Bithal Nathji on the other part, in consequence of which an award was made on the 15th of March 1888 whereby all the other temples and **[430]** properties belonging to the parties were divided between them, the temples and properties now in suit remaining joint.

The plaintiff further alleged that in consequence of misunderstandings and disagreements between the parties the temples and properties appertaining to them were not being properly managed, and that there was a likelihood of further disagreement and disturbances. The plaintiff accordingly prayed that the Court might pass an order directing that each party should remain in possession of the temples and other properties in suit for a certain specified period, and, secondly, that orders should be passed by the Court regarding the protection of the goods and other effects and properties belonging to the said temples, and regarding the appointments, dismissal and performances of duties of the servants attached to the temples in suit, and also regarding the mode of residence of the parties in the buildings attached to the temples and as to their repairs.

The defendants objected to the plaintiffs' claim *in toto*, denying that the properties in suit were joint or that the plaintiff had any right in them, and alleging that the succession to the temple properties was by primogeniture. There were also various technical pleas raised.

The Court of first instance (Subordinate Judge of Agra) dismissed the suit so far as the first relief claimed by the plaintiff was concerned; but drew up a general scheme for the management of the temples and the property belonging to them.

From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal*, Babu *Satya Chandar Mukerji* and Munshi *Kalindi Prasad*, for the appellant.

Mr. *D. N. Banerji*, for the respondents.

JUDGMENT.

BURKITT, J. (KNOX, J., concurring):—This is an appeal by the plaintiff against a decree of the Subordinate Judge of Agra. The parties are the descendants of two brothers whose family from time immemorial had been the hereditary trustees and managers of certain temples at Muttra and Gokul and of the endowments appertaining to them. It appears that sometime **[431]** before suit most of the landed property had been by a friendly arbitration divided between them, but that the temples were left joint. In the 10th paragraph of the plaint it was alleged that for some time there had been disagreements between the parties as to the employment and dismissal of servants, the distribution of offerings made at the temple, the expenses of daily worship, &c., &c., and that there was an apprehension of disturbances, loss of property, &c. The plaintiff therefore prayed the Court to declare that each party was entitled to manage and superintend the temples *in turn* and to give proper instructions for the custody of the property appertaining to the temples, for the appointment of servants and such matters, and for the mode of living of the parties in the houses appertaining to the temples as well as for the repairs of the houses.

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As to the last mentioned matter, the plaintiff during the hearing of the suit explained (*vide* No. 506 of the record, at p. 49 of the respondents' printed book) that the dwelling-houses in question belong to the temples, that the plaintiff did not desire to have them partitioned, but wished that the parties should live in them as hitherto and that the Court should give directions as to their repair. A similar disclaimer of any desire to partition was made as to certain *baithaks*, or sitting-rooms.

On the following day (March 7th, 1895) another and most important admission was made on behalf of the plaintiff, and was concurred in on behalf of the defendants. According to that admission neither party has any personal pecuniary interest in the income of the temples, whether from property belonging to them or from offerings made by worshippers; all the income is declared by both parties to belong to the temples and to them only. This admission has the effect of correcting a statement made in the 7th paragraph of the plaint to the effect that "if there be any surplus income the parties appropriate it." It further is clear that in this case there is no dispute between the parties as to their right to share in the performance of the worship of the idols in the temples. The ceremonies of public worship are, as appears [432] from the plaint, performed by the servants attached to the temples and the parties are at liberty to take whatever share they please in them. Accordingly, on the allegations of the plaint and on the admission of the parties, it is clear that these temples are trust property in which none of the parties have any pecuniary interest, and that from time immemorial the management has been joint in the hands of the family to which the parties belong.

Thus the main relief asked for in the plaint narrowed itself down to a prayer that the Court would partition their duties as trustees and managers between the parties, and would fix stated periods during which each party in turn would hold exclusive possession of the temples and carry on the management. It was suggested that a period of six months in each year should be assigned to each.

The Subordinate Judge who tried the suit refused to grant to the plaintiff the relief he asked for. In a carefully considered judgment the Subordinate Judge pointed out most properly that this suit was not one for a declaration of plaintiff's right to share in conducting public worship at the temple and to a participation in the offerings. As to that matter he showed there was no dispute whatever, the real dispute being as to plaintiff's claim to hold the management "in turn."

The plaintiff appeals, contending that the relief asked for by him should have been granted. That was the only one of the grounds of appeal which was argued before us.

In support of his contention the learned vakil for the appellant cited to us several cases from the Bombay and Calcutta reports, *e.g.*, *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1). This case clearly is not in point in the present appeal. It was a case in which a person, who possessed jointly with others a right to worship at a certain shrine and to participate in the offerings, prayed to have his right partitioned from those of his co-sharers and to have periods fixed during which he might exercise it. The High Court held that such a right was a property [433] which could be partitioned like other kinds of property. In *Mancharam* v. *Pranshankar* (2) the Bombay High Court held that a transfer by a divided Hindu of his right to perform public worship and to

(1) 14 B.L.R. 166.

(2) 6 B. 298.

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participate in the offerings at the temple was not invalid. The cases *Limba bin Krishna* v. *Rama bin Pimplu* (1), *Anandamoyi Chaudrani* v. *Baikant Nath Rae* (2) and *Pranshankar* v. *Prannath* (3) were cases in which the plaintiffs set up their right to conduct public worship and to receive a share in the offerings made at the temples, and *Ram Soondur Thakoor* v. *Taruck Chunder Turkoruttun* (4) was a suit in which to establish similar rights the plaintiff sought to be authorized to remove an idol to his house.

All the above cases differ essentially from the present case in that in all of them there was a dispute as to the plaintiff's right to share in the manner set up by them in the performance of public worship and to receive a share in the offerings. Such cases cannot be considered as in any way laying down a rule applicable to the present case in which there is no such dispute.

The parties here are the joint managing trustees of the temples, whose duty it is as such to manage the affairs to the best of their united abilities, a duty which they undertook to perform when they accepted the trust. They have no rights of property or any personal pecuniary interest in the subject-matter of the trust. Is then one of such trustees entitled to ask a Court to partition the duties of the trust between himself and his co-trustees, and, *e.g.*, to give to him the exclusive management of, and possession of, the trust property for, say, six months in each year, putting the other trustees entirely aside during his period of management? We think not. We regard the body of trustees as being each of them not merely entitled, but also as being obliged by his acceptance of the trust to act jointly at all times with the others in the management of the trust property. The duty incumbent on the trustees is one incumbent on them acting jointly, and is not a "*property*" **[434]** personal to any one of them individually or to all of them jointly. As it is not a personal property, it does not come under the rule as to partition laid down in the first of the cases cited above. Such a duty cannot in our opinion be partitioned.

Something was said at the hearing as to the partition by arbitration which had already been made by the parties. No issue was raised before us as to that partition. It is therefore unnecessary for us to express any opinion as to whether it is a valid instrument or not. We concur with the lower Court in holding that the appellant is not entitled to partition in this case. We therefore dismiss this appeal with costs.

Appeal dismissed.

(1) 13 B. 548. (2) 8 W.R. 193. (3) 1 B.H.C.R. 12. (4) 19 W.R. 28.

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17 A.W.N.
(1897) 109.

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BALKISHAN DAS AND OTHERS (*Defendants*) *v.* W. F. LEGGE (*Plaintiff*).* [23rd April, 1897.]

Mortgage by conditional sale—Sale with a right of re-purchase—Conditional sale effected by two contemporaneous deeds—Evidence dehors the documents admissible to show what the transaction really was.

The plaintiff and the defendants executed upon the same day two documents. The one purported to be a deed of absolute sale of a certain estate by the plaintiff to the defendants. The other was an agreement by which the defendants covenanted, upon payment of a certain sum by a specified date, to reconvey the property sold by the first mentioned deed.

Held, that evidence was admissible *dehors* the documents to show that the intention of the parties was not to effect an out and out sale with merely a right of re-purchase under certain conditions left in the vendor, but to constitute a mortgage by conditional sale, or *bai-bil-wafa*.

The mere fact of a deed of absolute sale being accompanied by another deed giving a right of re-purchase will not, for that reason alone, constitute the transaction one of mortgage, but the intention of the parties must be gathered from the terms of the deeds or from the surrounding circumstances or from both.

Alderson v. *White* (1), *Lincoln* v. *Wright* (2), *Bhagwan Sahai* v. *Bhagwan Din* (3), *Ali Ahmad* v. *Rahmat-ullah* (4), *Ramasami Sastrigal* v. [435] *Samiyappanayakan* (5), *Bapaji Apaji* v. *Senavaraji Marvadi* (6), *Bhup Kuar*, v. *Muhammadi Begam* (7), and *Venkappa Chetti* v. *Akku* (8), referred to.

[**Affirmed**, 22 A. 149 = 4 C.W.N. 153 (**P.C.**) = 2 Bom. L.R. 523 = 27 I.A. 58 = 7 Sar. P.C.J. 601; **R.**, 29 A. 708 (**P.C.**) = 4 A.L.J. 737 = 9 Bom. L.R. 851 = 11 C.W.N. 913 = 17 M.L.J. 400; 2 Bom. L.R. 1058; 5 C.W.N. 351; 11 Ind. Cas. 124 (125); 19 Ind. Cas. 729; 4 O.C. 31 (57); 72 P.R. 1901 = 114 P.L.R. 1901; 6 S.L.R. 245 (246).]

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble *W. M. Colvin*, Messrs. *T. Conlan* and *D. N. Banerji*, and Munshi *Madho Prasad*, for the appellants.

Messrs. *L. DeGruyther*, *E. Chamier* and *G. P. Boys*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The plaintiff in the suit, out of which this appeal has arisen was the owner of an estate, called Taluqa Pataila, in the district of Jaunpur, which he obtained from the Government in 1861, as a reward for services done during the mutiny. He was also an indigo planter, carrying on a factory called the Basharatpur concern. In 1869 he mortgaged the Taluqa to Mr. W. Smyth for Rs. 1,30,000. In order to discharge the debt due to Mr. Smyth, he, on the 8th of April, 1872, executed two deeds in favour of Balkishan Das, defendant, and his brother Hari Das, the deceased father of the other defendants. One of these was a deed of simple mortgage for Rs. 1,25,000, in which the Taluqa Pataila was mortgaged, and the other was an instrument called a deed of estimate, securing a sum of Rs. 60,000. A part of this amount was

* First Appeal, No. 52 of 1895, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 8th February 1895.

(1) 2 De G. and J. 97 (105). (2) 4 De G. and J. 16. (3) 17 I.A. 98 = 12 A. 387.
(4) 14 A. 195. (5) 4 M. 179. (6) 2 B. 231.
(7) 6 A. 37. (8) 7 M.H.C.R. 219.

appropriated to the discharge of the mortgage in favour of Smyth, and the remainder was an advance taken for the purpose of manufacturing indigo. In the deed last mentioned certain factories and houses were hypothecated. On the 4th of February, 1873, two documents were executed which have given rise to the present litigation. One of them was a deed of absolute sale of Taluqa Pataila executed by the plaintiff in favour of Balkishan Das and Hari Das for a consideration of Rs. 1,50,000. The other was a deed of agreement (*iqrarnama*) executed by Balkishan Das and Hari Das in favour of the plaintiff, Mr. Legge, in which they covenanted that if the vendor paid on the 1st of March, 1876, the sum of Rs.1,65,000 in a lump sum, **[436]** together with any amount which might remain due on account of advances annually made for the purpose of carrying on the Basharatpur indigo factory, the property conveyed by the deed of sale would be by them re-conveyed to Mr. Legge. It is alleged on behalf of the plaintiff that these two deeds constitute a mortgage by conditional sale which the plaintiff is entitled to redeem, and the present suit was brought to redeem that mortgage.

On the other hand the defendants' case is that the transaction between the parties was one of absolute sale with a right of re-purchase on or before the 1st of March, 1876, and that the plaintiff, not having exercised the right within the time fixed, is no longer entitled to get back the property. The simple issue, therefore, is whether the transaction evidenced by the two deeds of the 4th of February, 1873, was, as alleged by the plaintiff, a mortgage by conditional sale, or, as alleged by the defendants, an absolute sale with a limited right of re-purchase. The Court below has held that the transaction was one of mortgage and has granted to the plaintiff a decree for redemption, conditional upon the payment of certain amounts to which we shall refer hereafter. The defendants have preferred this appeal, and the plaintiff has filed objections under s. 561 of the Code of Civil Procedure.

There can be no doubt that the deed executed by the plaintiff on the 4th of February, 1873, is on the face of it a deed of absolute sale. But that circumstance alone would not preclude the Court from considering whether the transaction was in reality a mortgage by conditional sale. A mortgage by conditional sale is thus defined in cl. (*c*) of s. 58 of Act No. IV of 1882 :—" Where the mortgagor ostensibly sells the mortgaged property, on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or, on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale." A transaction, therefore, which on the face of it is a sale, may be in reality a mortgage by conditional **[437]** sale, if it comes within the above definition. In order to determine whether the transaction is a mortgage, or sale with a condition of re-purchase, what we have to look to is the intention of the parties. This intention may be gathered from the terms of the deeds, or from the surrounding circumstances, or from both. That evidence *dehors* the documents is admissible to prove the intention is well established by numerous authorities, of which we need only refer to *Alderson* v. *White* (1), *Lincoln* v. *Wright* (2), and to the decision of their Lordships of the Privy Council in the case of *Bhagwan Sahai* v. *Bhagwan Din* (3). In that case, as in the present, there were two documents of even date,

(1) 2 De. G. and J. 97, (105). (2) 4 De. G. and J. 16. (3) 17 I.A. 98 = 12 A. 387.

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one being a deed of absolute sale, the other being a contract by the vendee to give the vendor a right to re-purchase on payment of the sale price within ten years. Their Lordships held on a construction of those documents that the transaction between the parties was not one of mortgage, but was one of absolute sale with a right to re-purchase. The effect of that ruling, in our opinion, is that the mere fact of a deed of absolute sale being accompanied by another deed giving to the vendor a right of repurchase would not for that reason alone constitute the transaction one of mortgage. Still, as was observed in the judgment of this Court in *Ali Ahmad* v. *Rahmat-ullah* (1), in which the above ruling was considered, this Court would be bound to follow that ruling in any case in which the circumstances are similar.

We have, therefore, to consider whether the circumstances of this case are similar to those of the case of *Bhagwan Sahai* v. *Bhagwan Din* referred to above. From the pleadings in that case it appears that the only defence raised in it was whether the deed conferring on the vendor the right of re-purchase was a genuine document. With the exception of the documents themselves there was no evidence to show the intention of the contracting parties in regard to the transaction. On this point we have **[438]** satisfied ourselves by a reference to the records of the case. This being so, their Lordships could not but hold that the transaction was one of sale with a right of re-purchase.

Before proceeding to consider the nature of the transaction entered into by the parties on the 4th of February, 1873, we may observe that that transaction took place long before the Transfer of Property Act of 1882 was enacted, and that, according to the plaintiff, the transaction was what is known in these Provinces as a *bai-bil-wafa* mortgage, which is a mortgage by conditional sale. As was observed in *Ali Ahmad* v. *Rahmat-ullah* (1) this form of mortgage "was introduced to enable Muhammadans, contrary to the precept of the Muhammadan law against lending money at interest, to lend money at interest and to obtain security for the re-payment of the principal and interest." It was also observed that a mortgage transaction of this description was understood by the people of these Provinces "as being capable of being effected in different ways, as for instance, by a deed which purported to assign the property absolutely, but which contained a stipulation for a right of re-purchase, or by two contemporaneous deeds, one of which purported to effect an absolute and unconditional sale, and the other of which was an agreement that the apparent vendor should have a right of re-purchase." See also the observations of Turner, C.J., on the same subject in *Ramasami Sastrigal* v. *Samiyappanayakan* (2). We may add, as was also observed in *Ali Ahmad* v. *Rahmat-ullah*, that in this part of India Muhammadan forms of conveyancing were followed for many centuries and are still not uncommon.

We may also remark that in our experience an absolute sale with a right of re-purchase is very rare in these Provinces, and that, before the decision of their Lordships of the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din*, the usual conception was that where there were two contemporaneous deeds, one of which was a deed of absolute sale and the other an agreement conferring **[439]** on the ostensible vendor a right of re-purchase, the transaction constituted a *bai-bil-wafa* or mortgage by conditional sale. In our opinion it is necessary to bear these facts in mind

(1) 14 A. 195.

(2) 4 M. 179 (183 and 184).

in considering what the intention of the contracting parties was when they entered into the transaction.

As we have stated above, Taluqa Pataila, the property which the plaintiff seeks to redeem in this suit, was mortgaged by him to Mr W. Smyth for Rs. 1,30,000 in 1869. The plaintiff was unable to discharge that mortgage, and in order to raise funds, not only for re-paying the debt due to Mr. Smyth, but also for carrying on his indigo concern, the plaintiff was on the look-out for a banker. He was introduced to Hari Das and Balkishan Das, two rich bankers of Benares. He borrowed from them Rs. 1,85,000 under the two deeds of the 8th of April, 1872, to which we have referred above, discharged the mortgage in favour of Mr. Smyth, and allowed Rs. 40,000 out of the amount of the instrument called the deed of estimate to remain in the hands of the creditors to be drawn on from time to time for carrying on the indigo concern. It was evidently in the contemplation of the parties that in future years similar estimates would be prepared as to the requirements of the plaintiff for his indigo business and advances taken from Hari Das and Balkishan Das to meet those requirements, and that the amounts advanced would be re-paid out of the proceeds of the sale of indigo. We have referred to this fact as it has a considerable bearing on the terms of the agreement of the 4th of February, 1873. The circumstances which, according to the plaintiff, led to the execution of the two deeds of that date were these. In January, 1873, the sum of Rs. 1,90,000 was due to Hari Das and Balkishan Das by the plaintiff and his partner, one De Momet, on account of principal and interest due upon the instruments of the 8th of April, 1872. The plaintiff asked Hari Das to make him further advances. He refused on the ground that De Momet was an unlucky man, but agreed to help the plaintiff if De Momet could be got rid of. De Momet agreed to retire, and executed two deeds in **[440]** favour of the plaintiff on the 14th of January, 1873, and withdrew from the partnership. The plaintiff states that he informed Hari Das of this and met him at Benares at the house of Mr. Smyth. We may remark in passing that at the period referred to Balkishan Das was very young, and Hari Das was the leading member of the firm, which belonged to the two brothers. What next happened we will state in the plaintiff's own words:—

"Mr. Smyth suggested that Hari Das would reduce the interest if he were put in possession of Pataila. Hari Das then said that he would like to see the estate first of all. A few days afterwards Hari Das saw the estate and I met him at the Kataban factory. Hari Das approved of the estate and asked me to sell it out and out. I declined and refused to sell on any account. After this Hari Das agreed to take possession of Pataila and said that I should execute a *bai-bil-wafa* mortgage with possession. The exact terms were not then settled. He was anxious to go away, and said he would send me a draft from Benares. He subsequently sent me the draft * * *. There were two drafts. I objected to the form of the document, which seemed to me to be a sale. Hari Das then said that with the *iqrarnama* it would be a *bai-bil-wafa* mortgage, and that this was the ordinary form of a mortgage with possession. I then consulted Mr. Man (a pleader, who was putting up in the same house of Mr. Nickels). Mr. Man told me that the two documents made a *bai-bil-wafa*, but I was to be sure that the *iqrarnama* was to be executed at the same time as the other deed. The terms settled were that Rs. 1,50,000 were to be lent on the taluqa, the profits to go for interest, and I was to pay Rs. 15,000 extra, as Hari Das said this was

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to protect him against loss." If the above statement be true, there can be no doubt that the contracting parties intended the transaction to be one of a *bai-bil-wafa* mortgage, that is, of a mortgage by conditional sale.

Now let us see whether the terms of the deed itself afford any evidence of such intention. Those terms, as translated and printed at p. 21 of the appellant's paper book, are as follows:—**[441]** "We the executants, therefore, of our own free will and accord, covenant and declare that if the said vendor pays on the 1st of March, 1876, the amount of Rs. 1,65,000 in a lump sum, we shall sell to the said vendor the whole of the said *ilaqa* sold, as it exists at present, for the said amount of Rs. 1,65,000, and we shall cause everything connected with mutation of names, &c., to be done; neither we nor our heirs shall have any objection thereto. If we or our heirs raise any objections to receive the money or relinquish the property, the vendor shall be competent to deposit the said amount in cash in the Government treasury, by virtue of this agreement, and obtain possession of the *ilaqa*, we shall have no sort of objection to it. It has further been stipulated between us, the executants and the vendor, that the latter would also have to pay, along with this amount, whatever money may be due to us by the vendor at the time, in the event of additions and alterations being made annually with our consent in the amount of estimate of the concern of the Basharatpur factory, and the sahib shall not be competent to effect a sale (*sic.* repurchase) until the payment of the estimate money relating to the factories of the Basharatpur concern. We shall recover from the vendor any amount of arrears that may be due to us by the tenants by making an assignment thereof in favour of the vendor, and after the expiry of the 1st of March, 1876, the said vendor shall not be competent either to pay the money or to make the purchase, and the conditions of this deed of agreement shall be deemed to be null and void."

The first clause to which we wish to refer is that which provides that in the event of the refusal of Hari Das and Balkishan Das or their heirs to receive the amount, upon the payment of which the property was to be re-conveyed, the plaintiff would be competent to deposit that amount in the Government Treasury. Regulation I of 1798, which is entitled "A regulation to prevent fraud and injustice in conditional sales of land under deeds of *bai-bil-wafa* or other deeds of the same nature," provides in its second section that a borrower of money under a deed of *bai-bil-wafa* **[442]** or other deed of conditional sale who may be desirous to redeem his land may tender to the lender the amout due to him or deposit that amount "in the dewany adawlut of the city or zila in which the land may be situated." There was no other authority sanctioning the deposit of money of this description in a Government Treasury. It seems to us, therefore, that the provision in the deed as to the deposit in the Government Treasury of the money payable by the plaintiff evidently referred to the deposit which could be made under Regulation I of 1798, and this circumstance, to our minds, strongly indicates that the parties contemplated the transaction to be one of loan secured by a mortgage. The stipulation as to payment into the Government Treasury in the event of the vendees refusing to receive the money would, as the learned counsel for the appellants was forced to admit, be meaningless if the agreement was merely a promise by the vendees to re-sell the property on certain terms, as in such a case no Government Treasury would receive the money; whereas, if it were a mortgage, the money would, if the mortgagees refused

to take it, be lodged in the Government Treasury through the medium of the Civil Court.

A similar indication is afforded by the next clause in the deed, which provides that upon payment of a lump sum of Rs. 1,65,000, in addition to other amounts, within three years, a re-sale could be obtained. The amount of consideration for the sale-deed executed by the plaintiffs was, as we have said, Rs. 1,50,000. It is not likely that the value of the property would have increased by Rs. 15,000 at the end of three years. That amount was therefore to be paid to Hari Das and Balkishan Das for the use of Rs. 1,50,000 for three years, that is, at the rate of Rs. 5,000 per annum. During this period of three years those persons were to enjoy the usufruct of the property, which, according to Balkishan Das, (see p. 33 of the appellants' book) amounted to about Rs. 10,000 a year, so that they were to obtain during the three years Rs. 15,000 a year,—a sum which exactly represents the interest on Rs. 1,50,000 at the rate of 10 per cent. per annum. **[443]** It seems to us, therefore, that the payment of the additional sum of Rs. 15,000 was stipulated for in order to secure to Hari Das and Balkishan Das interest on the Rs. 15,000 at 10 per cent. per annum. And this circumstance is to our minds a clear indication that the transaction was one of a loan and not of an out and out purchase.

There is yet another provision in the deed which indicates the real nature of the transaction. It is to the effect that, in order to entitle the plaintiff to obtain a re-conveyance of the property, he was to pay, along with the Rs. 1,65,000 aforesaid, whatever sums might be found to be due on account of the estimate being altered and renewed from year to year by mutual consent. According to this provision, which has not been very accurately translated, the plaintiff was to pay, not only the Rs. 1,50,000, the consideration-money for the so-called sale, not only an additional sum of Rs. 15,000 on account of what we consider to be interest, not only the amount which might be due on account of advances made for carrying on the indigo concern of the plaintiff, but also the balance of any future advances that might be made for the same purpose.

The deed thus secured re-payment not only of past advances, but also of advances to be made in the future. We find that on the 6th of April, 1873, that is, subsequently to the date of the deed in question, the plaintiff executed in favour of Hari Das and Balkishan Das a deed of estimate for carrying on his indigo concern, for the sum of Rs. 75,000. It appears from a deed executed by the plaintiff on the 3rd of March, 1874, that Rs. 70,546-14-3 was due upon the deed of the 6th of April, 1873, up to the 25th of January, 1874, and that by the deed of the 3rd of March, 1874, a further advance was taken of Rs. 30,000. For this total sum of Rs. 1,00,546-14-3 the only securities held by Hari Das and Balkishan Das were Rs. 8,000 agreed to be paid on account of interest by Kelly & Co., of Calcutta; Rs. 5,000 which Mr. Nickels undertook to pay; and factories and bungalows which were subsequently purchased by Hari Das and Balkishan **[444]** Das themselves for Rs. 66,000. There was still a sum of Rs. 21,546-14-6 and interest thereon, which would, save for the precarious outturn of indigo, remain unsecured, unless, as has been urged with much force on behalf of the plaintiff, the security for this sum was the property now in question. It would thus appear that Hari Das and Balkishan Das themselves looked to the Pataila property as security for future advances, and this they could not have done had the property been absolutely sold to them. We are therefore of opinion that the *iqrarnama* of the 4th

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of February, 1873, itself affords intrinsic evidence showing that the transaction was intended by the contracting parties to be one of mortgage and not an absolute sale with a right of re-purchase.

There are many extraneous circumstances which we think lead to the same conclusion. The *iqrarnama* of the 4th of February, 1873, was stamped as a declaration of trust and not as agreement, and this shows that the parties did not understand it to be an agreement to re-sell. Another circumstance is the absence of a motive for the plaintiff to part absolutely with the most valuable portion of the property he possessed. It is clear that he was anxious to continue his indigo concern, and for that purpose he was in need of funds, which he could raise without difficulty if he retained in his hands the equity of redemption of the property in question. It is not likely, therefore, that he entered into a contract of the nature alleged by the defendants. A third circumstance is the form adopted—a form commonly used in these Provinces to represent a *bai-bil-wafa* mortgage. A fourth circumstance is the paucity of instances in this part of the country of absolute sales with an option of re-purchase, which renders it unlikely that the parties entered into a transaction of that description, almost unknown in these Provinces. A fifth, and by no means an unimportant, circumstance is the value of the property. Taking the figures given by Balkishan Das (see p. 33 of the appellant's book) the income from the estate, exclusive of rent in kind, was, in 1873, Rs. 17,299-3-0. It appears from the **[445]** mortgage deed of the 8th of April, 1872, that the revenue was Rs. 6,506-10-0. The profits therefore amounted to at least Rs. 10,792-9-0 per annum. Whilst it is asserted on behalf of the defendants that the market value of such property is 16¼ years' purchase, it has been shown on behalf of the plaintiff that it varies from 22 to 25 years' purchase. As the property is situated in a permanently settled district, probabilities are in favour of the valuation alleged on behalf of the plaintiff. So that the property was worth more than 2¼ *lakhs* of rupees, and the consideration for the alleged sale was inadequate. Although, as Mr. *Conlan* argues, this inadequacy of consideration may not be a conclusive test, it is certainly, in our opinion, one of the tests by which the real nature of the transaction may be determined. A sixth circumstance is the existence of the relation of debtor and creditor between the parties previously to the date of the transaction in question, and this circumstance renders it probable that the same relation was continued.

We have thus from the terms of the deed itself and from the surrounding circumstances almost all the criteria by which, according to Butler, as quoted in *Bapaji Apaji* v. *Senavaraji Marvadi* (1) it may be judged whether the transaction was intended to be a mortgage by conditional sale or an absolute sale with an option of re-purchase. We agree with Westropp, C.J., that the tests enumerated by Mr. Butler are not the only tests, and we are of opinion that there may be many other circumstances, such as exist in this case, which indicate the true character of the transaction.

It is true that one criterion, according to the English authorities, for deciding whether the transaction is a mortgage or not is the presence or absence of a right in the grantor to recover the amount on payment of which the property is to be re-conveyed, and this test was applied by the Bombay High Court in the case cited above. We are, however, of opinion

(1) 2 B. 231 (244 and 245).

that this test cannot be applied to the case of *bai-bil-wafa* mortgages which obtain in [446] these Provinces and are unknown in the Presidency of Bombay. In the case of such mortgages, which are mortgages by conditional sale, the mortgagee has no personal remedy against the mortgagor for the mortgage money, and his only remedy is a decree for foreclosure (see s. 87 of Act No. IV of 1882), and therefore the test referred to above cannot in these Provinces enable a Court to decide as to the character of the transaction (see Tagore Law Lectures on Mortgage by Dr. Rashbehary Ghose, 2nd edition, p. 199). For the above reason the rulings of the Bombay High Court relied upon by the learned counsel for the appellants are distinguishable from the present case. The decision of this Court in *Bhup Kuar* v. *Muhammadi Begam* (1) and of the Madras High Court in *Venkappa Chetti* v. *Akku* (2), also relied upon by the learned counsel, have no application, as the two deeds in question in those cases were not of contemporaneous date.

Turning now to the oral evidence in this case, we have the evidence of the plaintiff himself which we have quoted at length in an earlier part of this judgment. The plaintiff, Mr. Legge, is an old man, seventy five years of age, and his statements on this point are borne out in important particulars. Moreover, it is not in the present suit that he has for the first time asserted that the transaction into which he entered with regard to the Pataila estate was a mortgage by conditional sale and not an absolute sale. On the 26th of May, 1876, only about three months after the date on which, according to the defendants he could have exercised his option of re-purchase, he stated in a deposition given by him in a suit brought against him by Hari Das and Balkishan Das that he had made a conditional sale of the estate in favour of those persons, and he reiterated the same statement in the written statement filed by him in that case (see pp. 28 and 29 of the respondent's book). It is true that no issue arose in that case as to the nature of the transaction now in question, but as the statement was made it would in all probability have been traversed by Hari Das and Balkishan Das, [447] and would not have been allowed to go unchallenged had it been absolutely untrue. We cannot suppose that so far back as 1876, when the plaintiff had no immediate prospect of being able to claim the property, he made an untrue statement in order to make evidence for a suit for redemption which he might possibly bring in the distant future. The fact of his making the statements to which we have referred affords strong corroboration to his present allegation that the transaction was a mortgage. That allegation is further corroborated by Mr. Man, a vakil of this Court, whom the plaintiff says he consulted at the time. Mr. Man is a marginal witness to the *iqrarnama* of the 4th of February, 1873, and there can be no doubt as to his presence at the time of its execution. He has sworn that Mr. Legge, the plaintiff, had a conversation with him about the transaction in question, that "Mr. Legge did not wish to make an out and out sale of the estate, and on my advice an *iqrarnama* was drawn up, the effect of which would be, as I told Mr. Legge, to enable him to get back his estate and make the transaction to be a *bai-bil-wafa* (mortgage by conditional sale)." He added:—"At the time of execution Hari Das made no objection as far as I remember. Had he objected I would not have signed the deed, nor would Hari Das have signed had he objected." Mr. Man is a perfectly

(1) 6 A. 37.

(2) 7 M.H.C.R. 219.

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disinterested witness, and we do not see the slightest reason to question the truth of what he has stated. His evidence leaves no room for doubt that the parties intended the transaction to be one of mortgage and the two deeds now in question were drawn up under his advice for the purpose of evidencing a contract of mortgage by conditional sale and not a contract of sale with an option of re-purchase.

Against this evidence, which in our opinion is of very great value, we have the statements of Balkishan Das, the defendant, and of two of his servants, Dwarka Parsad and Chunnu Lal. Balkishan Das was, in 1873, barely 19 years of age, and, although he must have been present when the transaction took place. he evidently did not take any part in it, and everything was done by his elder brother Hari Das, who managed the affairs of their [448] firm. We are, therefore, unable to place any weight on the statements of Balkisban Das. The evidence given by the other two witnesses is inconsistent, improbable, and incredible.

As great stress was laid by respondent's counsel in the argument before us on the fact of the non-production of their account-books by the defendants, we directed those books to be produced before us, and we have taken evidence in regard to the entries contained in them relating to the various transactions with the plaintiff. The accounts do not throw any light on the question we have to determine. The transaction of the 4th of February, 1873, has been entered in the books as a transaction of sale, which, on the face of it, it purports to be. There is no reference to the right of re-purchase nor to a right to redeem. The account books, therefore, do not in our opinion assist the case of either party.

Upon a consideration of the terms of the *iqrarnama*, the surrounding circumstances and the oral evidence, we have come to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not an absolute sale with a right to re-purchase. This case is therefore perfectly distinguishable from that of *Bhagwan Sahai* v. *Bhagwan Din* decided by their Lordships of the Privy Council and relied upon by defendants.

Now remains the question of the amount which the plaintiff must pay in order to obtain redemption. The Court below has held that the amount payable under the *iqrarnama* of the 4th of February, 1873, consists, in addition to the Rs. 1,65,000 mentioned therein, of the arrears due by tenants and of Rs. 5,953-2-3 due on the deed of estimate of the 6th of April, 1873, and interest on that amount up to the 1st of March, 1876. As for the arrears, the Subordinate Judge remarks that no evidence has been adduced to prove the amount of the arrears. He has directed an inquiry to be held in execution of decree for the purpose of ascertaining that amount and has made a decree for the payment of the amount which may be so ascertained. This procedure is certainly not [449] warranted by any provisions of the Code of Civil Procedure. It was not a case of mesne profits, the determination of the amount of which in execution proceedings is sanctioned by s. 212 of the Code. In order to enable the Court to make a decree for redemption under s. 92 of the Transfer of Property Act, 1882, the Court ought to have ascertained the amount payable under the mortgage, as it was bound to declare in the decree the sum upon payment of which within the time fixed redemption was to take place. That portion of the decree of the Court below, therefore, which directs the arrears due by tenants to be ascertained in execution proceedings cannot be sustained. It was the duty of the defendants to prove what amount of arrears was due, and, as they failed to do so, their

1897
APRIL 23.

APPELLATE CIVIL.

19 A. 434 = 17 A.W.N. (1897) 109.

claim for the arrears ought to have been disallowed. This, we may remark, will not prejudice the defendants, as they will be entitled to realize from tenants the arrears accruing due previous to redemption.

As regards the sum of Rs. 5,953-2-3, whilst it is contended on behalf of the defendants-appellants that interest should have been allowed on that amount, not only till the 1st of March, 1876, but also for the period subsequent to that date, it is urged on behalf of the plaintiff that no portion of that amount should have been decreed, the plaintiff's allegation being that Hari Das and Balkishan Das relinquished their claim to that amount upon the plaintiff's undertaking not to prosecute them for perjury. The only evidence in support of the plaintiff's allegation is his own deposition, which on this point is not corroborated by any other evidence. We agree with the Subordinate Judge that the evidence is not sufficient to justify our relieving the plaintiff of his liability to pay that amount. We are further of opinion that interest should have been awarded on that amount for the period subsequent to the 1st of March, 1876. The deed of estimate of the 6th of April, 1873, under which that sum was due provides for the payment of interest. It is true that when on the 28th of March, 1875, Mr. Legge admitted Rs. 5,953-2-3 to be the balance due on that date upon that instrument, he made an indorsement to the effect that the balance [450] would be payable "in a year without interest" (see appellant's book, p. 31). But we are unable to agree with the learned counsel for the respondent that there was a novation of the original contract and that no further interest was payable on the sum of Rs. 5,953-2-3. In our opinion the plaintiff would not have been liable to pay interest had he made the payment within one year. But as he failed to do so, the defendants are entitled to obtain interest on that amount in accordance with the terms of the deed of the 6th of April, 1873. In this respect, the decree of the Court below should in our judgment be varied.

The appellants in their petition of appeal raised a plea to the effect that they were entitled to compensation for improvements. Their learned counsel, Mr. *Conlan*, conceded that no evidence had been adduced to prove improvements. The appellants are not, therefore, entitled to obtain any compensation on account of improvements.

The result is that we vary the decree below by setting aside that portion of it which directs that the amount of arrears due by tenants should be assessed in execution proceedings, and by awarding further interest on Rs. 5,953-2-3, referred to above, at the rate of 12 per cent. per annum from the 1st of March, 1876, to the date hereinafter mentioned or the date of payment, if payment be made on an earlier date. We direct the parties to pay and receive the costs of litigation in proportion to their failure and success. We extend the time for the payment of the mortgage-money to the 31st July, 1897, and in other respects we affirm the decree below.

Decree modified.

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APRIL 24.

APPELLATE CIVIL.

19 A. 450=17 A.W.N. (1897) 98.

19 A. 450=17 A.W.N. (1897) 98.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

BHUJBAL AND ANOTHER (*Defendants*) *v.* NANHEJU (*Plaintiff*).*
[24th April, 1897.]

Landlord and tenant—Suit for rent of land in Gwalior, defendant being resident in British India—Jurisdiction—Place where defendant resides.

Held that a suit by a lessor against his lessee to recover rent which had accrued due in respect of agricultural land situated in Gwalior, the plaintiff being a subject of the Gwalior State, but the defendant a British subject **[451]** resident in the district of Jhansi, was properly brought in a Civil Court in the district of Jhansi. *Gurdyal Singh* v. *The Raja of Faridkot* (1), referred to.

THIS was a suit to recover arrears of rent due on account of certain agricultural land situated in the State of Gwalior. The plaintiff was a subject of the Gwalior State. The defendants were subjects of the Queen-Empress and resided in the district of Jhansi. The contract was made in Gwalior. The suit was brought in the Court of the Munsif of Jhansi. The question whether the suit was cognizable in the Court in which it was brought was raised before the Munsif, who decided it in favour of the plaintiff with reference to s. 17 of the Code of Civil Procedure. The defendants appealed to the District Judge, who, by desire of both the parties, referred the question as to the jurisdiction of the Court to the High Court under s. 617 of the Code of Civil Procedure.

On this reference the following order was passed :—

Pandit *Madan Mohan Malaviya* and Babu *Satish Chandar Mukerji* for the appellants.

Mr. *H. C. Niblett*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLAIR, J.—This is a reference from the District Judge of Jhansi. The plaintiff is a resident of Gwalior and a subject of that State. The defendant is a subject of Her Majesty the Queen, living within the jurisdiction of the Court of the District Judge of Jhansi. The plaintiff brought the suit in which this reference is made for a decree for rent which had accrued due in respect of land let by the plaintiff to the defendant in Gwalior territory. The District Judge desires to be instructed as to whether or not the suit is maintainable in British territory.

The suit being one for rent which had accrued due, and the parties being the parties between whom the contract was made for the letting and for the payment of rent, the suit, in our opinion, lay in the Jhansi Court, within the jurisdiction of which the defendant was living. A suit for rent as between lessor and lessee, whether the lease is determined or not, and a suit for the use and occupation **[452]** of land, was not treated in England as a suit having a local venue. See, article "Action" in volume 1 of Tomlin's Law Dictionary. The case would consequently come within the decision of their Lordships of the Privy Council in *Gurdyal Singh* v. *The Raja of Faridkot* (1). With this reply the record will be returned to the District Judge.

* Miscellaneous No. 153 of 1896.

(1) 22 C. 222.

19 A. 452=17 A.W.N. (1897) 105.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

DUKHNA KUNWAR AND OTHERS (*Defendants*) *v.* UNKAR PANDE (*Plaintiff*).* [27th April, 1897.]

19 A. 452=17 A.W.N. (1897) 105.

Act No. XII *of* 1881 (*North-Western Provinces Rent Act*), *s.* 95 (*n*)—*Act No.* XIX *of* 1873 (*North-Western Provinces Land Revenue Act*), *s.* 64—*Civil and Revenue Courts—Jurisdiction—Jurisdiction of Civil Courts where no remedy open to plaintiff in the Revenue Courts.*

A plaintiff brought his suit in a Civil Court alleging that he was entitled to the possession of certain land as a tenant at fixed rates, and that in consequence of the order of a settlement officer he had been dispossessed by certain persons, alleged by him to be trespassers without title, whom he made defendants together with the zamindar of the land in dispute.

Held that, inasmuch as the plaintiff could under the circumstances indicated in his plaint have obtained no relief from a Court of Revenue, the Civil Court was competent to entertain the suit and to give the plaintiff a decree for possession as against the defendants, other than the zamindar, who were found to be trespassers, notwithstanding that the Civil Court could not declare what was the nature of the plaintiff's tenancy. *Tarapat Ojha* v. *Ram Ratan* (1) and *Ajudhia Rai* v. *Parmeshar Rai* (2) distinguished.

[Appr., 20 A. 520 (523); R., 23 A. 360; 23 A. 481 (484).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. E. Howard*, for the appellants.

Mr. *B. E. O'Conor*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—In this suit the plaintiff claimed a declaration that he was a tenant at fixed rates and he claimed possession. The defendants to the suit parties No. 1 claim possession as the occupancy tenants, and others of the defendants claim title under them, and one defendant was the zamindar.

[453] It appears that at and prior to the time of the revision of the settlement the plaintiff's name was entered in respect of the holding as a tenant at fixed rates. The plaintiff was at that time a minor under the guardianship of his aunt. The settlement officer subsequently in the course of the settlement entered in the record of the revision of settlement the defendants parties No. 1 as the tenants at fixed rates of the holding. The Subordinate Judge dismissed the plaintiff's suit. The District Judge in appeal found that the plaintiff was the tenant at fixed rates of the holding, that the defendants No. 1 and those claiming through them had no title, that the defendants No. 1 were trespassers, and gave the plaintiff a declaratory decree and a decree for possession. The defendants other than the zamindar have brought this appeal.

This is one of the class of cases which give the utmost difficulty to Civil Courts. Here is a case in which a thoroughly competent District Judge has found every material fact in favour of the plaintiff. He has found that the plaintiff is entitled to possession and that the defendants

* Second Appeal No. 1098 of 1894, from a decree of R. Greeven, Esq., Officiating District Judge of Ghazipur, dated the 15th September, 1894, reversing a decree of Pandit Bansidhar, Subordinate Judge of Ghazipur, dated the 17th March, 1893.

(1) 15 A. 387. (2) 18 A. 340.

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APRIL 27.

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19 A. 452=
17 A.W.N.
(1897) 105.

No. 1 and those claiming under them have no title whatever. It is a case in which the plaintiff during his minority when he was under the guardianship of his aunt, with only her to protect his interest, was despoiled by the defendants No. 1.

The question before us is one as to the jurisdiction of the Civil Court to entertain the suit. Before deciding that question let us see what remedy the plaintiff entitled to possession would have in a Court of Revenue. He would in this case in our opinion have absolutely no remedy in a Court of Revenue. The defendants No. 1 are not his tenants, therefore he could not bring ejectment in a Court of Revenue. The plaintiff was not dispossessed by the zamindar or by any one having any title under the zamindar, consequently s. 95, cl. (*n*) of Act No. XII of 1881 would not apply. So far as we can see, if the plaintiff is confined to a Court of Revenue for his remedy, the Court of Revenue can afford him no remedy whatever. It could not have been in the **[454]** contemplation of the Legislature when they created Courts of Revenue and Civil Courts that a man who was entitled to possession as against a trespasser, who was not his landlord, and who had no title through his landlord, should be left for ever out of possession and without any remedy. That consideration in our opinion points strongly to the conclusion that the Civil Court had in this case jurisdiction to give the plaintiff a decree for possession. When we turn to s. 64 of Act No. XIX of 1873 we find that when a Settlement Officer makes an entry in the settlement record on the basis of possession of the claimant, the section provides that "all persons not in possession, but claiming the right to be so, shall be referred by him to the proper Court." The inference from that is that in such cases the Settlement Officer is not the proper Court, and some other Court must be intended. The Court of Revenue might be intended where s 95. cl. (*n*) applied. Presumably the Civil Court must be intended where the Court of Revenue can afford no relief.

It was contended strongly by Mr. *Howard* that the Full Bench ruling in *Ajudhia Rai* v. *Parmeshar Rai* (1), governed this case. He also referred to the Full Bench ruling in *Tarapat Ojha* v. *Ram Ratan* (2). The latter case has no bearing on the case now before us, for in that case s. 95. cl. (*n*) of Act No. XII of 1881 applied and the Court of Revenue could grant a remedy. The former case, that of *Ajudhia Rai* v. *Parmeshar Rai*, is much nearer the case which is now before us. The case before the Full Bench was one in which the plaintiffs claimed a declaration that they were entitled as tenants at fixed rates, and they claimed to have the entries made at the recent settlement invalidated. The Civil Court could not invalidate the entries at a settlement, and it was clearly decided in that case that a Civil Court cannot give any decree declaring or deciding the status of an agricultural tenant. So far as that case applies here, it shows, and we agree with it, that the plaintiff's suit, so far as it claims any declaration as to his status, must be dismissed.

[455] It is incompetent to a Civil Court to make any declaration whatsoever as to the status of a tenant of an agricultural holding. We do not think, however, that the Full Bench ruling in *Ajudhia Rai* v. *Parmeshar Rai* precludes us from giving a simple decree for possession to the plaintiff, who has proved his right to possession as against the defendants No. 1 and those claiming under them, and who has proved his case that

(1) 18 A. 340.

(2) 15 A. 387.

he is the person entitled to the possession and that the defendants No. I and those claiming under them are simple trespassers.

We may observe that there is here no question between the plaintiff and the zamindar, although the zamindar was a defendant to the suit. The zamindar put in his written statement and alleged that the plaintiff was his tenant, and that the defendants No. I and those claiming under them had no title whatsoever.

We must say that we have had very considerable difficulty in dealing with this case and in seeing our way to giving the plaintiff his relief to the extent indicated. Mr. *O'Conor* has satisfied us that maintaining the decree below, so far as it is one simply for possession, we are not acting in conflict with the ruling of the Full Bench in *Ajudhia Rai* v. *Parmeshar Rai*. He has also satisfied us that we are bound, on the findings of the District Judge, to maintain to that extent the judgment of the District Judge, as otherwise the plaintiff entitled to possession would have no remedy, the Court of Revenue being incompetent under the circumstances of the case to put him in possession.

We allow the appeal to the extent that we vary the decree of the lower appellate Court by making it simply a decree for possession to be delivered to the plaintiff as against all the defendants except the zamindar. As the plaintiff has substantially succeeded in this appeal, we allow him two-thirds of the costs of this appeal and of the suit. The defendants appellants will have one-third of the costs of this appeal and of the suit.

Decree modified.

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APRIL 27.
APPELLATE CIVIL.
19 A. 452=17 A.W.N. (1897) 103.

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19 A. 456=17 A.W.N. (1897) 101.

[456] APPELLATE CIVIL.

Before Mr. Justice Aikman.

THAKUR DIN (*Plaintiff*) *v.* MANNU LAL (*Defendant*).*
[30th April, 1897.]

Act No. XII of 1881 (*North-Western Provinces Rent Act*), *s.* 95, *cls.* (*m*) *and* (*n*)—"*Wrongful dispossession*"—*Dispossession by process of law—Suit to recover damages for such dispossession—Civil and Revenue Courts—Jurisdiction.*

The expressions "wrongful dispossession" in cl. (*m*) and "wrongfully dispossessed" in cl. (*n*) of s. 95 of Act No. XII of 1881, do not include a dispossession by order of Court, though such order may be subsequently reversed on appeal. Where therefore a tenant who is evicted under s. 36 and the following sections of the Rent Act, but afterwards reinstated by order of a superior Court of Revenue, sues the evicting zamindar for damages, such a suit may be brought in a Civil Court *Sawai Ram* v. *Gir Prasad Singh* (1) and *Dhundu Bhagat* v. *Lalji Pande* (2) referred to.

THE facts of this case are fully stated in the judgment of Aikman, J.
Munshi *Ram Prasad*, for the appellant.
Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

AIKMAN, J.—The plaintiff Thakur Din, who is appellant here, was a tenant of agricultural land of which the defendant-respondent was landholder. The defendant served the plaintiff with a notice of ejectment from

* Second Appeal, No. 360 of 1896, from a decree of B. Lindsay, Esq., District Judge of Banda, dated the 18th March 1896, reversing a decree of Munshi Shankar Lal, Subordinate Judge of Banda, dated the 29th August 1895.

(1) 2 A. 707. (2) 1 Legal Remembrancer, R. and R. 183.

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APRIL 30.
APPELLATE CIVIL.
19 A. 456 = 17 A.W.N. (1897) 101.

his holding under the provisions of s. 36 of the Rent Act. The tenant thereon presented an application under the provisions of s. 39 of that Act, contesting his liability to be ejected. The question was determined by the Assistant Collector adversely to the tenant, and the Assistant Collector's decision was upheld on appeal by the Commissioner. On the 18th of November, 1893, the Board of Revenue set aside the orders of the subordinate Courts of Revenue, and held that the plaintiff was a tenant with right of occupancy, and that the notice of ejectment was invalid. Meanwhile the landholder had taken proceedings under s. 40 of the Rent Act, and caused the plaintiff to be ejected from his holding on the 24th of September, 1892. After the plaintiff had won his case in the Board of Revenue, he applied to **[457]** be replaced in possession of his holding, and he obtained possession on the 17th of February, 1894. He brought the present suit in the Civil Court for the recovery of compensation for the period during which he had been out of possession of his holding. He obtained a decree from the Subordinate Judge, but on appeal the District Judge of Banda set aside this decree and dismissed the plaintiff's suit, holding that the plaintiff's remedy was an application under cl. (*m*) of s. 95 of the Rent Act, and that therefore the Civil Court had no jurisdiction. The learned District Judge relied on a decision of the Board of Revenue in *Khoresuri* v. *Maharaja Partab Narain Singh*, No. 4 of the Selected Decisions of the Board of Revenue for 1892. That case arose under the Oudh Rent Act, which materially differs from Act No. XII of 1881, inasmuch as sub-s. (2) of s. 60 of the Oudh Act reserves to the tenant a right to institute a suit against his landlord to recover compensation for illegal ejectment under sub-s. (1) of that section. Sub-s. (1) corresponds to s. 40 of Act No. XII of 1881, but the latter section contains no provision at all corresponding to the provisions of sub-s. (2) of s. 60 of the Oudh Rent Act: the ruling therefore upon which the lower appellate Court relies, has no bearing upon the present case.

The question for decision in this appeal is whether a dispossession by process of Court can be considered to be a "wrongful dispossession" within the meaning of cl. (*m*) of s. 95. In my opinion it cannot be so considered. This was held in a previous decision of the Board of Revenue in *Dhundu Bhagat* v. *Lalji Pande* (1). In *Sawai Ram* v. *Gir Prasad Singh* (2) it was held by this Court that where an occupancy tenant had been dispossessed by a Civil Court and had afterwards been reinstated, this dispossession was not a wrongful dispossession within the meaning of cls. (*m*) and (*n*) of s. 95. Clause (*m*) provides for an application for compensation for wrongful dispossession; the next cl. (*n*) refers to an application for the **[458]** recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed. I think the expressions "wrongful dispossession" in cl. (*m*) and "wrongfully dispossessed" must be read in the same sense, and in my opinion no application could be entertained under cl. (*n*) to recover possession of land from which a tenant had been dispossessed by order of Court. Another consideration which leads me to the same view is the short period of limitation provided by cl. (*e*) of s. 96, for applications under cls. (*m*) and (*n*) of s. 95. Clause (*e*) of s. 96 declares that such applications shall not be brought after six months from the date of the wrongful dispossession. In the present instance, the plaintiff was dispossessed on the 24th September, 1892, and it was not until upwards

(1) 1 Legal Remembrancer, R. & R., 183.
(2) 2 A. 707.

of a year afterwards that the Board of Revenue declared that he ought not to have been ousted from his holding. If his remedy therefore was by an application under cl. (*m*) and not by a suit in the Civil Court, he would in the present case have no redress. For the above reasons I am of opinion that the decision of the lower appellate Court was wrong. I allow this appeal, and, setting aside the decree of the lower appellate Court, remand the case under the provisions of s. 562 of the Code of Civil Procedure with directions to the District Judge to restore the appeal to his file of pending appeals and proceed to dispose of it on the merits, as raised in the other grounds in the memorandum of appeal to his Court. The appellant will have his costs in this Court in any event.

Appeal decreed and cause remanded.

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19 A. 458=17 A.W.N. (1897) 106.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

BIRJ NATH DE AND ANOTHER (*Defendants*) *v.* CHANDAR MOHAN BANERJI (*Plaintiff*).* [4th May, 1897.]

Will—Application for probate—Issue raised as to testator's title to property purporting to be dealt with by the will—Practice.

It is not the duty of a Court entertaining an application for grant of probate to consider any issue as to the title of the testator to the property with **[459]** which the will propounded purports to deal, or as to what disposing power the testator may have possessed over such property. *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (1), *Hormusji Navroji* v. *Bai Dhanbaiji*, *Jamsetji Dosabhai* (2), *Arunamoyi Dasi* v. *Mohendra Nath Wadadar* (3), *Barot Parshotam Kallu* v. *Bai Muli* (4), *Tharp* v. *Macdonald* (5), and *Annoda Sundari Dasi* v. *Jugutmani Dabi* (6) referred to.

[Appr., 26 B. 792; 1900 P.L.R. p. 251 (290); **R.**, 28 B. 644=6 Bom.L.R. 966; 15 C.P.L.R. 101 (103); L.B.R. (1893—1900) 653.**]**

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellants.

Babu *Durga Charan Banerji* and Babu *Sarat Chandar*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—This appeal is filed under the Letters Patent from the decree of our brother Knox granting probate of the will of Musammat Saudamani Dasi, who died on the 14th of July, 1890. The application for probate was filed in the Court of the District Judge of Benares. Two persons—Birj Nath De and Hem Chandar De—appeared and opposed. They opposed, according to their written statement, on the ground that the will in question had not been executed by Musammat Saudamani Dasi and that she had no disposing power over the property, or some of it, dealt with by the will. The District Judge found that the execution of the will was not proved. On appeal to this Court our brother Knox found that execution was proved. The appellants before

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* Appeal No. 2 of 1895 under s. 10 of the Letters Patent.

(1) 4 C. 1. (2) 12 B. 164. (3) 20 C. 888.
(4) 18 B. 749. (5) L.R. 3 P.D. 76. (6) 6 C.L.R. 176.

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MAY 4.

APPELLATE CIVIL.

19 A. 458 = 17 A.W.N. (1897) 106.

us are the objectors. The questions raised before us here are, first, whether the will was actually executed, and, secondly, as to whether Musammat Saudamani Dasi had power to dispose of the property mentioned in the will.

In our opinion the due execution of the will is clearly proved. It is true that the will is not before us, but that is not the fault of the applicant for probate. The will has been made away with by other parties for whose action the applicant for probate is not responsible. The original will was registered in the Sub-Registrar's office at Benares. A Commissioner was duly appointed to [460] obtain an acknowledgment of execution from Musammat Saudamani Dasi, and she, having been identified, admitted execution of the will, and on that the will was registered. It is not suggested here that the officer in question did not act strictly in accordance with law. It is not suggested that on the occasion of his going to Musammat Saudamani Dasi's house that lady was personated by some one else. However, the execution of the will does not rest there. Two ladies were called, and we believe their evidence on this point, and they say that they were present when the will was executed by Musammat Saudamani Dasi. Another person was called; he witnessed the will. He apparently makes a living by letting himself out as a witness to the execution of documents. We see no reason to disbelieve him. Although the District Judge of Benares found that the execution of the will was not proved, he found that some such will had been executed. We find that the will was duly executed by Saudamani Dasi. The other witness to the will is dead. There was no issue before us of undue influence, or want of testamentary capacity or fraud or revocation.

As to the second point. It has been contended by Mr. *Dwarka Nath Banerji* for the appellants that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not the testator's or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issues. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was not collusion in the case. It is much safer in the interests of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.

Mr. *Banerji* contends that according to the practice in England and the practice in India, we should try these questions [461] as to title. In support of his contention as to the practice in England he relies on the decision in *Tharp* v. *Macdonald*. *In the goods of Tharp* (1). That was a case in which the probate of the will of a married woman was opposed by her husband; and the case turned on this, that a married woman had in England no testamentary power unless she was possessed of separate property. Accordingly it was necessary to ascertain whether the testatrix in that case was possessed of any separate property so as to give her a title to make a will. It is obvious from the judgment of Sir George Jessel that the inquiry was merly one to ascertain the testamentary capacity of the lady, that is, whether she had any property which gave her the right to make a will. It was the possession of separate property

(1) L.R. 3 P.D. 76.

which removed the legal incapacity under which she would have been so far as the making of a will was concerned. Sir George Jessel pointed out that it was not necessary to ascertain whether all the personal property mentioned in the will was property over which she had a power of disposal by will. It is obvious that if Mr. *Banerji's* proposition were well founded in law, a Court in India would have to go on and find as to the title to every bit of property dealt with by the will, the title to which was questioned by the objector.

Mr. *Banerji* has also relied for the practice in this country on *Annoda Sundari Dasi* v. *Jugutmani Debi* (1). Where Sir Louis Jackson in that case said:—"It appears to me that every consideration which ought to induce the Court to refuse probate of such a will must be taken into account,"—he had not in his mind any such question as a dispute as to the right to the property mentioned in the will. The illustration which he gives of what he means puts that beyond all doubt. The illustration was a case of undue influence.

That it is not the practice of the Courts in India, so far as we are aware, to try questions of title and finally decide them on applications for grant of probate or letters of administration, may be inferred from the following cases:—*Behary Lall Sandyal* **[462]** v. *Juggo Mohun Gossain* (2), *Hormusji Navroji* v. *Bai Dhanbaiji*, *Jamsetji Dosabhai* (3), *Arunamoyi Dasi* v. *Mohendra Nath Wadadar* (4) and *Barot Parshotam Kallu* v. *Bai Muli* (5). In our opinion the view of the law expressed in those cases is correct. In this Court our brother Burkitt in an unreported case has decided that questions of the title of the testator or intestate to property are not to be dealt with in applications for probate or letters of administration.

We accordingly decline to express any opinion as to whether the testatrix had a disposing power over the property, or any of it, mentioned in her will. The contention in the first Court could hardly have been seriously put forward, as the objectors called no evidence to support it. We dismiss this appeal with costs.

Appeal dismissed.

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19 A. 462 = 17 A.W.N. (1897) 107.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

FAKIRE AND OTHERS (*Plaintiffs*) *v.* TASADDUQ HUSAIN AND OTHERS (*Defendants*).* [5th May, 1897.]

Costs—Joint decree for costs against defendants having separate defences, defendants being also wrong-doers—Suit for contribution—Suit not maintainable.

In a suit against one defendant for possession of certain property, which was claimed as his by the original defendant, certain third persons got themselves added to the array of parties as defendants and put in a defence in opposition to and exclusive of that of the first defendant. The plaintiff in that suit obtained a decree, the claims of both sets of defendants being found to be unsupported, and the decree gave costs jointly against all the defendants. The decree having been executed for costs against the first defendant, he sued the other defendants for contribution. *Held* that the suit would not lie. *Kristo Chunder Chatterjee*

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* Second Appeal, No. 22 of 1895, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 25th September 1894, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 3rd August 1894.

(1) 6 C.L.R. 176. (2) 4 C. 1. (3) 12 B. 164; (4) 20 C, 888. (5) 18 B. 749.

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APPELLATE CIVIL.

19 A. 462 = 17 A.W.N. (1897) 107.

v. *Wise* (1), *Sreeputty Roy* v. *Loharam Roy* (2), *Abdul Wahid Khan* v. *Shaluka Bibi* (3) and *Suput Singh* v. *Imrit Tewari* (4) referred to.
[R., 7 P.R. 1901 = P.L.R. (1900) 525 ; D., 26 M. 373.]

[463] THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

Pandit *Moti Lal* and Babu *Datti Lal*, for the respondents.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—This was a suit for contribution. It arose in this way. The plaintiff in a former suit, to which the appellant here was an original defendant, sought possession of a *mandi* and a house. The plaintiff here, in that suit a defendant, defended as to all the property claimed ; as to part alleging that he was a tenant who had not received notice ; as to the rest entirely denying the title of the plaintiff to that suit. The defendants here, we suppose, being desirous of embroiling themselves in litigation, got themselves made defendants, and they also claimed the *mandi*, but made no claim to the house. In the result the plaintiff in the former suit recovered as against this plaintiff most of what he claimed, and got a decree as against the defendants here. The decree, so far as costs were concerned, decreed costs jointly against the defendants. This plaintiff paid all those costs and now seeks by this suit to compel his co-defendants in the former suit to contribute to the costs which were paid to the plaintiff in that suit. The first Court dismissed the claim. The District Judge of Allahabad, relying on the decision in *Kristo Chunder Chatterjee* v. *J. P. Wise* (1), dismissed the appeal. From that decree this appeal has been brought.

It appears to us that it lay upon the plaintiff here to show that there was either some contract between him and the defendants, or some equity which created a duty on these defendants to contribute to the costs in question as between themselves. Apparently the plaintiff and defendants here were wrong-doers. They were holding on to property to which the plaintiff in the former suit was entitled, and to which they (or either or any of them) were not entitled. Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit which **[464]** was independent of, and separate from, and inconsistent with, the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other ; and there was no equity between these persons, whose cases were antagonistic to each other.

It appears to us that the principle upon which *Kristo Chunder Chatterjee* v. *Wise* (1) and *Sreeputty Roy* v. *Loharam Roy* (2) were decided is the correct principle to apply in this case. It is the principle which we believe the Privy Council would have applied ; at least so we conclude from the judgment of their Lordships in *Abdul Wahid Khan* v. *Shaluka Bibi* (3). That there may in some events be contribution between wrong-doers is shown from the judgment in *Suput Singh* v. *Imrit Tewari* (4). No facts were alleged or proved here, and no facts existed, which would entitle the plaintiff to obtain contribution from the defendants in respect of these costs.

We dismiss this appeal with costs.

Appeal dismissed.

(1) 14 W.R. 70. (2) 7 W.R. 384. (3) 21 C. 496 (503). (4) 5 C. 720.

19 A. 464=17 A.W.N. (1897) 102.

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MAY 6.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SHAM LAL (*Defendant*) *v.* CHOKHE (*Plaintiff*).*
[6th May, 1897.]

19 A. 464=17 A.W.N. (1897) 102.

Act No. XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 42—*Landholder and tenant—Assessment of crops of evicted tenant—Effect of such assessment.*

Held that where a landholder, having ejected a tenant upon whose holding there are growing crops, applies under s. 42, cl. (*c*) of Act No. XII of 1881 for assessment of the price of such crops, he is bound by the assessment which the Revenue Court may make, and cannot afterwards refuse to pay the price so fixed.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Aikman, J., in Second Appeal, No. 1019 of 1894, *Sham Lal* v. *Chokhe* (1). The facts of the case will be [465] found in the report of the Second Appeal, *q. v.* In this appeal the Court (Edge, C. J., and Blair, J.) simply affirmed the judgment and decree appealed from, and accordingly dismissed the appeal.

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19 A. 465=17 A.W.N. (1897) 115.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS *v.* SCHADE AND ANOTHER.† [7th May, 1897.]

Act No. I *of* 1878 (*Opium Act*), *s.* 9—*Criminal Procedure Code, s.* 29—*Commitment by Magistrate to Court of Session—No jurisdiction in Court of Session—Commitment quashed.*

Held that inasmuch as a conviction of an offence punishable under Act No. I of 1878 must be by a Magistrate, a Magistrate taking cognizance of such an offence has no power to commit to the Court of Session. *Indrobeer Thaba* (2) and *Regina* v. *Donoghue* (3) referred to.

THIS was a reference under s. 215 of the Code of Criminal Procedure made by the Sessions Judge of Allahabad. Two persons, one of them a European British subject, had been charged before a Magistrate of the first class with being, on different dates and at different places, in the possession of opium in contravention of the rules made by Government under Act No. I of 1878. The Magistrate committed both the accused to the Court of Session. The Sessions Judge, being of opinion that, having regard to s. 9 of the Opium Act, 1878, a conviction, if any, could only be arrived at by a Magistrate, referred the case to the High Court with a view to the commitment being quashed.

Messrs. *J. E. Howard* and *C. Dillon*, for the accused.

The Public Prosecutor (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C.J., and BLAIR, J.—A Magistrate of the first class having taken cognizance of a case in which two men were charged with offences

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* Appeal No. 31 of 1897 under s. 19 of the Letters Patent.

† Criminal Revision No. 231 of 1897.

(1) 19 A. 68=16 A.W.N. (1896) 179. (2) 1 W.R.Cr.R. 5. (3 5 M.H.C.R. 277.

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MAY 7.

REVISIONAL CRIMINAL.

19 A. 465 = 17 A.W.N. (1897) 115.

under Act No. I of 1878, committed them for trial to the Court of Session. One of the men is a European British subject. It is quite clear from s. 9 of Act No I of 1878 that the Court of Session has no jurisdiction in the matter. The [466] conviction, if there is one, must be before a Magistrate, for a Magistrate, and not the Judge of the Court of Session, is the person empowered to pass sentence. Similar questions arose in *Indrobeer Thaba* (1) and *Regina* v. *Donoghue* (2). It is probable that the Magistrate who took cognizance of the case has not power to award a sufficient punishment in case these men are proved to be guilty of the offence. As to whether or not these men, or either of them, are guilty, we express no opinion. We set aside the order of commitment, the result of which is that the case goes back to the Court of the Magistrate who made the order of commitment, and we transfer the case from the Court of that Magistrate to the Court of the District Magistrate of Allahabad. As to the question whether these men should be tried separately or together, that the Magistrate must decide. If any application for separate trials is made to him, he will no doubt consider it; but we make no suggestion that they should be tried separately.

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19 A. 466 = 17 A.W.N. (1897) 118.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

AMIR HASAN (*Plaintiff*) *v.* RAHIM BAKHSH AND OTHERS (*Defendants*).* [11th May, 1897.]

Pre-emption—Muhammadan Law—Rights of third persons having a claim to pre-emption where the vendee is also a person who would have a similar claim were the sale to a stranger.

Under the Muhammadan law, even when the buyer is himself a pre-emptor, that is a person who would have the right of pre-emption against an outsider, other persons having a similar rights of pre-emption are entitled to claim pre-emption against the buyer; and, in such a case, the rights of the claimants to pre-emption should be determined in the same way in which they would have been determined had the buyer acquired the property by enforcing his right of pre-emption against a stranger, in the absence of the other pre-emptors, and the absentee pre-emptors had appeared subsequently and claimed pre-emption. [467] *Baboo Moheshee Lal* v. *Mr. G. Christian* (3), *Teeka Dharee Singh* v. *Mohur Singh* (4), *Lalla Newbut Lall* v. *Lalla Jewan Lall* (5), dissented from.

In cases of pre-emption, to which the Muhammadan law applies the rules of that law are to be administered in their entirety where they are not inconsistent with the principles of justice, equity and good conscience. *Chundo* v. *Hakeem Alim-ood-deen* (6) and *Gobind Dayal* v. *Inayat-ul-lah* (7) referred to.

A person entitled to a right of pre-emption is not bound to claim pre-emption in respect of all the sales which may be executed in regard to the property, although every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer. *Kashi Nath* v. *Mukhta Prasad* (8) referred to.

[F., 30 A. 372 = 5 A.L.J. 414 = A.W.N. (1908) 153; Appr., 21 A. 292; R., 20 A.W.N. 193; 17 Ind. Cas. 39 (42) = 6 S.L.R. 107]

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* Second Appeal, No. 203 of 1896, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 23rd December 1895, confirming a decree of Maulvi Mubammad Shafi, Munsif of Koel, dated the 8th April 1895.

(1) 1 W.R.Cr. R. 5. (2) 5 M.H.C.R. 277. (3) 6 W.R. 250.
(4) 7 W.R. 260. (5) 4 C. 831. (6) N.W.P.H.C.R. (1874) 28.
(7) 7 A. 775. (8) 6 A. 370.

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19 A. 466 = 17 A.W.N. (1897) 118.

THIS was a suit for possession of a house by right of pre-emption according to the Muhammadan law. The claim was based upon the allegation that the house sold was situated in the same lane as the plaintiff's house, the lane being in the joint user of the plaintiff and the vendors. The plaintiff alleged compliance in the usual manner with the necessary formalities required by Muhammadan law. The vendees defendants resisted the claim principally on the ground that they also had a house situated in the same common lane; that they thereby were possessed of equal rights of pre-emption with the plaintiff, and that, as the sale had been completed in their favour, the plaintiff's suit could not succeed as against them.

The Court of first instance (Munsif of Koel) accepted this plea of the defendants vendees and dismissed the suit.

The plaintiff appealed, and the Lower Appellate Court (District Judge of Aligarh) dismissed the appeal, also holding that inasmuch as the vendees themselves had an equal right of pre-emption, by reason of participation in the common lane, with the plaintiff, the plaintiff's claim could not be supported as against them.

The plaintiff thereupon appealed to the High Court.

Mr. *Karamat Husain*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

[468] BANERJI and AIKMAN, JJ.—This was a suit for pre-emption under the Muhammadan law. The property claimed is a house situated in a blind lane, and the plaintiff claims pre-emption as a partner in the appendages of the house. It has been found by the Courts below that the vendees own houses in the same lane and would themselves have the right equally with the plaintiff to pre-empt the property against a stranger. Those Courts have held that the plaintiff has no preferential right of pre-emption and is not entitled to a decree, and they have accordingly dismissed the claim.

It is contended on behalf of the plaintiff, who has preferred this appeal, that the Muhammadan law does not require that the claimant for pre-emption should have a preferential right, and that under that law, if the vendee and the pre-emptor have equal rights of pre-emption as against an outsider, the property should be divided between them in the same way in which it would have been divided between them had the vendee been a stranger and both of them had claimed pre-emption against him. The contention is that the rule laid down in Book, XXXVIII, Chapter I, of the Hedaya (Vol. III, p. 566) that "when there is a plurality of persons entitled to the privilege of *shaffa* the right of all is equal" is as much applicable when the purchaser is a person having the right of pre-emption as when he is a stranger. The question thus raised is by no means an easy one, and has not, as far as we are aware, been decided by this Court. There are, however, three rulings of the Calcutta High Court which support the view of the learned Judge of the Court below.

In *Baboo Moheshee Lal* v. *Mr. G. Christian* (1) Bayley and Shumbhoo Nath Pundit, JJ., held that the right of pre-emption "could, under Muhammadan law only, be against strangers or third parties *not* co-parceners." In *Teeka Dharee Singh* v. *Mohur Singh* (2) the same learned Judges observed that "the very fact of the purchaser not being a stranger,

(1) 6 W.R. 250.

(2) 7 W.R. 260.

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but one who is already either a shareholder or a neighbour, proves that the Muhammadan [469] law of pre-emption never intended to apply to such a case." It is difficult to follow the reasoning of the learned Judges in the case last mentioned, but in neither of the two cases have they referred to any authority of Muhammadan law as supporting their view.

The case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) was decided by a Full Bench, which held that "by the Muhammadan law one coparcener has no right of pre-emption as against another co-parcener." The learned Chief Justice in delivering the judgment of the Court said:— "There appears to be no reason, either upon principle or authority, why the right of *shaffa* should exist as between co-parceners, and the rule as laid down in Hamilton's Hedaya, Vol. III, Book 38, Ch. I, appears to have been misunderstood in this respect. That rule merely prescribes that any one partner (or co-parcener) of a property has a right of *shaffa* as against a stranger who purchases a share from his co-partner, and does not mean that the right exists as between co-partners who may purchase shares from one another. The object of the rule, as explained in that chapter, and in Ch. 3. is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious that no such annoyance can result from a sale by one co-parcener to another. The only result of such a sale would be to give the purchaser a larger share in the joint property than he had before, and perhaps larger than the other co-parceners have." No other authorities were cited in the judgment.

In Mr. Justice Ameer Ali's work on Muhammadan law it is stated, on p. 590 of Vol. I, that "when one co-sharer conveys his share to another co-sharer, no other co-sharer, if any, can have a right of pre-emption, the rights of all being equal, and the reason on which the right is founded, therefore, being absent. In other words, no right of pre-emption arises in favour of a co-parcener when the purchaser himself is a co-sharer of the vendor and the [470] claimant." The learned author evidently based his opinion on the rulings mentioned above as he has not referred to any authority of Muhammadan law which warrants it.

As, according to the Hedaya, the object is "to prevent the vexation arising from a disagreeable neighbour" (Vol. III, p. 591; Book XXXVIII, Chap. III), and as in the case of a purchase by a person who stands on the same footing as the claimant for pre-emption that object is non-existent, it would seem, were there no authority to the contrary, that the Muhammadan law sanctioned the enforcement of the right of pre-emption against a stranger only. But the texts from various authors who are regarded as high authorities on Muhammadan law cited by Mr. *Karamat Husain*, the learned counsel for the appellant, to whom we are much indebted for his erudite and exhaustive argument, leave no room for doubt that the right of pre-emption may, under that law, be enforced against a purchaser who is not a stranger, but is a person who could equally with the plaintiff have claimed pre-emption against a stranger, and that in the case of purchase by such a person the rights of other persons entitled to pre-empt the property should be determined in the manner in which they would have been determined had the person who purchased the property acquired it by pre-emption against a stranger purchaser in the absence of other pre-emptors, and the absentee pre emptors had

(1) 4 C. 831.

afterwards appeared and claimed their shares. It is settled law that where the vendee is a stranger and more persons than one have the right of pre-emption, and one of those persons is absent "decree is to be given to those who are present, according to their number. But if, after decree of the whole to one who is present, a second should appear, half is to be decreed to him, and if a third should appear, decree is to be given to him for a third of what is in the hands of each of the other two." (Baillie's Digest of Muhammadan law, 2nd ed., p. 501. See also Hedaya. Vol. III, p. 567 and Tagore Law Lectures for 1873, p. 519). According to the authorities cited to us by the learned counsel, to which we shall presently refer, the above rule applies and determines the right of [471] pre-emption, even when the purchaser is a pre-emptor, that is, a person who would have the pre-emptive right as against a stranger. It is in this sense that the word appears to have been used in the following texts of Muhammadan law which have been cited to us, and which seem to us to be conclusive on the point.

In the *Takmila Bahr-ur-Raik* (*a*) occurs a passage which has a direct bearing upon the question before us. It is thus translated :—" It is given in the *Tatar Khaniyah* that a neighbour purchased a house and there was another neighbour on the other side who claimed pre-emption; the house would be equally divided between the purchaser and the neighbour." The *Bahr-ur-Raik* is, according to Mr. Morley (Introduction to the Digest, p. CCLXX), the most famous commentary on the *Kanz-ud-Dakaik*, " a book of great reputation, " and Mr. Justice Ameer Ali says of it that " it is highly thought of in Sunni countries " (Muhammadan Law, Vol. I, Introduction, p. 19). The *Tatar Khaniyah* is referred to on p. CCLXXXVII of the Introduc-[472]tion to Morley's Digest, and on pp. 52 and 53 of Shama Charan Sircar's Tagore Law Lectures for 1873.

(*a*) Part II, Book on Pre-emption. 1 Egyptian Edition, p. 143.

(a) تكمله البحرالرائق شرح كنزالدقائق جزء ثامن كتاب الشفعه طبع مصر ١٣٢٣

(هى تمليك البقعة جبراً على المشتري بما قام عليه) هذا فى الشرع و زاد بعضهم بشركة اوجوار فقوله تمليك جنس شمل تمليك العين و المنافع و قوله البقعة فصل اخرج به تمليك المنافع و قوله جبراً اخرج به البيع فانه يكون بالرضا و قوله بما قام عليه يعني حقيقة أوْ حكما كما سياتي فى الخمر و غيره و المراد تمليك البقعة أوْ بعضها ليشمل ما اذا اشتراها احد شفعائها فى التاتارخانيه اشترى العجار داراً و لها جار آخر من جانب آخر وطلب الشفعة تقسم الدار بين المشتري والعجار نصفين •

ايضاً ١٦١

ولو اشتراها الشفيع من المشتري بطلت شفعته لانه بالاقدام على الشراء اعرض عن الشفعه ولمن هو بعده فى الشفعاء أوْ مثله ان ياخذها منه بالشفعة بالعقد الاول وان شاء بالثاني بخلاف ما اذا اشتراها ابتداءً من غيران يثبت له فيها حق الاخذ لان شراها هناك لم يتضمن اعراضا •

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The *Radd-ul-Mukhtar*, which Mr. Justice Ameer Ali says, "is certainly esteemed now-a-days as the best authority on Hanifi Law" (Muhammadan Law, Vol. I, Introduction, p. 21), and which, according to Mr. Shama Charan Sircar (p. 46) is "a very high authority among the Hanifis," quoting from Alqunyah says:— "A neighbour purchases a house while there is another neighbour to it. (If) the neighbour then demands pre-emption and the purchaser too, the house is to be divided between them half and half, for both of them are pre-emptors." (*b*). The author of the *Radd-ul-Mukhtar* says further:—"His words 'according to the number of the pre-emptors.' Because of their equality in the right for the whole owing to the existence of the cause of it, there ought to be equality in the juristic result. And this would include the case in which the purchaser should happen to be one of them and should demand (pre-emption) with them. He then would be calculated to be one of them and the property sold would be divided among them." (*c*).

In the well known work, the *Fatawa Alamgiri*, we have the following passages:—"If a person purchases a house of which he is a pre-emptor and then appears another pre-emptor **[473]** having an equal right with him, the *Kazi* (Judge) will pass a decree for one half." (*d*).

(*b*) Vol. V, Book on Pre-emption, p. 165. Egyptian Edition.

(*b*) ردالمحتار جلد خامس كتاب الشفعه باب مايثبت هى فيه صفحه ١٦٥ مصر

و فى القنية اشترى الجار داراً و لها جار آخر فطلب الشفعة و كذا المشتري فهي بينهما نصفين لانهما شفيعان *

(*c*) Vol, V, p. 152.

(*c*) ردالمحتار جلد خامس كتاب الشفعه صفحه ١٥٢ طبع مصر

(قوله بقدر رؤس الشفعاء) لاستوائهم فى استحقاق الكل لوجود علته فيجب الاستواء فى الحكم و شمل مالو كان المشتري احد هم وطلب معهم فيحسب واحدا منهم و يقسم المبيع عليهم كما فى الوهبانية و شروحها *

(*d*) Vol. IV, Book on Pre-emption, Chap. VI, Lucknow Edition, p. 15.

(*d*) فتاوای عالمگيري كتاب الشفعه جلد رابع باب السادس طبع نولكشور ١٥

(ولو ان رجلا اشترى دارا وهو شفيعها ثم جائه شفيع مثله قضى القاضي بنصفها) و ان جائه شفيع دونه فلا شفعة له هكذا فى شرح الطحاوى *

ايضاً ١٥-١٦

ولو كان الشفيع الحاضر اشترى الدار من المشتري ثم حضر الغائب فان شاء اخذ كل الدار بالبيع الاول و ان شاء أخذ كلها بالبيع الثانى ولو كان المشترى الاول شفيعا للدار فاشتراها الشفيع الحاضر منه ثم قدم الغائب فان شاء اخذ نصف الدار بالبيع الاول لان المشترى الاول لم يثبت له حق الشراء قبل الشراء حتى يكون

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Again.—"If the first vendee is a pre-emptor of the house and the pre-emptor present purchases it from him, and then the absent pre-emptor appears, the last named pre-emptor can, if he likes, take half the house under the first sale."

The *Inayah* or *Aini*, a commentary on the Hedaya, which, Mr. Morley says, "is much esteemed for its studious analysis and interpretation of the text" (Introduction, p. CCLXIX), contains the following passage:—"If the first purchaser is also a pre-emptor and the pre-emptor who is present also purchases it jointly with him and subsequently the absent pre-emptor [474] appears, he (the absent pre-emptor) can, if he likes, take half the house under the first sale." (*e*)

The last authority, but by no means of the least weight, to which we will refer is the *Durr-ul Mukhtar*. It is, according to Mr. Justice Ameer Ali, "a work of great authority and merit." (Mahomedan Law, Introduction, p. 20), and the learned author of the Tagore Law Lectures for 1873 refers to it as "a work of great celebrity" (p. 46). It says—"When two persons purchase a house and both are pre-emptors and then appears a third pre-emptor after division has been made under a decree or otherwise, he, that is, the pre-emptor, can have the division cancelled,

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بشرائه معرضا عنه فاذا باعه من الشفيع الحاضر لم يثبت للغائب الا مقدار ماكان يستحقه بالمزاحمة مع الاول و هو النصف لان السبب عند البيع الاول اوجب الشفعة للكل في كل الدار وقد بطل حق الشفيع الحاضر بالشراء لكون الشراء دليل الاعراض فبقى حق المشترى الاول والغائب في كل الدار فيقسم بينهما فياخذ الغائب نصف الدار بالبيع الاول و ان شاء اخذ الكل بالبيع الثانى لان السبب عند العقد الثانى اوجب للشفيع حق الشفعة ثم بطل حق الشفيع الحاضر عند العقد الاول ولم يتعلق باقدامه على الشراء الثانى لاعراضه فكان للغائب ان ياخذ كل الدار بالعقد الثانى *

(*e*) Vol. IV, Book on Pre emption, Lucknow Edition, p. 23.

(*e*) عينى شرح هدايه كتاب الشفعه جلد رابع طبع نولكشور ٢٣

فى المبسوط والذخيرة شفيعان احدهما حاضر و الآخر غائب و قضى للحاضر بكل الدار فللغائب ان ياخذ نصفها ولو جعل بعض الشفعاء نصيبه للآخر لم يصح الجعل وسقط حقه و قسمت على عدد من بقى و ان قال الذى قضى له بالشفعة للاخر انا اسلم لك الكل فاما ان تاخذ الكل او تدع فليس له ذلك وللثانى ان ياخذ النصف ولو كان الحاضر لم ياخذها بالشفعة ولكن اشتراها من المشتري فحضر الغائب ان شاء اخذها كلها بالبيع الاول او بالبيع الثانى لان الحاضر اسقط حقه بالاقدام على الشرى و خرج من الدين ولو كان المشتري الاول شفيعا ايضا فاشتراها شفيع حاضر ايضا معه فحضر الغائب ان شاء اخذ نصف الدار بالبيع الاول و ان شاء اخذ الكل بالبيع الثانى والله سبحانه و تعالى اعلم *

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because what was a half before, has now become one-third (*Sharah wahbaniya*)."(*f*)

[475] These texts, the authority of which has not been questioned by Mr. *Abdul Majid* on behalf of the respondents, establish, as we have said, two propositions; first, that even when the buyer is himself a pre-emptor, that is, a person who would have the right of pre-emotion against an outsider, other persons having a similar right of pre-emption are entitled to claim pre-emption against the buyer; and, secondly, that in such a case the rights of the claimants to pre-emption should be determined in the same way in which they would have been determined, had the buyer acquired the property by enforcing his right of pre-emption against a stranger, in the absence of the other pre-emptors and the absentee pre-emptors had appeared subsequently and claimed pre-emption. In this view, as all persons having equal right of pre-emption are only entitled under the Muhammadan law to divide the property equally *per capita*, and as the purchasers in this case are two in number, the plaintiff appellant is entitled to only a third share of the property sold.

Mr. *Abdul Majid*, whilst conceding that this is so under strict Muhammadan law, contends that we should not apply the rules of Muhammadan law in their entirety to cases of pre-emption. He relies on the rulings of the Full Bench in *Chundo* v. *Hakeem Alim-ood-deen* (1) and *Gobind Dayal* v. *Inayat-ul-lah* (2) in which the majority of this Court held that the Court is not bound to administer the Muhammadan law in claims of pre-emption, but that, according to the rule of justice, equity and good conscience, **[476]** that law should be applied in cases of pre-emption. We, as a Division Bench, are bound by the opinion of the majority of the Full Bench, and, according to that opinion, to administer under the rule of justice, equity and good conscience the rules of Muhammadan law in

(1) Book on Pre-emption, Calcutta Edition, p. 706.

(*f*) الدرالمختار كتاب الشفعه طبع كلكته ٧٠٤

ويبطلها شراء الشفيع من المشتري فلمن دونه او مثله اخذها منه بالشفعة بالعقد الاول او الثانى بخلاف مالو اشتراها ابتداء حيث لاشفعة لمن دونه •

الدرالمختار كتاب الشفعه طبع كلكته ٧٠٦

(كمالو اشترى اثنان دارا و هما شفيعان ثم جاء شفيع ثالث بعد ما اقتسما بقضاء او غيره فله اي للشفيع ان ينقض القسمة ضرورة صيرورة الصف ثلثا-شرح وهبانية) •

ردالمحتار جلد خامس كتاب الشفعه باب مايبطلها طبع مصر ١٦٧

قوله (و يبطلها شراء الشفيع من المشتري لانه بالاقدام على الشراء من المشتري اعرض عن الطلب و به تبطل الشفعة المنح (قوله فلمن دونه كما اذا كان شريكا و لاجنبي جار - (قوله بالعقد الاول او الثانى) انظر ماكتبناه عن التاتر خانية عند قول المصنف ويفسخ بحضوره (قوله بخلاف مالو اشتراها ابتداء) اى قبل ان يثبت له فيها حق الاخذ لانه لم يتضمن اعراضا لاقباله على التمليك وهو معنى الاخذ بالشفعة و انما اشتراها لعدم التمكن من اخذها بطريق آخر زيلعى •

(b) N.W.P. H.C.R. (1874) 28.

(2) 7 A. 775.

cases of pre-emption. We do not think we should be justified in applying those rules in a mutilated form. and we are of opinion that in cases of pre-emption we should apply the Muhammadan law, where it is not inconsistent with the principles of justice, equity and good conscience. We are not satisfied that the rules deducible from the texts cited above are repugnant to those principles.

Mr. *Abdul Majid's* next contention is that the plaintiff does not seek to pre-empt the whole of the property sold and that his suit must fail for this reason. It is alleged that the house in question was sold by Musammats Ulfat and Imrat on the 28th of September, 1893, and that on the 29th of September, 1893, five persons conveyed to the same vendees what they stated to be their interests in the house. The plaintiff has claimed pre-emption in respect of the first sale only. It is argued that as he has not claimed to pre-empt the property comprised in both the sales, he has thereby forfeited his right of pre-emption. We are aware of no law which requires that a person entitled to the right of pre-emption is bound to claim pre-emption in respect of all the sales which may be executed in regard to the property. What the Muhammadan law enjoins is, as observed by Mahmood, J., in *Kashi Nath* v. *Mukta Prasad*, (1), that "every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer." In this case the plaintiff has in his plaint claimed the whole of the property comprised in the sale deed of the 28th of September, 1893, and he has not split up that bargain. His claim, therefore, does not violate any rule of Muhammadan law. As, however, the vendees have equal rights of pre-emption with him and they are two in number, the plaintiff would be entitled to only a third share of the property **[477]** on payment of one-third of the sale price. provided that he has complied with all the requirements of Muhammadan law. In this case it was denied that he had made the preliminary demands, and it was asserted that the sale had taken place with his consent. There was also a dispute as to the actual amount of the sale price. These questions have not been decided by the lower appellate Court. As that Court dismissed the suit upon a preliminary point, and its decision upon that point is, in our opinion, erroneous, we set aside the decree below and remand the case to the lower appellate Court under s. 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and case remanded.

(1) 6 A. 370.

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(1897) 117.

19 A. 477=17 A.W.N. (1897) 117.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

MOTI LAL (*Decree-holder*) *v.* MAKUND SINGH AND OTHERS (*Judgment-debtors*).* [11th May, 1897.]

Execution of decree—Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *sch. ii, art.* 179 (4)—"*Step in-aid of execution*"—*Application by decree-holder to be put in possession of property which he has purchased at a sale in execution of his decree.*

Held that an application made by a decree-holder to be put into possession of property which he had purchased at an auction sale held in execution of his decree was a "step-in-aid of execution" of that decree, and would afford the decree-holder a fresh starting point for limitation. *Sujan Singh* v. *Hira Singh* (1) referred to.

[F., 27 C. 709 (712); 1 Ind. Cas. 430 (431)=13 C.W.N. 694; R., 31 A. 82=6 A.L.J. 71=5 M.L.T. 85=1 Ind. Cas. 416 (420); 35 B. 452=13 Bom. L.R. 661 (669)=11 Ind. Cas. 987; 25 M. 529; 14 C.W.N. 433 (435)=5 Ind. Cas. 89 (91); 8 O.C. 161.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. K. Porter* and Munshi *Gobind Prasad*, for the appellant.

Munshi *Ram Prasad* and Babu *Satya Chandar Mukerji*, for the respondents.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—The question before us is as to whether execution of a decree for money in this case was barred [478] by limitation on the 19th of January, 1895, when an application, out of which this appeal has arisen, was made.

The decree-holder, or rather his heir, is appellant here. The decree-holder obtained his decree for money, and, under an application of the 9th of April, 1890, he, on the 20th of November, 1891, brought some property of the judgment-debtors (respondents here) to sale, and, having obtained leave to purchase, he purchased it himself. On the 21st of January, 1892, the sale was confirmed. On the 9th of February, 1892, he obtained a certificate of sale in respect of the sale to which we have referred. On the 29th of February, 1892, the decree-holder applied to the Court to be put in possession of the property which he had purchased. On the 21st of March, 1892, the decree-holder was put in possession by the Court. On the 6th of April, 1892, the decree-holder died and was succeeded by his minor son, appellant here, and on the 19th of January, 1895, the son filed the present application for execution of the decree. The Subordinate Judge of Aligarh dismissed the application, holding that the execution of the decree was barred by limitation.

In order to save limitation the appellant has relied upon the application for a certificate of sale of the 9th of February, 1892, and the application to be put into possession of the 29th of February, 1892. If the making of either of these applications by the decree-holder was the taking of a step-in-aid of execution of the decree, the application of the 19th of January, 1895, was within time.

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* First Appeal No. 144 of 1895 from an order of Babu Bepin Bihari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 6th May, 1895.

(1) 12 A. 399.

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Now it has been held by this Court that an application by a decree-holder to obtain payment to him out of Court of purchase-money paid for the property of his judgment-debtor at a sale held under the decree-holder's decree was "taking a step-in-aid of execution" within the meaning of art. 179, paragraph 4, of the Limitation Act. That decision was approved of by the Full Bench of this Court in *Sujan Singh* v. *Hira Singh* (1). A proceeding in execution cannot be said to be completed (at least so [479] far as a decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree. Consequently it appears to us that an application to be paid out of Court the proceeds of such sale must be considered as the taking of a step-in-aid of the execution of the decree.

Now, apart from procedure, which does not assist us in ascertaining or applying principles of law, is there any difference between the case of a decree-holder applying to the Court to be paid out of Court the proceeds of a sale held in execution of his decree for money, and the case of a decree-holder, where he has himself purchased—consequently where no money passes—applying to the Court to be put in possession of that which represents money, which, if a third person had purchased, would have been paid into Court.

Mr. *Ram Prasad*, for the judgment-debtor, has contended that, inasmuch as the decree-holder, when he purchases, files in Court a receipt for so much of his judgment-debt as represents his purchase-money, he, on filing that receipt, must be treated as having received the purchase-money. The filing of the receipt is a mere matter of procedure, no money passes or is intended to pass, unless the purchase-money is in excess of the judgment-debt, and the execution of his decree cannot be said to be satisfied until in the one case he has received the purchase-money paid into Court, and in the other case until he be put into possession of the property of his judgment-debtor which he has purchased and which represents money, which, if a third person purchased, would have been paid into Court, and upon the decree-holder's application would have been paid out to him. We can see no difference between the two cases.

We hold that the application of the 19th January, 1895, to execute this decree was within time. We allow this appeal with costs, and we direct the Court below to proceed with the execution of the decree.

Appeal decreed.

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19 A. 480=17 A.W.N. (1897) 115.

[480] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SANWAL DAS (*Defendant*) *v.* BISMILLAH BEGAM (*Plaintiff*).*

[11th May, 1897.]

Civil Procedure Code, ss. 244, 278—Execution of decree—Decree for sale on a mortgage—Mode of intervention of third party claiming an interest by succession in the property decreed to be sold.

Two heirs of a Muhammadan woman took possession on her death of certain immoveable property left by her to the exclusion of the third heir, their sister.

* First Appeal from Order No. 8 of 1897 from an order of W. F. Wells, Esq., District Judge of Agra, dated the 18th December, 1896.

(1) 12 A. 399.

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They mortgaged that property. The mortgagee brought a suit and obtained a decree for sale. After decree one of the mortgagors died and his sister was brought upon the record as his representative. The property was sold, and subsequently the sister brought a suit against the auction purchaser for recovery of her share in the mortgaged property. *Held*, that s. 244 of the Code of Civil Procedure did not apply and that the suit was maintainable. *Deefholts* v. *Peters* (1) and *Seth Chand Mal* v. *Durga Dei* (2), referred to.

[F., 32 C. 265 ; 1 N.L.R. 142 ; R., 21 A. 277 ; 21 A. 356 ; 30 M. 26 = 16 M L.J. 545 ; 32 M. 429 = 19 M.L.J. 401 = 2 Ind. Cas. 18 (23) ; 6 Bom. L R. 1043 (1049) ; 1 C.P.L.R. 73 ; D., 26 A. 152 ; 9 C.L.J. 358 = 4 Ind. Cas. 121 (122) ; 13 Ind. Cas. 563 (564) = 123 P.L.R. 1912 = 247 P.W.R. 1912.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—One Badshah Begam had three children —Ikram Husain, Farhat Husain, and Bismillah Begam. Ikram Husain and Farhat Husain after Badshah Begam's death mortgaged a village which had belonged to Badshah Begam in her life-time, and which, unless something in the way of limitation happened, belonged to Ikram Husain, Farhat Husain and Bismillah Begam as heirs of Badshah Begam. The mortgagee brought a suit for sale under s. 88 of the Transfer of Property Act against Ikram Husain and Farhat Husain, and got a decree directing that, in the event of the amount decreed not being paid, the village which had belonged to Badshah Begam should be sold. Farhat Husain died before the decree was executed, and thereupon his sister, Bismillah Begam, was brought into the proceedings as his representative. The village was sold, and Bismillah Begam brought this suit to obtain her one-fifth share of this village. The first Court dismissed the suit on the ground that s. 244 of the Code of Civil Procedure applied. **[481]** The second Court, holding that s. 244 did not apply, set aside the decree of the first Court and made an order of remand under s. 562 of the Code. From that order of remand this appeal has been brought.

It has been contended by Mr. *Ram Prasad* that Bismillah Begam's remedy was an objection to the sale under s. 244 of the Code of Civil Procedure. The Calcutta High Court has held in *Deefholts* v. *Peters* (1) that s. 278 of the Code of Civil Procedure does not apply in execution of decrees for sale. Mr. *Ram Prasad* has relied on the judgment of this Court in *Seth Chand Mal* v. *Durga Dei* (2). We may say that, although we agree entirely with the judgment in that case, it cannot be applied here. If there is one point on which we believe there is general concurrence of opinion in the High Courts of India, it is that a Court executing a decree cannot take upon itself to alter or vary that decree. Its powers are confined to construing a decree when necessary and executing a decree in its terms so long as the law allows the decree to be executed. There is an essential difference between the execution of a decree for money by the sale of the property and the execution of a decree for sale of property specified in the decree. In the first case any third person can intervene in the execution of a decree and show that the decree could not be executed against

(1) 14 C. 631.

(2) 12 A. 313.

particular property, if that property was not the property of the judgment-debtor, but was the property of the person opposing. Similarly in the case of a decree for money, where the judgment-debtor dies, his representative is entitled to oppose the execution of the decree against any particular property by showing that property was not the property of the judgment-debtor and was the property of the representative, as for example, that it was his self-acquired property. That course can be taken by a stranger or a representative in execution of a decree for money for this reason, that a decree for money is not based upon any adjudication that the particular property, or in fact any property, which may subsequently be brought to sale in execution of the [482] decree, was the property of the judgment-debtor, or property which would be liable to his debts. Consequently, when such objection is taken before the Court executing a decree for money, that Court has power to inquire into and decide on any such objection taken to the execution of the decree against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act, the Court executing the decree must sell the property decreed to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser. For these reasons we are of opinion that the Court of first appeal was right and that s. 244 of the Code of Civil Procedure did not bar this suit.

We dismiss this appeal and affirm the decision of the Court [below with costs].*

Appeal dismissed.

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19 A. 482 = 17 A.W.N. (1897), 124.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

THE BANK OF UPPER INDIA (*Plaintiff*) *v.* SHEO PRASAD AND OTHERS (*Defendants*.)† [17th May, 1897.]

Execution of decree—Civil Procedure Code, s. 276—Attachment—Effect upon maintenance of attachment of order dismissing application for execution.

Where property has once been attached in execution of a decree, an order merely dismissing an application for execution which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree holder will be in the same position as he was before and entitled to the full benefit of the attachment. *Gunga Rai* v. *Mussumat Sakeena Begam* (1); *Nadir Hossein* v. *Pearoo Thovildarinee* (2); and *Golam Yaheya* v. *Sham Soonduree Kooeree* (3) referred to.

[F., 31 A. 367 = 6 A.L.J. 434 = 1 Ind. Cas. 951; 8 A.L.J. 619 (641) = 10 Ind. Cas. 245 (246); R., 9 C.L.J. 239 (243) = 4 Ind. Cas. 46 (47)]

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *J. E. Howard* and *E. A. Howard*, for the appellant.

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* The words in rectangular brackets though not given in the I.L.R. Series form a portion of the Judgment—ED.

† First Appeal No 213 of 1895 from a decree of Saiyid Zain-ul-Abdin, Subordinate Judge of Cawnpore, dated the 5th September 1895.

(1) N.W.P.H.C.R. (1873) 72. (2) 14 B.L.R. 425. (3) 12 W.R. 142.

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Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

[483] BURKITT, J. (KNOX, J., concurring).—This case is a very instructive illustration of the saying that a successful litigant's troubles commence when he tries to execute his decree, as we have here the case of a decree-holder who for more than eleven years has been unable to obtain the fruits of a decree in his favour.

The facts are as follows :—

One Sheo Bakhsh lent money to one Adhar Singh wherewith to pay the Government revenue due from him and to save his property from sale. No security was taken for the loan. The money not being repaid, Sheo Bakhsh sued Adhar Singh and obtained a money decree on the 24th April 1886 for some Rs. 9,642 odd. He took out execution in May 1887 by attaching two villages belonging to his judgment-debtor, namely, Atarra Mahal Ajit Singh and Bairipur, and asked that they should be sold and his decree paid off from the proceeds of the sale. His troubles then began. An objection to the attachment was made by Bijai Singh, son of the judgment-debtor. Bijai Singh claimed these villages as his property under a deed of gift, dated June 23rd, 1886, from his father, the judgment-debtor. The Court executing the decree allowed the objection and directed the attachment to be removed. That order was passed in May, 1888. The decree-holder thereupon instituted a suit against his judgment-debtor and against Bijai Singh, and on February 14th, 1889, he obtained a decree declaring that the two villages were liable to attachment and sale in execution of the decree of April 1886. An appeal was taken against the declaratory decree, but was dismissed by the High Court on January 28th, 1891. Meanwhile the decree-holder took prompt action on the decree of February 14th, 1889. He made an application on February 19th, 1889, to the execution Court, on the strength of that decree, asking for attachment and sale of the two villages. That application was granted, an attachment being levied on the two villages, on the 22nd June 1889. As the villages attached were ancestral property, the further execution of the decree was, on September 12th, 1889, transferred to the Collector under the rules framed by Government to give **[484]** effect to s. 320 of the Code of Civil Procedure. The case, however, did not remain long in the Collector's Court. For on January 31st, 1890, as the decree-holder was unable to attend at his Court in camp in the interior of the district, the Deputy Collector, on whose file the execution case was pending, struck it off for default and returned the papers to the Subordinate Judge, who at once followed suit by striking the case off his pending files. This proceeding was quite unnecessary, as he had struck the case off his files when he sent it to the Collector in September. The decree-holder then made several ineffectual attempts to induce the Subordinate Judge to send back the case for further execution to the Collector. At last, on an application made in September, 1890, the Subordinate Judge directed the case to be again sent to the Collector for further execution. This order was made on November 19th, 1890. The result of this last order was in our opinion to restore the state of things which existed on September 12th, 1889, when the decree first was sent to the Collector for execution. There was no necessity for any further attachment. The orders of the Deputy Collector and of the Subordinate Judge striking the execution case off their files of pending cases did not dissolve the attachment which had been imposed in the previous June, 1889. No formal

order was passed by either tribunal withdrawing the attachment, and the decree-holder certainly had neither asked for nor consented to such a withdrawal. In this opinion we are supported by the authority of many decided cases, *e.g.*, *Gunga Rai* v. *Mussumat Sakeena Begum* (1), *Nadir Hossein* v. *Pearoo Thovildarinee* (2), *Golam Yaheya* v. *Sham Soonduree Kooeree* (3), &c. We may add also that as to this point no question was raised nor any argument addressed to us at the hearing of this appeal. With the retransfer of the execution case to the Collector the decree-holder's troubles did not come to an end. The judgment-debtor early in January 1891, put in a petition before the Subordinate Judge in which, on various tech-[485] nical grounds, he objected to the continuance of the execution proceedings before the Collector. That petition was rejected on technical grounds on April 17th, 1891. The judgment-debtor, however, preserved, and, on April 13th, 1891, he again put in a petition in which on technical grounds he contended that the decree was not capable of execution, and prayed that the decree-holder's application for execution might be disallowed. The Subordinate Judge thereupon went into the matter, and by order dated June 8th, 1891, held that the pending proceedings in execution could not be maintained, and disallowed the application for execution. The Subordinate Judge held that the application was barred under s. 158 of the Code of Civil Procedure by reason of the infructuous proceedings mentioned above, which took place between the orders of January 31st and November 19th, 1890.

The result of the decision of June 8th, 1891, was that the decree-holder's execution proceedings before the Collector came to an abrupt termination, and the papers were returned to the Subordinate Judge. So after the expiration of more than five years from the date of his decree the decree-holder, through no fault of his own, found himself no nearer getting the benefit of his decree than he had been in 1886. He, however, now appealed to the High Court against the order of June 1891 and prayed that Court to order execution of his decree to be proceeded with. The appeal was allowed by the High Court on December 15th, 1892, the order of the Subordinate Judge was set aside, and it was ordered that "the proceedings in execution will proceed." Thereupon the decree-holder again applied to the Subordinate Judge on the strength of the order of the High Court and the case was on his application, by order of March 3rd, 1894, again sent to the Collector for further execution. Even then the judgment-debtor was not satisfied. He again, on April 21st, 1894, applied to the execution Court objecting to the order for execution, and to the transfer of the proceedings to the Collector. It is not necessary to notice the reasons he gave for his objection. Here the appellant [486] Bank for the first time came on the scene. It also, on May 4th, 1894, practically supported the objections made by the judgment-debtor and called on the Court to compel the decree-holder to attach anew and to notify the terms of a mortgage it held from the judgment-debtor. Both objections were overruled by the Court, and an appeal to the High Court was dismissed in June 1896.

But meanwhile, *i.e.*, between the orders of June 8th, 1891, and of December 15th, 1892, the case had entered into a new phase. On the 4th of January, 1892, the judgment-debtor, jointly with his son, Bijai Singh, borrowed Rs. 30,000 from the Bank of Upper India and, as security for the repayment of the loan, mortgaged six villages, among

(1) N.W.P.H.C.R. (1873) 72. (2) 14 B.L.R. 425. (3) 12 W.R. 142.

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which are the two villages Atarra Mahal Ajit Singh and Bairipur which the decree-holder Sheo Bakhsh had attached on June 22nd, 1889, in execution of his decree, and in respect of which the execution proceedings had been twice transferred to the Collector. Hence the present suit, in which the plaintiff Bank seeks to enforce its mortgage by sale of all the mortgaged villages. The persons impleaded as defendants are Adhar and his son (who have not appeared) and the five sons of Sheo Bakhsh, the decree-holder referred to above, now deceased. The lower Court gave the Bank a decree for recovery of the loan by the sale of the mortgaged property, with the exception of Atarra Mahal Ajit Singh and Bairipur. It held that, as these villages were under attachment to satisfy the decree held by Sheo Bakhsh's sons, the Bank could not bring them to sale unless it paid off that decree. The Bank appeals, contending that it is entitled to a decree for sale of the two villages just mentioned.

In the memorandum of appeal the Bank refers to what it calls a "finding" by the Subordinate Judge that Sheo Bakhsh was a consenting party to the mortgage of January, 1892. We are unable to discover any such "finding" on the record. The Subordinate Judge in that which he calls "a short account of the case," but which clearly is no more than a historical *resume* of [487] the case of each party, does say that "Sheo Bakhsh having joined the executants expressed his consent to the contents of the document." It is impossible to say where the Subordinate Judge got that statement. It is not mentioned in the plaint, nor referred to in the written statement, nor was it put in issue. Neither Adhar nor Bijai Singh put in an appearance, so the statement could not have been made by them, and the present respondents certainly did not make any such admission and do not admit it now. The Bank's mortgage deed also contains no assent whatever by Sheo Bakhsh nor any mention of his name; the only parties to it are the Bank, Bijai and Adhar. Probably the fact was asserted by the Bank's pleader when stating his case in the lower Court, and that would explain why—no evidence being produced to support it—the Subordinate Judge made no mention of it in his judgment. It is too large a draft on our credulity to ask us to believe that Sheo Bakhsh, who for years had been straining every nerve to obtain execution of his decree, and whose appeal was then pending in the High Court, could have taken such a fatal step as to assent to the mortgage of January 4th, 1892. We notice that in its judgment of January 28th, 1891, referred to above, the High Court treated with contempt a similar plea that Sheo Bakhsh had consented to the deed of gift.

Passing away from that matter, we have now to decide whether the appellant Bank is entitled to a decree for sale of the two villages under its mortgage, or whether the respondents have a prior lien. The Subordinate Judge has found in favour of the respondents. In our opinion his decision is right. The declaratory decree given by the Subordinate Judge on February 14th, 1889 (affirmed by the High Court on January 28th, 1891), decided finally that the two villages were liable to sale in execution of Sheo Bakhsh's decree, and that decree bound not merely Adhar and Bijai, but also their mortgagee the Bank, which claims title through them. It has been held by some authorities that the decree of February 14th, 1889, had the effect of restoring the attachment which had been removed on May 12th, 1888. It is [488] unnecessary to decide that point, as the two villages were again duly attached on June 22nd, 1889, and undoubtedly remained subject to that attachment

at least up to June 8th, 1891, the date on which the Subordinate Judge disallowed the then pending application for execution, wrongly holding that that application was barred under s. 158 of the Code of Civil Procedure. Now it is in our opinion very doubtful whether that order had the effect of dissolving the attachment. The order did not formally withdraw the attachment, nor did it declare (as was incorrectly stated at the hearing of this appeal) that the decree was incapable of execution. It did no more than lay down that execution should not be allowed on that particular application. But if it be the case that the effect of that order was to dissolve the attachment, we are of opinion that the effect of the order of the High Court in appeal (December 15th, 1892) was to wipe out the order of June 8th, 1891, and to re-establish the position of the parties as it stood before that order was made. The argument for the appellant Bank is that the effect of the order of the High Court was to send the decree-holder back to the Subordinate Judge with a bare money decree in his hands, deprived of the security he had obtained by the attachment in June, 1889, and of the benefit of the protection given by s. 276 of the Code of Civil Procedure. In short, it is contended that the only course open to this decree-holder, on succeeding in his appeal in the High Court, and on obtaining from that Court an order that the proceedings in execution should proceed, was to apply again for attachment and sale and to begin *de novo*, subject to any alienation which his judgment-debtor might have made in the interval between the two orders. Admittedly the decree-holder was in no way in fault. It was the Subordinate Judge who made a wrong order, and, if the contention for the appellant be correct, the effect of that wrong order is to damnify the unfortunate decree-holder most disastrously by enabling Adhar successfully to swindle his creditor. We are unable to believe that the law can be as contended for by the appellant Bank. We are of opinion that when the High Court [489] set aside the wrong order of the Subordinate Judge, it set it aside to the fullest extent, and that, if the effect of that order was to dissolve the attachment, the effect of the appellate order was to cancel that portion also of the Subordinate Judge's order. We fail to see why we should hold that that portion of the order was not affected by the appellate decree. We hold, therefore, that the two villages in dispute in this appeal were at the date of the appellant Bank's mortgage lying under a duly perfected and existent attachment in execution of Sheo Bakhsh's decree, and that under the provision of s. 276 of the Code of Civil Procedure the Bank's mortgage is void against any claims enforceable under that attachment, and therefore void against the decree held by the respondents.

It also was contended that the Bank's mortgage would, under the provision of s. 52 of the Transfer of Property Act, be inoperative as against the respondent's decree on the ground that the mortgage was entered into during the active prosecution of a contentious proceeding in which the right to sell the dispute villages was directly and specifically in question. We, however, consider it to be unnecessary to express any opinion on that question.

For the reasons given above we are of opinion that this appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

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19 A. 489=17 A.W.N. (1897) 123.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

BISHAN CHAND (*Defendant*) *v.* RADHA KISHAN DAS (*Plaintiff*).*
[17th May, 1897.]

18 A. 489=17 A.W.N. (1897) 123.

Contract – Sale – Deposit—Contract going off by default of purchaser—Vendor entitled to retain deposit.

Held that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. *Ex parte Barrell, in re Parnell* (1) and *Howe* v. *Smith* (2) referred to.

[R., 33 A. 166 (168)=7 A L J. 1019 (1021)=7 Ind. Cas. 794 (795); 33 M. 375 (394)=20 M.L J. 230 (251)=6 M.L.T. 334=3 Ind Cas. 941; 4 A.L J. 778=A.W.N. (1908) 5; 11 Ind.Cas. 229 (231)=14 C.L J. 159; 19 Ind.Cas. 462 (465)=24 M L J. 488 (497)=13 M L.T. 391 (397)=(1913) M.W.N. 341 (346); 3 M.L.T. 177 (178).]

[490] THE facts of this case are fully stated in the judgment of the Court.

Mr. *Malcolmson*, for the appellant.

Babu *Durga Charan Banerji*, for the respondent.

JUDGMENT.

BURKITT, J. (KNOX, J., concurring).—This is an appeal by the defendant in the suit from a decree of the Subordinate Judge of Benares, dated the 22nd of August 1895.

The claim was for the recovery of Rs 6,500 from the defendant. The plaintiff puts his case as follows:—He says that the defendant held a decree (No. 163 of 1892) against two persons named Sundar Das and Baij Nath Prasad; that the plaintiff, being related to Sundar Das, desired to purchase the decree in order to help him; that he entered into a contract with the defendant to purchase the decree, agreeing to pay any "miscellaneous expenses" which the defendant had incurred in obtaining the decree in addition to the amount secured by the decree, costs, &c., and that he sent to the defendant Rs. 6,500 as a deposit and in part payment of the consideration money. The plaint then goes on to allege that the defendant sent to the plaintiff two written drafts (one of a sale-deed and the other of an agreement); that the plaintiff refused to execute the agreement as he had not contracted to execute such a document; that he called on the defendant to send him a detail of the miscellaneous charges, but that the defendant insisted on the execution of the draft agreement, and neither completed the sale-deed nor sent the detail of "miscellaneous charges," but in breach of his contract put the decree into execution and realized the amount due on it. Finally, the plaintiff alleged that the defendant refused to return the Rs. 6,500. He accordingly instituted this suit to recover that amount with interest, costs, &c.

The defendant in reply contended that he had not broken the contract, and asserted that it was the plaintiff who was in fault by not having paid up in proper time the balance of the purchase money and the miscellaneous charges, which he put at Rs. 2,000, though the defendant at the

* First Appeal, No. 220 of 1895, from an order of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 22nd August 1895.

(1) L. R. 10 Ch. App. 512.

(2) L.R. 27 Ch. D. 89.

plaintiff's request had had the sale of [491] Sundar Das' property under his decree postponed. He denied that he had ever sent any draft agreement to the plaintiff or had asked him to execute such a document, but asserted that he had sent a draft sale-deed to the plaintiff in which Rs. 2,000 were entered as being payable on account of the "miscellaneous charges." The written statement of defence further alleged that defendant had sustained a loss of Rs. 2,000 by the non-completion of the contract, and in its last paragraph there is a plea that as the plaintiff was the person who broke the contract a suit by him was not maintainable.

The Subordinate Judge found on every issue in favour of the plaintiff and gave him a decree in full. The defendant appeals.

The only really important issue in this case is which side was guilty of the breach of contract.

[After a discussion of the facts of the case, the Court, differing from the Court of first instance, found that the contract to purchase had been broken by the plaintiff. The judgment then continued] :—

The question now remains what decree should be passed in this appeal. If the defendant had persevered in the last plea set forth in his written statement, we should unhesitatingly have dismissed the suit. On our finding that the plaintiff was the person who broke the contract, we are of opinion that the plaintiff was not competent to sue to recover the deposit. In the case of *Ex parte Barrell, in re Parnell* (1) it was held that where a contract for sale goes off by default of the purchaser the vendor is entitled to retain the deposit, Lord Justice James remarking that "the money was paid to the vendor as a guarantee that the contract should be performed: the trustee refuses to perform the contract and then says—'Give me back the deposit;'—there is no ground for such a claim." And in the same case Lord Justice Mellish is reported to have said :—"It appears to me clear that, even where there is no clause in the contract as to forfeiture of the deposit, if the purchaser repudiate the contract he cannot have [492] back the money, as the contract has gone off through his default." That case was cited with approval in the later case of *Howe* v. *Smith* (2), in which it was held by the Lords Justices Cotton, Bowen and Fry that a "deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff having failed to perform the contract within a reasonable time had no right to a return of the deposit." Following the rule of law laid down in the above cited cases, we hold that the plaintiff, having broken his contract to purchase, had no right to a return of the deposit, and that the Subordinate Judge ought to have given effect to the last plea in the written statement of defence by dismissing the suit. In this appeal, however, the defendant appellant has not stood on his strict legal rights. He says he is willing to pay Rs. 4,500 to the plaintiff, and in the Court below, he called evidence, which we believe to be true, to show that he had tendered Rs. 4,500 to the plaintiff, who refused to accept it on the ground that he was entitled to the full Rs. 6,500. In this appeal the defendant appellant has contented himself with contesting the decree as to Rs. 2,000 and as to interest and costs. Had the appellant appealed against the whole decree, we most certainly should have dismissed the suit. But, as matters stand, the decree we pass is that we allow this appeal, that we strike Rs. 2,000

(1) L. R. 10 Ch. App. 512.

(2) L.R. 27 Ch. D. 89.

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off the principal sum decreed, that we set aside the order of the lower Court allowing any costs or interest to the plaintiff, and, as we are of opinion that the plaintiff ought thankfully to have accepted the Rs. 4,500 tendered to him by the defendant, and that this suit was wrongfully instituted, we direct that the plaintiff respondent do pay all the defendant's appellant's costs in this Court and in the lower Court.

Appeal decreed.

19 A. 489 = 17 A.W.N. (1897) 123.

19 A. 493 = 17 A.W.N. (1897) 133.

[493] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS *v.* RAM CHANDAR.* [18th May, 1897.]

Evidence—Presumption—Municipal bye-law, presumption as to the validity of Act No. XV of 1883 (North-Western Provinces and Oudh Municipalities Act), s. 55.

Where a person was tried for and convicted of a breach of certain bye-laws purporting to have been duly passed by a Municipal Board, it was *held* that the presumption was that such bye-laws had been passed with due regard to the necessary procedure and were not illegal, and that it lay upon the accused to object to their validity and was no part of the duty of a Court exercising appellate or revisional jurisdiction to enter of its own motion into the question whether such rules had been properly framed in accordance with the provisions of the law on that subject. *The Municipality of Sholapur* v. *The Sholapur Spinning and Weaving Company* (1) referred to.

[R., 7 O.C. 51 (55).]

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Bareilly. The facts of the case will appear from the order of reference which was as follows :—

"This is an application for revision of an order made by the Joint Magistrate of Bareilly and purporting to have been made under ss 1 and 4 of Act No. XV of 1883. The case was sent back in order that the offence proved might be indicated, as required by s. 263 (*f*) of the Code of Criminal Procedure, and it was pointed out that the sections named were not penal sections. On the proceedings received back the authorities quoted are s. 1 (2), Chapter 1, and s 4, Chapter III of the rules passed by the Municipal Board of Bareilly under s. 55 (3) of Act No. XV of 1883. Upon this the parties were heard and the following order was made :—'Inasmuch as it appears that the bye-law under which the conviction under revision was made and the punishment inflicted is not forthcoming, it is ordered that a precept issue to the District Magistrate to send to this Court a copy of the rules made under s. 55 (1) and of any direction made under s. 55 (2) of Act No. XV of 1883, duly **[494]** certified for the purpose of s. 65 of Act No. I of 1872, or of the corresponding rules as made, confirmed, and published under ss. 22 to 24 of Act No. XV of 1873.'

"The District Magistrate has now forwarded to this Court a publication (apparently unofficial) entitled—'The Municipal Manual of Bareilly, compiled by Preonath Banerji, Municipal Commissioner and Pleader, High Court.'

"The alleged offences of which the appellant has been convicted are :—(1) constructing a *sandas* (or privy in which night-soil is allowed to accumulate) without the permission of the Municipal Board, and

* Criminal Revision No. 170 of 1897.

(1) 20 B. 732.

(2) altering a *chabutra* abutting on the street without the previous sanction of the Board.

"I see no reason to doubt that the applicant did the acts alleged to be offences; but I am in doubt whether these acts are offences, and punishable, and for the reasons following:—

"The Bareilly Municipality was, until the 24th January, 1884, a Municipality established under the North-Western Provinces and Oudh Municipalities Act, 1873. On that date the Local Government, acting under s. 5 of Act No. XV of 1883, by Notification No. 13, *North-Western Provinces and Oudh Gazette*, dated 26th January 1884, Part I, p. 40, applied Act No. XV of 1883 to the Bareilly Municipality, and thereupon the former Act (No. XV of 1873) ceased to apply [*Cf.* s. 17 (1) (*a*) of Act No. XV of 1883]; but rules made under the old Act are deemed to have been made under Act No. XV of 1883 and continue in force until repealed by new rules so made. It is, however, provided [s. 71 (2)] that 'the authorities empowered to make such new rules shall, as soon as may be, make them, and take such action as may be necessary for bringing them into force.' No action has been taken under this sub-section, and the rules which the applicant has been convicted of infringing are not 'new rules' within the meaning of s. 71 of Act No. XV of 1883. For the two rules now in question to be valid, therefore, they must be rules made under the North-Western Provinces and Oudh Municipal Act, 1873, or any Act repealed thereby (*e.g.*, VI **[495]** of 1868). The two rules in question are contained in Notification No. 699, dated the 9th October 1879, published at Part III, Municipal Supplement, *North-Western Provinces and Oudh Gazette*, dated the 18th October 1879; but this notification purports to be a confirmation of rules under s. 22 of Act No. XV of 1873 and a direction that the rules be adopted by all Municipalities. If the notification were a simple confirmation under s. 23 and publication under s. 24, the ordinary presumption would be that the rules had been duly made under s. 22. In that case the direction that they be adopted by all Municipalities would be unnecessary; but from the wording of the notification as it stands, I am in doubt whether it is not intended to express that the Local Government makes the rules under s. 22 and directs that they be adopted (*e.g.* by all Municipalities which had not previously made these same rules for themselves under s. 22). The Act, however, does not empower the local Government to make rules, but only to confirm rules made by the Municipal Committee; so that if the rules now in question were not made by the Bareilly Municipality before the notification was issued, the notification itself does not make the rules valid and binding. I am unable to discover that the Bareilly Municipal Committee ever did make these rules under s. 22 of Act XV of 1873. It is possible that they may be contained in the bye-laws mentioned at p. 291 of Mr. Fraser's book—Local Rules and orders made under enactments applying to the North-Western Provinces and Oudh—but the publication of those bye-laws is not traced, and publication is essential to validity under s. 24 of Act No. XV of 1873."

The Sessions Judge then referred the case to the High Court.

The Public Prosecutor (*Mr. E. Chamier*), for the Crown.

The Court passed the following:—

ORDER.

EDGE, C. J., and BLAIR, J.— In our opinion the presumption was that the rules in question had been duly made, published, and sanctioned.

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A Court ought to presume, until some evidence is given to destroy the presumption, that a Municipality has used [496] the regular and lawful procedure, and that the common course of business has been followed in that procedure. It is for the person raising the objection to give some evidence to show that it would not be safe to make such a presumption. The decision of the High Court at Bombay in *The Municipality of Sholapur* v. *The Sholapur Spinning and Weaving Company* (1) is an authority on this subject. A point of this kind should have been taken by the party concerned if there was anything in it, and should not have been taken of its own motion by a Court sitting in appeal or revision. We see no ground for interfering: the rule will be discharged.

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19 A. 496 = 17 A.W.N. (1897) 128.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ALTAF ALI KHAN AND OTHERS (*Defendants*) *v.* LALTA PRASAD AND OTHERS (*Plaintiffs*).* [20th May, 1897.]

Mortgage—Lease of mortgaged premises by mortgagee to mortgagor—Remedy of mortgagee for non-payment of rent—Jurisdiction—Civil and Revenue Courts.

Certain mortgagees in whose favour a deed of mortgage providing for possession in lieu of interest had been executed, on the day following the execution of the mortgage granted a lease of the mortgaged premises to the mortgagor. The two documents were registered on the same day. The amount of rent reserved by the lease was exactly equivalent to the amount of interest payable under the mortgage, and the mortgage-deed contained a covenant that any arrears due by the lessee should be a charge upon the mortgaged property. In the counter-part of the lease also a similar covenant making the mortgaged property security for the rent payable under the lease was inserted.

Held, that under the above circumstances, the mortgage and the lease formed merely different parts of the same transaction, and that the mortgagees were entitled to seek their remedy for non payment of the rent reserved in a Civil Court by means of a suit upon the mortgage and were not obliged to have recourse to a suit for rent in a Court of Revenue. *Baghelin* v. *Mathura Prasad* (2) followed.

[**F.**, 17 P.W.R. 1908; **Appr.**, 6 O.C. 18; **R.**, 21 A. 4 (9); 26 M. 662 (667); 13 Ind. Cas. 720 = 120 P.L.R. 1912 = 59 P.W.R. 1912; **D.**, 23 A. 338 (341).]

[497] THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellants.

The Hon'ble *W. M. Colvin* and Messrs. *T. Conlan* and *D. N. Banerji*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal has arisen in a suit brought upon a mortgage, dated the 22nd of November 1875. The mortgage-deed provided that the mortgagees were to be placed in possession of the mortgaged property in lieu of interest. Instead of entering into possession themselves, the mortgagees granted a lease of the mortgaged property to the mortgagor on the day following that of the mortgage for the same term as the term of the mortgage. The mortgagor having made default

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* First Appeal, No. 84 of 1896, from a decree of Syed Muhammad Jafar Husain Khan, Subordinate Judge of Bareilly, dated the 11th December 1895.

(1) 20 B. 732.

(2) 4 A. 430.

in the payment of the rent stipulated in the lease, which was a sum equivalent to the amount of the interest chargeable on the mortgage-debt, the present suit was brought to recover the amount alleged to be due upon the mortgage. No objection was raised in the Court below or has been raised in this Court as to the competency of the plaintiffs to maintain the present claim. The only question which has been raised, and which we have to determine, is whether, by reason of the granting of the lease to which we have referred, the relation which subsists between the parties was that of landholder and tenant and the plaintiffs' only remedy for the arrears due upon the lease was a suit in a Court of Revenue, or whether the parties stood to each other in the relation of mortgagee and mortgagor and the plaintiffs are entitled to maintain their claim in the Civil Court.

The learned counsel for the appellants relied on an unreported judgment of this Court in Second Appeal No. 1112 of 1894, decided on the 8th of April, 1897. The learned counsel for the respondents on the other hand referred us to the case of *Baghelin* v. *Mathura Prasad* (1). In the former case, it was held that under the circumstances of that case the relation between the **[498]** parties was that of landholder and tenant, the mortgagor having taken a lease from the mortgagee and attorned to him as his tenant. In the latter case, it was held that the transaction was one of mortgage, and, although a lease had been granted, the relation between the parties remained that of mortgagor and mortgagee.

In our opinion, each case must be decided with reference to its own peculiar circumstances. What we have to consider in this case is, what was the intention of the parties when they executed the deeds of the 22nd and 23rd of November, 1875. If it was intended that both the deeds were to form a single transaction, namely, a transaction of mortgage, and the lease was granted simply to provide a mode for realizing the interest payable on the mortgage amount, we must hold that the parties stood in the relation of mortgagee and mortgagor, and that the relation was not altered by reason of the execution of the lease. In this case, we find that the two documents were presented for registration on one and the same date, that the amount of rent reserved by the lease was exactly equivalent to the amount of interest payable on the mortgage, and that the mortgage deed contained a covenant to the effect that any arrears due by the lessee would be a charge on the mortgaged property. In the counter-part of the lease executed by the mortgagor on the 23rd of November, 1875, there is a similar covenant by which the mortgaged property and other properties of one of the mortgagors were made security for the rent payable under the lease, that is, for the amount of interest chargeable under the mortgage. It is a significant circumstance also that in the twelfth paragraph of his written statement, Altaf Ali, the principal defendant, says that the lease was executed only for the sake of facilitating the payment of interest. Taking all these circumstances into consideration, we are of opinion that it was not the intention of the parties that the lease was for any other purpose than the realization of the interest payable upon the mortgage, and that the two deeds of the 22nd and 23rd of November, 1875, must be regarded as **[499]** one and the same transaction. This case is therefore distinguishable from the unreported ruling relied on by the counsel for the appellants, and it is more in accordance with the case of *Baghelin* v. *Mathura Prasad* (1).

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(1) 4 A. 430.

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The pleas raised in the appeal therefore fail. As was the case in the other appeals between the same parties decided to-day, the amount decreed should be reduced by Rs. 7,099-4-0, which the plaintiffs included in their claim by reason of the judgment of the Subordinate Judge in the suit out of which First Appeal No. 254 of 1894 arose.

The result is that we vary the decree below by making a decree in favour of the plaintiffs under s. 88 of Act No. IV of 1882, for the sale of the mortgaged property in the event of the defendants failing to pay to the plaintiffs or into Court on or before the 3rd of November, 1897, Rs. 64,771-2-0, together with interest at the rate of twelve annas and a half per cent. per mensem on Rs. 30,000, the principal amount of the mortgage, from the 30th of May, 1895, to the 3rd of November, 1897, aforesaid, or to the date of payment, if sooner made, together also with the plaintiff's costs in the Court below, proportionate to the principal and interest now decreed, less Rs. 41-6-0 allowed to the defendants as their costs in that Court, and together also with the plaintiffs' costs of this appeal.

Decree modified.

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19 A. 499 = 17 A.W N. (1897) 127.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MANGLI PRASAD (*Plaintiff*) *v.* DEBI DIN (*Defendant*).*

[21st May, 1897.]

Execution of decree—Limitation—Suit for possession of property purchased at auction sale in execution of a decree—Effect of formal possession in saving limitation—Civil Procedure Code, ss. 318, 319.

Where possession of property purchased at auction sale in execution of a decree is formally given by the Court under s. 318 or s. 319 of the Code of Civil Procedure, although the actual possession may remain with the **[500]** judgment-debtor, the date of the granting of such formal possession forms as against the judgment-debtor a fresh starting point for limitation in respect of a suit for possession of the property sold brought by the auction purchaser or his representative. *Juggobunahu Mukerjee* v. *Ram Chunder Bysack* (1) and *Joggobundhu Mitter* v. *Purnanund Gossami* (2) referred to.

[Appr., 28 A. 722 = 3 A.L.J. 504 = A.W.N. (1906) 213; **R.**, 16 C.P.L.R. 107; 8 Ind. Cas. 236 (238) = 70 P.L.R. 1910 = 58 P.W.R. 1911; 10 Ind. Cas. 319 (320); **D.**, 21 A. 269.**]**

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

BANERJI, J.—The only question which arises in this appeal is that of limitation. The plaintiff brought his suit for possession of a share of zamindari. That share originally belonged to the defendant, and was sold by auction as his property in execution of a decree on the 21st of

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* Second Appeal No. 350 of 1896, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farukhabad, dated the 26th February 1896, reversing a decree of Munshi Bakhtawar Lal, Munsif of Fatehgarh, dated the 22nd June, 1895.

(1) 5 C. 584.

(2) 16 C. 530.

August, 1880. It was purchased by one Ganesh Rai, whose successor in title is the plaintiff. It was alleged by the plaintiff that he obtained formal possession through the Court on the 14th of July, 1884; that he remained in possession for two years, and that subsequently he was dispossessed by the defendant. It was on this allegation that he brought the present suit on the 29th of May, 1895. The Court of first instance found that, although Ganesh Rai had obtained formal possession through the Court, he had never obtained actual possession of the property, and that ever since the auction sale the property has remained in the possession of the defendant. That Court, however, gave the plaintiff a decree, being of opinion that the delivery of formal possession on the 14th of July, 1884, gave to the plaintiff a fresh start for the computation of limitation, and as the suit had been brought within twelve years from that date it was within time. The lower appellate Court has concurred with the Munsif in holding that the plaintiff never obtained actual possession. It, however, seems to have been of opinion that the fact of the delivery of formal possession through the Court was immaterial for the purposes of limitation, and it held that as the defendant had been in possession since the date of the auction sale and the period of his possession had exceeded twelve years, the plaintiff's claim was **[501]** barred by limitation. That Court accordingly dismissed the suit. It is against the decree of the lower appellate Court that the plaintiff has preferred this appeal, and it is contended on his behalf that limitation should be computed from the date on which formal possession was delivered to Ganesh Rai.

In my opinion this contention must prevail. If possession was delivered to the auction purchaser through the Court in the manner required by s. 318 or 319 of the Code of Civil Procedure, that delivery of possession gave to the auction purchaser, as against the judgment-debtor whose rights were purchased by him, a conclusive title, and must, as observed by the Calcutta High Court in the case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), be deemed to be equivalent to actual possession. On the date of delivery of possession, the auction purchaser must be held to have obtained actual possession as against the judgment-debtor, and it is only during the period following that date that the possession of the judgment-debtor, if he continued in possession, could be regarded as adverse. This view is supported by the Full Bench ruling of the Calcutta High Court in the case of *Joggobundhu Mitter* v. *Purnanund Gossami* (2), in which it was held that limitation should be computed in a suit for possession against the judgment-debtor from the date of delivery of formal possession. No ruling has been cited on behalf of the respondent to support the contrary view, except the ruling in *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (3), which was overruled by the subsequent Full Bench ruling to which I have referred. The decisions of the Bombay High Court in *Lakshman* v. *Moru* (4), *Harjivan* v. *Shivram* (5), and *Namdev* v. *Ramchandra Gomaji Marwadi* (6), relied upon by the learned vakil for the respondent have no bearing upon the present question, as the person in possession in those cases was not the judgment-debtor, but a third party who was unaffected by the proceedings relating to delivery of possession. I am of opinion that the lower Court has erred in

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(1) 5 C. 584.
(2) 16 C. 530.
(3) 10 C. 402.
(4) 16 B. 722.
(5) 19 B. 620.
(6) 18 B. 37.

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19 A. 499=17 A.W.N. (1897) 127.

[502] holding that limitation should be computed from the date of the auction purchase by Ganesh Rai, the plaintiff's predecessor in title. As I have said above, if possession was delivered to the auction purchaser in the mode prescribed by s. 318 or 319 of the Code of Civil Procedure, the date of such possession would give to the plaintiff a fresh start for the computation of limitation. In this case s. 319 was the section applicable. The learned Subordinate Judge has not clearly found whether possession was delivered in accordance with the provisions of that section. I therefore refer to him the following issue under s. 566 of the Code of Civil Procedure for a clear finding :—" Was possession delivered to Ganesh Rai in the manner prescribed by s. 319 of the Code of Civil Procedure, and if so, on what date ?" The Court below will receive such evidence as may be tendered on the above question, and on the receipt of its finding ten days will be allowed for filing objections.

Issue referred.

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19 A. 502=17 A.W.N. (1897) 134.

MISCELLANEOUS CRIMINAL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

QUEEN-EMPRESS *v.* SHAKIR ALI AND OTHERS.*

[28th May, 1897.]

Procedure—Criminal Procedure Code, s. 211—Witnesses—Right of accused to have witnesses summoned in his defence when he has refused to give in a list in the Magistrate's Court.

If an accused person, on being called upon under s. 211 of the Code of Criminal Procedure to give orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial, declines to give in such list, he cannot compel the Magistrate after committal to issue any summonses for witnesses on his behalf. Neither under such circumstances will the Sessions Judge be obliged to issue summonses for the attendance of such witnesses unless he is satisfied that their evidence may be material. *Queen-Empress* v. *Har Gobind Singh* (1) referred to.

THE facts of this case sufficiently appear from the order of the Court.

[503] Mr. *A. H. C. Hamilton*, for the applicant.

ORDER.

EDGE, C. J. and BLAIR, J.—This is an application to transfer a case pending in a Court of Session to another Court of Session on the ground that the Sessions Judge declined to summon certain witnesses for the accused. It appears that these applicants were asked in the Magistrate's Court if they had any witnesses to call. They stated that they reserved their case for the Court of Session and would not file any list of witnesses. Later on, and after commitment, they applied to the Magistrate to summon certain witnesses for the defence. The Magistrate declined on the ground that he was not bound to do so under the Code of Criminal Procedure. Application was then made to the Sessions Judge to have these witnesses summoned. He also declined. It has been contended that this Court, in the case of *Queen-Empress* v. *Har Gobind Singh* (1), decided that where an accused person has declined to file a list of witnesses during the inquiry before the Magistrate he is entitled after

* Criminal Miscellaneous No. 34 of 1897.

(1) 14 A. 242.

committal to have the Magistrate summon any witnesses he may name, and, if an application to be made to the Judge before trial, at the trial he is equally entitled to have any witness whom he names summoned. This Court decided nothing of the kind in *Queen-Empress* v. *Har Gobind Singh* (1). The Court was dealing there with what had actually taken place. We were referring to certain comments made on the procedure of the Magistrate. It appears to us that if an accused person, on being called upon under s. 211 of the Code of Criminal Procedure to give orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial, declines to give in such list, he cannot compel the Magistrate after committal to issue any summonses for witnesses on his behalf. He is of course entitled to call any witnesses in the Court of Session whom he may have in Court, whether or not he has caused such witnesses to be summoned. The Sessions Judge may in his discretion cause any witness to be summoned for the accused on an application made during the trial, and he is bound to procure the attendance **[504]** of such witnesses, if he considers that their evidence may be material. It may be dangerous in some districts for the accused to run the risk of having his witnesses tampered with. It may thus be wise in some cases for the accused to decline to give a list to the Magistrate, and to reserve his evidence for the Court of Session. In order to entitle him to have his witnesses summoned, he must satisfy the Judge of the probability that such witnesses would be material. We have no doubt in the present case that if these accused do give to the Sessions Judge any reasons for concluding that the witnesses whom they ask to have summoned can give material evidence, the Sessions Judge will take the necessary steps to procure their attendance. We decline to interfere further in this case. The Sessions Judge will act on this application if any case is made out before him, showing that it is a reasonable application and not merely one for delay.

We dismiss this application.

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MISCELLANEOUS CRIMINAL.

19 A. 502=17 A.W.N. (1897) 134.

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19 A. 504=17 A.W.N. (1897) 135.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

YASIN KHAN AND OTHERS (*Defendants*) *v.* MUHAMMAD YAR KHAN (*Plaintiff*).* [31st May, 1897.]

Muhammadan Law—Dower—Suit by heirs of Muhammadan widow for her dower—Alienation of property of the deceased husband by his heirs pendente lite.

While a suit for the dower debt due to a Muhammadan widow was pending on behalf of her heirs, the heirs of her deceased husband mortgaged certain property which had been of the deceased in his life-time. The heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. *Held* that this decree took priority over the mortgagee's decree and a sale held in execution thereof. *Bazayet Hossein* v. *Dooli Chand* (2) referred to.

[F., 29 M. 508=16 M.L.J. 413 ; Disappr., 52 P.L.R. 1909=45 P.W.R. 1908 ; D., 26 A. 28=23 A.W.N. 184.]

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* Second Appeal No. 82 of 1895 from a decree of J. E. Gill, Esq., District Judge of Mainpuri, dated the 25th September 1894, confirming a decree of Babu Gokul Prasad, Munsif of Shikohabad, dated the 10th March 1893.

(1) 14 A. 242.

(2) 4 C. 402.

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MAY 31.

APPELLATE CIVIL.

19 A. 504 = 17 A.W.N. (1897) 135.

THE facts of this case are as follows :—

The defendants, as representatives of one Musammat Nurbi, the widow of Wazir Khan, on the 4th of December, 1890, brought [505] a suit against Munir Khan, the son and representative of Wazir Khan, to recover a certain amount as Nurbi's dower, and obtained a decree on the 31st January, 1891. Before this decree was passed, Munir Khan, on the 3rd January, 1891, hypothecated two houses and certain other property by a bond to the plaintiff, who, having put that bond in suit, obtained a decree enforcing hypothecation on the 27th of July, 1891, and at an auction sale held in execution of his decree purchased 31 out of 48 sihams in the two houses on the 27th of November, 1891. On the 14th of February, 1892, the plaintiff obtained possession of the share he had purchased. Subsequently the defendants brought to sale, in execution of their decree of the 31st of January, 1891, 28 sihams out of 43 in the said two houses, and themselves became the purchasers on the 27th of June, 1892, and obtained possession on the 9th of September, 1892. The plaintiff had taken an objection to the attachment and sale of this share in the execution department, but his objection was disallowed. Subsequently he brought the present suit to recover possession of 28 out of 48 sihams in the houses in suit by invalidating the order of the 27th of June, 1892, and setting aside the sale of the 27th of June, 1892, on the ground that his decree and purchase had priority over the defendants' decree and purchase.

The suit was decreed in the first Court, and the defendants' appeal was dismissed in the Court of first appeal. The defendants thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Satish Chandar Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—A suit for dower was brought by the heir of a Muhammadan widow. While that suit was pending, the heirs of the deceased husband of the widow mortgaged the property which had belonged to the deceased husband in his life-time. The heirs of the widow got a decree which could only be executed against the assets of the husband which the heirs of the husband had in their possession. The case is governed by the principle laid down by their Lordships of the Privy Council in [506] *Bazayet Hossein* v. *Dooli Chund* (1). Applying that principle, we allow this appeal, and set aside the decree of the Court below and the decree of the first Court, and dismiss the suit with costs in all Courts.

Appeal decreed.

(1) 4 C. 402.

19 A. 506 (F.B.)=17 A.W.N. (1897) 142.

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FULL BENCH.

19 A. 506 (F.B.)= 17 A.W.N. (1897) 142.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox Mr. Justice Blair, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. PANDEH BHAT.* [1st June, 1897.]

Criminal Procedure Code ss. 367, 424—*Judgment of Appellate Court—What such judgment must contain.*

A Magistrate having special powers under s. 34 of the Code of Criminal Procedure convicted one P.B. under ss. 471 and 476 of the Indian Penal Code and sentenced him to four years' rigorous imprisonment. P.B. appealed to the Sessions Judge, and on that appeal the Sessions Judge recorded the following judgment :—"I have perused the record and see no cause for interference with the finding of the District Magistrate. As regards the sentence, it is not excessive, but, having regard to the great age of the appellant, I will reduce it to three years' rigorous imprisonment with three months' solitary confinement."

Held that this judgment was in compliance with the provisions of s 367 of the Code of Criminal Procedure, read with s. 424 of the same Code.

[**Appr.**, 10 Cr. L.J. 268 (269)=12 M.C.C R 211 ; **D.**, 13 Cr.L.J. 559 (561)=15 Ind. Cas. 975=8 N.L.R 84.]

THE facts of this case sufficiently appear from the judgment of the Court.

The Public Prosecutor (Mr. *E. Chamier*) for the Crown.

The judgment of the Court (EDGE, C.J., KNOX, BLAIR and BURKITT, JJ.) was delivered by—

JUDGMENT.

EDGE, C.J.—Pandeh Bhat was convicted by a Magistrate of the offences punishable under ss. 471 and 476 of the Indian Penal Code. The Magistrate was a Magistrate having special powers under s. 34 of the Code of Criminal Procedure. He sentenced Pandeh Bhat to four years' rigorous imprisonment in all. Pandeh Bhat appealed to the Sessions Judge of Kumaun. The Sessions Judge dismissed his appeal in the following **[507]** judgment :—"I have perused the record and see no cause for interference with the finding of the District Magistrate. As regards the sentence, it is not excessive, but, having regard to the great age of the appellant, I will reduce it to three years' rigorous imprisonment with three months' solitary confinement." Pandeh Bhat has applied in revision to this Court. The only ground in revision which we need consider, and indeed which is open to him in revision, is that the judgment of the Sessions Judge does not comply with the requirements of s. 367 of the Code of Criminal Procedure. By s. 424 of that Code s. 367 is made applicable, so far as may be practicable, to the judgment of any appellate Court other than a High Court.

Our attention has been drawn by the Public Prosecutor to the decisions in *Kamruddin Dai* v. *Sonatun Mandal* (1). *In the matter of the petition of Ram Das Maghi* (2), *Farkan* v. *Sómsher Mahomed* (3), *Girish Myte* v. *Queen-Empress* (4), *Queen-Empress* v. *Ram Narain* (5), *Queen-Empress* v. *Bhujpal* (6), *Queen-Empress* v. *Sameshar* (7), and *Queen-Empress* v. *Nannhu* (8).

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* Criminal Revision No. 208 of 1896.

(1) 11 C. 449. (2) 13 C. 110. (3) 22 C. 241.
(4) 23 C. 420. (5) 6 A.W.N. (1886) 177. (6) 6 A.W.N. (1886) 289.
(7) 8 A. W. N. (1888) 280. (8) 17 A. 241.

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FULL BENCH.

19 A. 506 (F.B.) = 17 A.W.N. (1897) 142.

It is difficult to lay down any rule with precision as to what judgment of an appellate Court complies and what judgment does not comply with the requirements of the Code of Criminal Procedure. The object, no doubt, of the Legislature in formulating rules as to judgments was partly to insure that a Criminal Court should consider the case before it in its different bearings and should on such consideration arrive at definite conclusions, and also one object may have been that the judgment should show that in fact the Criminal Court had considered the evidence in a case of first instance or in a case of appeal, and had found in case of a conviction that the facts proved to the satisfaction of the Court brought an offence home to the accused person whom the Court convicted.

[508] Now, to take the case of a criminal appeal, in those cases in which an appeal is summarily rejected under s. 421 of the Code, this Court has expressed its opinion as to what the judgment should be in the case of *Queen-Empress* v. *Nannhu* (1). We are not dealing here with the case of a judgment of a Court of first instance. We are not dealing with a case in which as a matter of fact the pleader for the appellant in the Court of Session had been heard fully. In our opinion if the Sessions Judge had simply said in his judgment :—"I dismiss this appeal"—that would not have been a judgment: that would have been, so to speak, merely the order which resulted from the conclusions at which the Judge had arrived. A judgment must contain something more than that. It must contain something to justify the order dealing with the appeal. One way to arrive at a conclusion as to what the Legislature contemplated when enacting ss. 367 and 424 of the Code is to take a case, for example, which might occur and which in the experience of some of us has occurred before now. A Magistrate has written a judgment in a criminal case which has resulted in a conviction and a sentence. That judgment shows that the Magistrate had before his mind what were the ingredients in law of the offence of which he convicted the accused. It shows that he had considered the evidence; that he had come to definite conclusions on that evidence; that he had given reasons for those conclusions, and that acting on those conclusions he had found the man before him guilty of a particular offence. The case comes in appeal before a Court of Session. The Sessions Judge after a most careful consideration agrees with every word which the Magistrate has written and can add nothing to what appears in the Magistrate's judgment. What is he to do? Is he to sit down and copy out the Magistrate's judgment, making the necessary alterations to show that it is a judgment in appeal, and not a judgment in first instance, and having done so is he to deliver it as his judgment and sign it? Such a process might appear rather ludicrous, or, to throw the **[509]** only variety which the Sessions Judge is capable of throwing into the case, agreeing with everything the Magistrate has written and having nothing material to add, is the Sessions Judge to sit down and paraphrase the judgment of the Magistrate in order to produce a semblance of variety? It appears to us that the most reasonable course for the Sessions Judge to take, and one which the Legislature would probably have considered sufficient, and which it has not forbidden, would be for the Sessions Judge in such a case to write such a judgment as the following:—"I have considered the evidence in this case, and I agree with the Magistrate in his conclusions and in the reasons given for them, and in my

(1) 17 A. 241.

opinion the sentence which he passed was a proper sentence." It appears to us that such a judgment would be in compliance with the law and not in violation of the law. One must trust to the honour of Sessions Judges, and trust that they would not make such statements in their judgments unless they were true, in the same way as one must trust to the honour of a Sessions Judge and believe that he would not dismiss a criminal appeal unless he were satisfied that the appellant had been properly convicted of the offence and properly sentenced.

Although we say this, we know that Sessions Judges in these Provinces do, and will, in criminal appeals which raise complicated questions of fact or law write full judgments dealing with the questions of fact or law. Such judgments are very useful in case of applications being made to this Court in revision. In the present case there was absolutely no necessity from any point of view for writing one word more than what has been written by the Sessions Judge. The case against the appellant was a perfectly clear one; there could be no two different conclusions arrived at; and if the Sessions Judge had sat down and written a longer judgment dealing with the evidence and the facts, we doubt if he could have improved on the judgment of the Magistrate, in fact he would probably have taken it as his model.

We dismiss this application in revision.

1897 JUNE 1. FULL BENCH. 19 A. 505 (F.B.) = 17 A.W.N. (1897) 142.

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19 A. 510 = 17 A.W N. (1897) 135.

[510] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

THE MAHARAJA OF BHARTPUR (*Plaintiff*) *v.* KACHERU AND OTHERS (*Defendants*).* [1st June, 1897.]

Civil Procedure Code, ss. 37, 432—Suit brought by an independent prince—Signature and verification of plaint—Recognised agent—Procedure.

Section 432 of the Code of Civil Procedure was not intended to limit the scope of s. 37 of the Code, and does not prevent the institution of a suit by an independent prince in his own name and through a recognised agent other than one appointed under s. 432. *Beer Chunder Manikya* v. *Ishan Chunder Burdhun* (1), followed.

[R., 41 P.R. 1902 = 54 P.L.R. 1902.]

THIS was a suit brought on behalf of the Maharaja of Bhartpur in the Court of an Assistant Collector of Muttra for the recovery of arrears of rent for 1298 and 1299 Fasli. In the first court the suit was tried on its merits and a decree given for the plaintiff. The defendants appealed to the District Judge, and in his Court the plea was taken that the plaint and verification were not properly signed. The plaint was signed, and attested by one Syed Muhammad, who held a power of attorney from the Maharaja of Bhartpur authorizing him to act on behalf of the Maharaja in suits filed on behalf of or against him; and the contention was that the provisions of s. 37 of the Code of Civil Procedure were, in the case of independent princes, limited by s. 432 of the Code, and that a person

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* Second Appeal, No. 66 of 1895, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 28th November 1894, reversing a decree of Muhammad Ibrar Hasan Khan, first class Assistant Collector of Muttra, dated the 23rd December 1892.

(1) 10 C. 136.

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19 A. 510=
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(1897) 135.

appearing in a Court in British India on behalf of an independent prince must be specially appointed by Government at the request of such prince or at the request of a person recognised by the British Government as a suitable agent and representative of such prince. The lower appellate Court accepted this contention, and, decreeing the appeal, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

[511] Pandit *Sundar Lal* and Lala *Sheo Charan Lal*, for the appellant.

Mr. *D. N. Banerji* and Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought on behalf of the Maharaja of Bhartpur in the Court of an Assistant Collector, for the recovery of arrears of rent payable under a lease. The plaint was signed and verified by one Syed Muhammad, who holds a general power of attorney from the Maharaja, authorizing him to act on behalf of the Maharaja in suits filed on behalf of or against him. The suit was defended in the Court of first instance on the merits, and no objection was taken on the ground that the plaint did not comply with the requirements of law in the matter of presentation, signature, and verification. That Court granted a decree to the plaintiff. The defendants appealed, and for the first time it was urged on their behalf that, the plaintiff not having signed the plaint or the verification under it, the suit ought to have been dismissed in the form in which it had been brought. The learned Judge of the lower appellate Court has allowed this plea, and dismissed the suit. He has relied for his conclusions on the provisions of s. 432 of the Code of Civil Procedure, and he was of opinion that that section provided a limitation to the general provisions of s. 37 of the Code. The correctness of this opinion has been questioned in this appeal. The point is not free from difficulty. The plaint is in compliance with the provisions of s. 107 of Act No. XII of 1881, but, as that Act is silent as to the rights of ruling chiefs to institute suits in British Courts, or as to their privileges as regards suits brought against them in such Courts, the general provisions of the Code of Civil Procedure would, according to the ruling of the Full Bench in *Madho Prakash Singh* v. *Murli Manohar* (1), govern the suit brought in the Court of Revenue. We have therefore to consider what is the effect of s. 432 of the Code upon the question now before us. It must be admitted that the language of that section is not as clear as it might have [512] been. The section, so far as it bears upon the present question, is as follows:—"Persons specially appointed by order of Government at the request of any Sovereign Prince or ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief." It is contended that, under this section, the only recognized agents by whom applications, acts and appearances may be made or done on behalf of a Sovereign Prince or ruling Chief are the persons referred to in the section, that is, the persons specially appointed by the order

(1) 5 A. 406.

of Government at the request of the Sovereign Prince or ruling Chief, or of any person competent to act on behalf of such Sovereign Prince or ruling Chief, to prosecute or defend any suit on his behalf, and that this section limits the scope of s. 37 of the Code of Civil Procedure. This contention would have been a valid contention had the section run thus:—"No persons other than persons specially appointed shall be deemed to be the recognised agents." That would have made the meaning of the Legislature perfectly clear. On the other hand, had the article "the" before the words "recognised agents" been omitted, we should have had no difficulty in accepting the contention of the learned Counsel for the appellant. As we are unable to conceive of any reason why the Legislature should have limited the rights of ruling Chiefs and Sovereign Princes with regard to the appointment of recognised agents which they had under s. 37, it seems to us that the object of s. 432 was to add, in the case of Sovereign Princes and ruling Chiefs, another class of recognised agents to those specified in s. 37. The provisions of s. 464 show that where the Legislature intended that Sovereign Princes or ruling Chiefs should be excepted from the operation of the general provisions of the Code, special provision was made in it [513] for that purpose. Had it been the intention of the Legislature to limit the scope of s. 37 by the provisions contained in s. 432, we should have expected similar provisions in the Code indicating that intention. It was held by the Calcutta High Court in *Beer Chunder Manikya* v. *Ishan Chunder Burdhun* (1) that s. 432 does not prevent the institution of a suit by an independent Prince in his own name and through a recognised agent other than one appointed under that section. The section was amended after that ruling was passed. If the law as laid down in the ruling was different from that which the Legislature contemplated by s. 432, the section would in all probability have been amended in such a way as to make the meaning of the Legislature clear. Although, as we have said, the question is one not free from difficulty, we see no reason to put on s. 432 an interpretation different from that placed on it by the Calcutta High Court. In our opinion the learned Judge below was wrong in holding that the plaint had not been properly signed and verified, and in dismissing the claim on that ground. We set aside the decree of the lower appellate Court and remand the case under s. 562 of the Code of Civil Procedure to that Court with directions to readmit it under its original number in the register and dispose of it according to law. The appellant will get his costs of this appeal.

Appeal decreed and cause remanded.

(1) 10 C. 136.

1897
JUNE 2.

APPELLATE CIVIL.

19 A. 513 = 17 A.W.N. (1897) 136.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

FAUJI LAL (*Plaintiff*) *v.* CHANGA MAL (*Defendant*).*
[2nd June, 1897.]

19 A. 513 = 17 A.W.N. (1897) 136.

Act No. IX *of* 1887 (*Provincial Small Cause Courts Act*), *sch. ii, art.* 29 (*c*)—*Suit by a retired partner for the consideration due for his retirement—Jurisdiction—Small Cause Court.*

A suit by a retired partner for money alleged to have been agreed to be paid to him by the continuing partners in consideration of his retirement is not excluded from the jurisdiction of a Court of Small Causes.

[514] THIS was a suit to recover Rs. 200 with a certain amount of interest. The plaintiff alleged that he and the defendant were once partners in a pearl-selling venture to which he, the plaintiff, had contributed Rs. 200; that the defendant withdrew from the partnership promising to repay him the two hundred rupees with interest, but that he never did so. The plaint was originally presented to the Court of the Small Cause Court Judge of Agra, who, holding the suit to be a suit relating to a still continuing partnership, returned it to be presented to the proper Court. The plaintiff then took his plaint to the Court of the Munsif, who entertained the suit and ultimately gave the plaintiff a decree. The defendant appealed; and the lower appellate Court (Subordinate Judge of Agra) decreed the appeal and dismissed the suit, on the ground that it was a suit triable only by a Court of Small Causes, and returned the plaint for presentation to such Court. The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—The appellant in this second appeal is the plaintiff. He took a plaint to the Court of Small Causes at Agra, and the Judge of that Court refused to entertain it, holding that the matter was not one within his jurisdiction. The plaintiff then went to the Court of the Munsif, who gave him a decree, holding that the case was one within his jurisdiction as Munsif. The Subordinate Judge in appeal has set aside that decree, being of opinion that the suit was one which fell distinctly within the jurisdiction of a Small Cause Court, and has returned the plaint to be presented to that Court. It is now contended by the plaintiff in appeal that the suit is one which is not cognizable by the Court of Small Causes and that the decision of the Subordinate Judge to that effect was wrong. We have examined the plaint. The suit as laid is a suit by a person who was once a member of a partnership, from which partnership, he says, he retired under an agreement that the surviving partners would thereafter pay him a certain sum for his interest in the business. That sum was never paid, and he now **[515]** sues to recover it. It was sought by the learned advocate for the appellant to bring the case within clause 29 (*c*) of the second schedule attached to Act No. IX of 1887. But this is not a suit for the balance of a partnership account,

* Second Appeal, No. 152 of 1895, from a decree of Maulvi Aziz-ul Rahman, Subordinate Judge of Agra, dated the 17th November 1894, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 30th June 1894.

as the partnership, so far as the plaintiff is concerned, does not exist. Clause 29 (*c*) contemplates a suit to ascertain the profits and loss of a business and to have a balance of a partnership account struck, and was never intended to extend to the recovery of a mere debt due to a retired partner from the firm.

The appeal fails and is dismissed, but without costs.

Appeal dismissed.

1897 JUNE 2. APPELLATE CIVIL.

19 A. 513=17 A.W.N. (1897) 136.

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19 A. 515=17 A W.N. (1897) 139.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GHAZI (*Defendant*) *v.* SUKRU (*Plaintiff*).* [5th June, 1897.]

Hindu Law—Marriage—Consent of the father of the girl not always necessary to the validity of a marriage.

Under the Hindu law if a girl is given in marriage by her mother and all the necessary rites are duly performed and there is no question of force or fraud and no other legal impediment to the marriage, the marriage will not be invalid merely because the consent of the girl's father has not been obtained. *Baee Rulyat* v. *Jey Chund Kewul* (1) and *Venkatacharyulu* v. *Rangacharyulu* (2) referred to.

[**Appr.**, 15 C.P.L.R. 46; **R.**, 11 A.L.J. 272 (275)=18 Ind. Cas. 927.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.
Pandit *Moti Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit brought by the respondent against the appellant, his father-in-law, in which he prayed that his wife, the daughter of the defendant, be allowed to live with him, and that her father be restrained from offering obstruction to her doing so. The plaintiff was married to defendant's daughter on the 14th of May 1894. The marriage was celebrated without the consent of the defendant by the girl's mother, whom the defendant had ceased to support for a number [516] of years. It has been found that the girl had attained marriageable age, and that by reason of the father not supporting his wife and daughter, the mother and mother's brother, with whom they had been living, secretly married the girl to the plaintiff. It has been found that the usual rites of marriage were gone through, and that the relationship between the plaintiff and the girl was not such as to render the marriage illegal under Hindu Law. The question which was raised in the lower Courts was whether the marriage under such circumstances was valid according to Hindu Law. The Subordinate Judge, on the authority of the rulings cited by him in his judgment, held that it was a valid marriage and granted to the plaintiff the relief prayed for. Against this decree the defendant has preferred the present appeal, and it has

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* Second Appeal, No. 386 of 1895, from a decree of Babu Brij Pal Das, Subordinate Judge of Allahabad, dated the 7th March 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 10th September 1894.

(1) 1 Morley's Digest, 181. (2) 14 M. 316.

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been contended that the marriage of the plaintiff with the defendant's daughter without the defendant's consent was not a valid marriage. We are unable to accept this contention. A uniform course of rulings, dating back to 1843 (see *Baee Rulyat and others* v. *Jey Chund Kewul*, 1 Morley's Digest, 181) has laid down that the want of a guardian's consent would not invalidate a marriage actually and properly celebrated. The authorities on the subject are all collected and carefully reviewed in the learned judgment of Muttusami Ayyar and Shephard, JJ., in *Venkatacharyulu* v. *Rangacharyulu* (1). and it seems to us unnecessary to refer to them in detail. In that case, upon the authorities referred to, it was held by the learned Judges that where there is a gift in marriage by the legal guardian and the marriage rites were duly solemnized, the marriage is irrevocable. The mother is a legal guardian of the daughter, though the father is a preferential guardian. If the girl was given away in marriage by her mother and all the necessary rites were duly performed that would make the marriage a valid marriage, and in the absence of force or fraud such marriage would not be regarded as void by reason of the father of the girl not consenting to it. Mr. *Madho Prasad* on behalf of the appellant concedes that mere absence of the father's consent would [517] not render the marriage void unless there was force or fraud. In this case it is admitted that there was no force, and we are unable to see how it can be urged that the marriage was celebrated by fraud. As we have said above, the learned Subordinate Judge has found that the father of the girl behaved badly towards his wife and daughter and treated them, in a most unnatural manner, that for years he had deserted them, and that in consequence of his conduct they were living with the brother of the mother of the girl who supported and maintained both. The girl had attained a marriageable age, and the defendant, her father, had taken no steps to get her married. It was under such circumstances that the mother and her brother arranged with the plaintiff for the marriage of the girl with the plaintiff, took her to his house and there celebrated the marriage. We cannot hold under these circumstances that any fraud was committed. This appeal fails and is dismissed with costs.

Appeal decreed.

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19 A. 517 = 17 A.W.N. (1897) 143.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

IMAM KHAN (*Plaintiff*), *v.* AYUB KHAN AND OTHERS (*Defendants*).* [3rd June, 1897.]

Civil Procedure Code, s. 13, *Expl. II*—Res judicata—*Matter which might have been made ground of attack in a former suit.*

Where a plaintiff sued for possession of immoveable property as owner, having no title as owner, but a possible title as mortgagee, it was *held* that he could not in a subsequent suit between the same parties for possession of the same property claim as mortgagee, inasmuch as his title as mortgagee might have formed an alternative ground of attack in the former suit. *Amolak Ram* v. *Champa*

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* Second Appeal, No. 213 of 1895, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 14th November 1894, confirming a decree of Maharaj Singh Mathur, Munsif of Haveli, Aligarh, dated the 12th December 1893.

(1) 14 M. 316.

Lal (1), *Mathura Prasad* v. *Sambhar Singh* (2), *Hasan Ali* v. *Siraji Husain* (3) *Atchayya* v. *Bangarayya* (4), and *Kameswar Pershad* v. *Rajkumari Ruttun Koer* (5) referred to.

[Diss., 2 O.C. 139; 12 O.C. 347 (375)=4 Ind. Cas. 763 (775); 55 P.R. 1907=65 P.L.R. 1908=96 P.W.R. 1907; F., 20 A. 516; R., 4 P.R. 1903.]

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19 A. 517=17 A.W.N. (1897) 143.

THE facts of this case are fully stated in the judgment of the Court.

[518] Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Raoof*, for the respondents.

JUDGMENT.

KNOX and BURKITT, JJ.—The suit is concerned with two houses, which for brevity's sake we will call the North and South house. The North house belonged to one Muhammad Raza Khan, the South house to his wife, Hamid-un-nissa. Hamid-un-nissa died in 1875. Her husband, Muhammad Raza Khan, died in 1879, having in 1877 mortgaged both the houses with possession to one Sultan Khan. In 1885 the representatives of Musammat Hamid-un-nissa instituted a suit against the mortgagee Sultan Khan and against the representatives of Muhammad Raza Khan for their shares in the South house, and they got a decree in March, 1886, for 552 out of 624 sihams. On an application for review by the mortgagee a compromise was arrived at between the mortgagee Sultan Khan and the representatives of Hamid-un-nissa, by which the latter were to have possession of both the houses on paying Rs. 65 to the mortgagee. The compromise apparently was made a rule of Court, the money was deposited in January 1886, and possession was given to the representatives of Hamid-un-nissa in 1890. Now the present suit has been instituted by Iman Khan, father of Musammat Hamid-un-nissa. He has impleaded the representatives of Muhammad Raza Khan, and has asked for possession of both houses on the ground that he has been illegally ejected by the representatives of Muhammad Raza. The prayer of his suit is for possession of both houses as mortgagee or in the alternative for recovery of Rs. 93, the mortgage-money. A decree has been passed in favour of the plaintiff for the South house. This appeal has reference to the North house only. The main defence set up by the representatives of Muhammad Raza is that the plaintiff's suit is barred under the second explanation to s. 13 of the Code of Civil Procedure. They alleged that the claim now made might and ought to have been made in the former litigation between the parties. The facts of the former litigation are these:—In June 1890 the representatives of [519] Hamid-un-nissa sued the representatives of Muhammad Raza Khan for possession as absolute owners of the house. No hint of any other title being vested in the plaintiff was then made. The suit was dismissed in appeal in December 1891, the plaintiff having failed prove the absolute title set up. On these facts it is now contended that this suit is barred under s. 13 of the Code of Civil Procedure. In our opinion this contention is correct. Following the case of *Amolak Ram* v. *Champa Lal* (1), the case of *Mathura Prasad* v. *Sambhar Singh* (2), the case of *Hasan Ali* v. *Siraji Husain* (3) and the case of *Atchayya* v. *Bangarayya* (4), we are of opinion that the claim in the alternative to hold as mortgagee not merely might, but ought to, have been added to the prayer in the former suit as a matter of attack on the defendant. On this question the judgment of their Lordships of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttun Koer* (5) is instructive, and,

(1) 11 A.W.N. (1891) 132.
(2) 12 A.W.N. (1892) 224.
(3) 16 A. 252.
(4) 16 M. 117.
(5) 19 I.A. 234.

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adopting the rule therein laid down, we cannot say that a claim to possession under an absolute title and a claim to possession under a mortgage title are so dissimilar as to cause confusion. On a consideration of these authorities we have no hesitation in holding that the alternative claim to possession as mortgagee ought to have been made a matter of attack in the former suit, and as such was not done, this suit, as far as the North house is concerned, is in our opinion barred by the principle of *res judicata* laid down in explanation II, s. 13 of the Code of Civil Procedure. We therefore dismiss the appeal with costs.

Appeal dismissed.

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19 A. 520=17 A.W.N. (1897) 137.

[520] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAHABIR PRASAD (*Decree-holder*) *v.* SITAL SINGH AND OTHERS (*Judgment-debtors*).* [5th June, 1897.]

Act No. IV *of* 1882 *(Transfer of Property Act), ss.* 88 *and* 89—*Order absolute for sale—Execution of decree—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), sch. II, art.* 179.

The period of limitation for execution of a decree for sale under s. 88 of the Transfer of Property Act begins to run from the date of the granting of an order absolute for sale under s 89 of the Act, without which order the decree cannot be executed, and not from the date of the decree itself. *Oudh Behari Lal* v. *Nageshar Lal* (1) and *Mulchand* v. *Mukta Pal Singh* (2) referred to.

[R., 27 A. 501=2 A.L.J. 180=A.W.N. (1905) 70.]

THE facts of the case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of proceedings relating to the execution of a decree. The appellant, decree-holder, obtained on the 17th of December, 1886, from the Court of first instance a decree for sale on a mortgage, which was affirmed in appeal on the 10th of August 1887. The decree was one under s. 88 of Act No. IV of 1882. On the 15th of July 1890, the decree-holder applied for an order absolute for sale under s. 89 of that Act, and on the 20th September, 1890, the order asked for was made. He then applied for sale in execution of his decree on the 12th September, 1893. The lower appellate Court has held that this application was beyond time, having been made after the expiry of three years from the date of the application for an order under s. 89 and that execution is therefore barred. In my opinion the Court below was wrong. A decree-holder who obtains a decree under s. 88 of the Transfer of Property Act is not entitled to apply for the sale of the mortgaged property upon the passing of that decree. His right to obtain execution by sale of [521] the mortgaged property only accrues to him, and the decree made

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* Second Appeal, No. 383 of 1895, from an order of V.A Smith, Esq., District Judge of Gorakhpur, dated the 5th June 1894, reversing an order of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated 3rd March 1894.

(1) 13 A. 278.

(2) 16 A.W.N. (1896) 100.

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under s. 88 becomes capable of execution, on his obtaining an order absolute for sale under s. 89. Until that order has been passed, the mortgagor's right to redeem does not become extinct, and it is only when the right of redemption of the mortgagor is gone that the mortgagee can cause the mortgaged property to be sold by applying for execution of the decree passed under s. 88. His right to execute that decree thus depends upon the passing of the order absolute for sale under s. 89, and, as I have said, since he could not apply for sale until that order was made, his application for execution would be within time if presented within three years of the date of the order under s. 89. In this case the application for execution was made before the expiry of three years from the date of the order under s. 89. It may be that the application was an application to execute, not the order, but the decree itself; but the right to execute the decree did not accrue to the decree-holder, and the decree did not become capable of execution, until the order was obtained. In this view the application was not time-barred, and the Court below has erred in holding it to be so. It is true that in *Oudh Behari Lal* v. *Nageshar Lal* (1) it was held that an application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceeding in execution and may be made to the Court executing the decree, but that is not the question before us. The question which arises in this appeal is whether a decree-holder could apply for the execution of a decree obtained by him under s. 88 until he had obtained an order under s. 89. As, in my opinion, he could not do so, his application, if made within three years from the date of the order under s. 89, would be an application within time. I do not mean to imply that it is necessary for the decree-holder to make a separate application for an order under s. 89, though that would be a preferable course to pursue. The prayer for an order under that section and for the sale of the property may be contained in the same application, as [522] held in the case referred to above. I would allow the appeal, and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs here and in the lower appellate Court.

AIKMAN, J.—The question raised by this appeal was considered by me in *Mulchand* v. *Mukta Pal Singh* (2). For the reasons given in my judgment in that case I concur with my brother Banerji in thinking that this appeal should be allowed and in the order proposed by him.

Appeal decreed.

(1) 18 A. 278.

(2) 16 A.W.N. (1896) 100.

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19 A. 522 = 17 A.W.N. (1897) 139.

19 A. 522=17 A.W.N. (1897) 139.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

WAZIR SINGH (*Defendant*) *v.* THAKUR KISHORI RAWANJI THROUGH SHIB GOPAL AND ANOTHER (*Plaintiffs*).*

[7th June, 1897.]

Act No. XII *of* 1881 (*N.W P. Rent Act*), *s.* 185—*Civil Procedure Code, s.* 623—*Review of judgment—S.* 623 *of the Code of Civil Procedure not applicable to cases under the Rent Act.*

Section 623 and the following sections of the Code of Civil Procedure which deal with reviews of judgments have no application to suits and proceedings under the N.W.P. Rent Act, 1881.

Where s. 185 of Act No. XII of 1881 applies, it is only in cases where there is no right of appeal that a review can be granted, and that only on the special ground provided for in the Act itself.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellant.

The respondents were not represented.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit for profits by a co-sharer against the lambardar under cl. (*b*) of s. 93 of Act No. XII of 1881. The claim was to recover Rs. 104-12-6. On the 29th of May, 1893, the Court of first instance made a decree in favour of the plaintiffs for Rs. 15-12-5. The plaintiff did not appeal from that decree, although an appeal lay under s. 189 **[523]** of the Act. He, however, applied on the 2nd of July 1893, for a review of the judgment of the Court of first instance under s. 623 of the Code of Civil Procedure. That Court granted the application, modified its decree and made a decree in favour of the plaintiffs for Rs. 37-2-9. From this decree the defendant appealed to the District Judge, who affirmed the decree passed on the review. The defendant has preferred this second appeal; and he urges in this Court, as he did in the Court below, that s. 623 did not apply, and that the Court of first instance was not competent to review its judgment. In our opinion this plea must prevail. The provisions of the Code of Civil Procedure no doubt apply to proceedings under the Rent Act when the Act itself is silent; but we find that in the matter of review of judgment the Act contains special provisions. S. 185 prόvides that in a suit in which the judgment of the Collector of the District is final, he may order the rehearing of a suit upon the ground of the discovery of new evidence and on no other ground. That section differs from s. 623 of the Code of Civil Procedure in two respects. It authorizes the Court to grant a review of judgment only in a suit in which the judgment is final, and it limits the ground for review to that of the discovery of new evidence. This, in our opinion, is a clear indication of the intention of the Legislature that the provisions of s. 623 should not apply to a suit in a Court of Revenue. It is also clear from the provisions of ss. 201-A and 201-B, that in the case of orders passed upon applications a review of judgment

* Second Appeal No. 584 of 1895 from a decree of H. G. Pearse, Esq., C.S., District Judge of Agra, dated the 19th February 1895, confirming a decree of Munshi Narain Singh, Assistant Collector of Muttra, dated the 29th September 1893.

is allowable only when the orders are final and no appeal lies from them. A comparison of these sections with s. 188 confirms us in our opinion that what the Legislature intended was that where there was a right of appeal there should be no right to apply for a review of judgment. It is only in cases where there is no right of appeal that a review can be granted, and that only on the special ground provided for in the Act itself. The provisions of the sections quoted show that in the matter of review the Rent Act is not silent; consequently s. 623 and the following sections of the Code of Civil Procedure which deal with reviews **[524]** of judgments have no application to suits and proceedings under the Rent Act. The Assistant Collector was therefore wrong in reviewing his judgment and in modifying the decree which he made on the 29th of May 1893. The plaintiffs ought to have sought their remedy by appeal. We set aside the decree below and restore the decree of the Assistant Collector, dated the 29th of May 1893. The appellant will get the costs incurred by him here and in the Courts below subsequent to the 29th of May 1893.

Appeal decreed.

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19 A. 524=17 A.W.N. (1897) 141.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

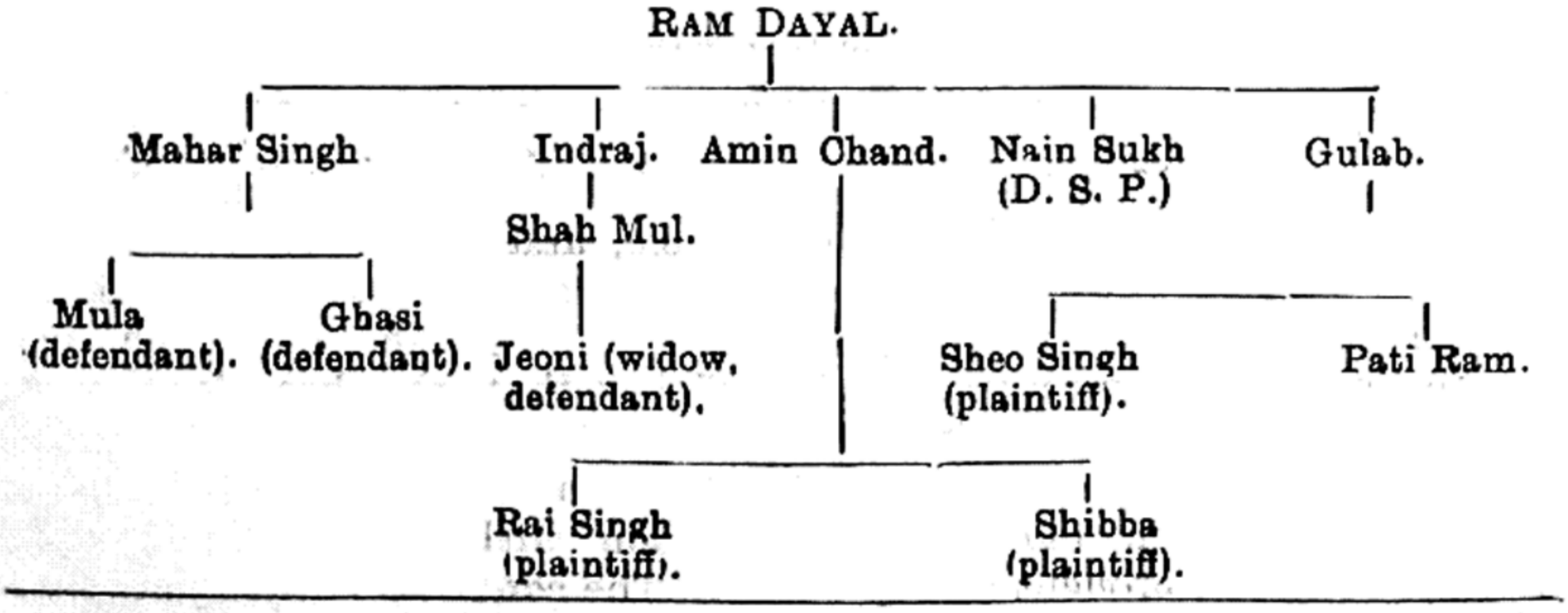
SHEO SINGH AND OTHERS (*Plaintiffs*) *v.* JEONI AND OTHERS (*Defendants*).* [9th June, 1897.]

Act No. XV of 1877 (*Indian Limitation Act*), *sch. ii, art.* 125—*Limitation—Alienation—Decree in a collusive suit against a Hindu widow.*

Held that the action of a Hindu widow in causing a collusive suit to be brought against her and confessing judgment therein whereby the plaintiff in that suit got a decree for possession of property of which the widow was in possession holding a Hindu widow's estate, amounted to an "alienation" of such property within the meaning of art. 125 of the second schedule of Act No. XV of 1877.

[Appr., 29 A. 239=4 A.L.J. 160=A.W.N. (1907), 33=3 M.L.T. 59.]

THIS was a suit for a declaration that an alienation made by a Hindu widow of property which had been of her husband in his lifetime would not affect the interests of the plaintiffs as reversioners. The relationship of the parties *inter se* is shown by the subjoined genealogical table :—



* Second Appeal No. 506 of 1895 from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 1st February, 1895, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Saharanpur, dated the 16th April, 1894.

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[525] Shah Mul died in 1872, and his widow Jeoni took possession of his estate. Jeoni married Ghasi according to the *karao* form. Mahar Singh instituted a suit in respect of the entire estate of Shah Mul against Jeoni. That suit was compromised on the 12th of March 1883, and on the basis of that compromise a decree was passed in favour of Mahar Singh. On the death of Mahar Singh the present suit was brought by some of the other members of the family of Ram Dayal against Mula, Ghasi and Musammat Jeoni on the ground that the suit which ended in the compromise of the 12th of March 1883 was a collusive suit brought with the intention of injuring the plaintiffs. The Court of first instance (Subordinate Judge of Saharanpur) dismissed the suit as barred by limitation, holding that art. 120 of the second schedule of the Indian Limitation Act applied. The plaintiffs appealed. The lower appellate Court (District Judge of Saharanpur) dismissed the appeal, with reference to the case of *Chhaganram Astikram* v. *Bai Motigavri* (1).

The plaintiffs thereupon appealed to the High Court.

Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The only question in this appeal is whether art. 125 of the second schedule of the Indian Limitation Act governs the case or art. 120. The lower Courts have applied the latter article and have held the claim to be barred by limitation. The plaintiff's case was this :—Musammat Jeoni, the widow of one Shah Mul succeeded to the property of Shah Mul on his death and acquired therein a Hindu widow's estate. According to the custom of the caste to which she belonged, she married her husband's first cousin, the defendant Ghasi, who is a son of Mahar Singh. The allegation of the plaintiffs is that in order to transfer the property to her second husband, the device to which she resorted was that she got a suit instituted against herself by Mahar Singh, the father of Ghasi, claiming the property of Shah Mul on the ground that, by reason of her second marriage, she had [526] forfeited her right to the estate of Shah Mul, and that she confessed judgment and allowed a decree to be passed in favour of Mahar Singh, which had the effect of transferring the property from her to Mahar Singh. The plaintiffs say that this was an alienation by Jeoni ; that it was an alienation which she was incompetent to make, and the plaintiffs bring this suit for a declaration that the alienation is not binding on them and will not affect their rights as reversioners after the death of Jeoni

The question we have to consider is whether, on the case set up by the plaintiffs, there has been an alienation by the widow within the meaning of art. 125 of the second schedule of the Limitation Act. If an alienation has taken place, that article, and not art. 120, will apply. It is true that the widow has not by deed transferred the property to Mahar Singh, but it is not necessary that an alienation should be made by her by written document. It is sufficient that she has done an act which has necessarily resulted in the transfer of the estate to the transferee. In this case, if the plaintiff's allegations be true, it was the act of the widow herself, namely, her collusion with Mahar Singh, which initiated the suit brought by the latter. The confession of judgment was the next act done by her, the necessary result of which was the decree

(1) 14 B. 512.

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made by the Court. The Court had no option but to make a decree in accordance with the confession of judgment filed by her. We have no hesitation in holding that these acts of Jeoni, if established, amounted to an alienation of the property, and therefore, if the plaintiffs succeed in establishing the case set up by them, their suit would be governed by art. 125. The only authority cited for the contrary view is a remark made by Mr. Justice Birdwood in the case of *Chhaganram Astikram* v. *Bai Motigavri* (1). In that case there was no dispute on the question whether art. 125 or 120 applied, and therefore the observations of the learned Judge were no more than *obiter dicta*. Whether Jeoni by her re-marriage lost her rights in her husband's estate is not a question which we are called upon to decide at this stage. **[527]** If the plaintiffs succeed in showing that she did not, that would be a circumstance to be taken into consideration in determining whether the suit brought by Mahar Singh against Jeoni was a collusive suit or not. The result is that we must set aside the decrees below and remand the case under s. 562 of Code of Civil Procedure to the Court of first instance, which we hereby do, with directions to readmit it under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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19 A. 527 = 17 A.W.N. (1897) 147.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DIP NARAIN SINGH (*Defendant*) *v.* HIRA SINGH AND ANOTHER (*Plaintiffs*).* [17th June, 1897.]

Mortgage—Prior and subsequent mortgages—Redemption—Price to be paid by a subsequent mortgagee redeeming after the mortgaged property has been brought to sale and purchased by the prior mortgagee.

A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay the prior mortgagee the full amount due on his mortgage. *Gunga Pershad Sahu* v. *The Land Mortgage Bank* (2) and *Dadoba Arjunji* v. *Damodar Raghunath* (3) referred to. *Baldeo Bharthi* v. *Hushiar Singh* (4) distinguished.

[F., 12 O.C. 133 (138) = 2 Ind. Cas. 836; Rel. on, 9 A.L.J. 29 (32) = 13 Ind. Cas. 939 (940); Appl., 33 A. 370 (372) = 8 A.L.J. 155 (157) = 9 Ind. Cas. 670; Appr., 25 A. 388 (394); R., 22 A. 453; 25 A. 446 (453) = 23 A.W.N. 150 (153); 26 A. 185 = A.W.N. (1903), 219; 33 C. 590 = 10 C.W.N. 592; 5 C L J. 315 = 11 C.W.N. 403; 8 M.L.J. 298; 4 N.L.R. 168 (173); 1 S.L.R. 172 (175).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *T. Conlan*, Pandit *Sundar Lal* and Munshi *Ram Prasad*, for the appellant.

Munshi *Jwala Prasad* and Pandit *Madan Mohan Malaviya*, for the respondents.

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* First Appeal No. 58 of 1895 from a decree of Pandit Rai Indar Narain, Subordinate Judge of Mirzapur, dated the 21st March 1895.

(1) 14 B. 512. (2) 21 C. 366. (3) 16 B. 486. (4) 15 A.W.N. (1895) 45.

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19 A. 527 = 17 A.W.N. (1897) 147.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The facts which gave rise to the suit out of which this appeal has arisen were these:—

On the 6th of January 1883 Shib Chandra Singh, Batak and Mahadeo executed a mortgage of a four annas share of zamindari [528] property in favour of Babu Dip Narain Singh, the defendant appellant. On the following day, that is, the 7th of January 1883, they granted to Thakur Hira Singh, respondent, and to Bharat Singh, the father of the other respondent, a mortgage over a similar share. It has been found by the Court below that the same share formed the subject matter of both the mortgages, and this finding has not been challenged in the memorandum of appeal before us. With the amounts borrowed under the two mortgage deeds a prior usufructuary mortgage of the same property was discharged.

The defendant, Babu Dip Narain Singh, brought a suit for sale under his mortgage and obtained a decree on the 11th of May 1889. The other mortgagees obtained a decree upon their mortgage on the 15th of October 1890. Neither mortgagee made the other a party to his suit as required by s. 85 of the Transfer of Property Act, 1882.

Dip Narain Singh caused a 2 annas 8 pies share to be sold in execution of his decree on the 20th of December 1890, and on the 28th of November 1891 he caused the remaining 1 anna 4 pies share to be sold. He himself purchased both the shares for a consideration of Rs. 2,100 and has obtained possession.

On the 20th July 1893 the plaintiffs caused the same property to be sold in execution of their decree and themselves became the purchasers. As they did not obtain possession, they brought the present suit and prayed for absolute possession on the allegation that they had priority of title. In the alternative they asked for a decree for redemption of the mortgage of the defendant in their character as subsequent mortgagees, and they offered to pay to the defendant Rs. 2,100, the amount of purchase money paid by him for the property, or such other amount as the Court might declare to be payable to him.

The Court below has made a decree in favour of the plaintiffs for redemption upon payment of the sale consideration, and has disallowed the first prayer of the plaint. The defendant has preferred this appeal.

[529] The first contention raised on his behalf is that upon the allegations of the plaintiffs themselves they are not entitled to sue for redemption. This contention has in our opinion no force. The mortgage in favour of the defendant is of a date prior to that of the plaintiffs. The plaintiffs therefore are manifestly subsequent mortgagees, and as they were not made parties to the suit in which the defendant obtained his decree, they have not lost the right of redemption which they had as subsequent mortgagees. It is true they stated in the plaint that the mortgages in favour of both the parties were made on the same date and that the rights of the parties as mortgagees were equal. That allegation could not be supported. Even if both the mortgage deeds were executed on the same date, both of them could not have been executed simultaneously and one deed must have been signed after the other. The plaintiffs' mortgage deed purports to be of a later date than that of the defendant's deed, and the plaintiffs have in a subsequent portion of their plaint accepted the status of puisne mortgagees. They are therefore entitled under s. 74 of Act No. IV of 1882 to redeem the defendant's prior mortgage.

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The next contention of the appellant, which raises the real question in the case, is that the Court below has erred in allowing redemption upon payment only of the sale price paid by the defendant. We are of opinion that this contention must prevail.

As the plaintiffs were not joined as parties to the defendant's suit for sale, as required by s. 85 of Act No. IV of 1882, they are, notwithstanding the sale in execution of the defendant's decree, in the same position in which they would have been, and have still the same rights which they would have had, if they had been made parties to that suit, that is to say, their right to redeem the prior mortgage of the defendant is saved to them. By s. 75 of Act No. IV of 1882 every second or other subsequent mortgagee has, as regards redemption, "the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees." If the mortgagor chooses [530] to exercise his right of redeeming the prior mortgage, he can only do so, under s. 60, on payment or tender of the prior mortgagee's mortgage money, which, according to s. 58, is "the principal money and interest of which payment is secured for the time being." If a puisne mortgagee elects to redeem the prior mortgage, he, like the mortgagor, will not be entitled to redeem that mortgage save upon payment or tender of the amount due upon that mortgage. Had the puisne mortgagee been joined as a defendant in the suit of the prior mortgagee, he could have prevented the extinction of his right of redemption and redeemed the prior mortgage by paying to the prior mortgagee or into Court within the time fixed by the Court under s. 88 the full amount due to the prior mortgagee. The omission to make the subsequent mortgagee a party to the prior mortgagee's suit has the effect, as we have said, of relegating the subsequent mortgagee to the position in which he was before the institution of that suit. It is therefore still open to him to redeem the first mortgage, but he cannot do so except on the terms on which he could have obtained redemption before the institution of the first mortgagee's suit or under the decree passed in that suit, namely, by payment of the whole amount due under that mortgage. A consideration of the provisions of the Transfer of Property Act, 1882, shows that, save when the integrity of a mortgage has been broken up in the manner mentioned in the last paragraph of s. 60, no mortgage can be redeemed except upon payment of the full amount due under it. We are, therefore, of opinion that a subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of the decree obtained by him without joining the subsequent mortgagee as a party. That the purchase money is not the criterion for determining the amount which a claimant for redemption must pay is evident from several considerations. Where the amount of the price exceeds the mortgage money, a puisne mortgagee, or other person interested in the property comprised in [531] the mortgage, who seeks to redeem the mortgage cannot be called upon to pay an amount in excess of the mortgage money. Under the first paragraph of s. 60 a mortgagor has the right to redeem on payment or tender of the mortgage money, and ss. 74 and 75 confer on a second or other subsequent mortgagee the right to redeem a prior mortgage on similar terms, so that under those sections the person entitled to redeem is not liable to pay a larger sum than the amount due upon the mortgage sought to be redeemed. Again, where the purchase money is in excess of the amount due upon the mortgage the surplus is paid to the mortgagor.

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Surely a subsequent mortgagee or other person having the right of redemption cannot be directed to pay an amount which has been received by the mortgagor and is not payable to the mortgagee. In our opinion the amount upon payment of which redemption can take place must, save where the integrity of the mortgage security has been broken up, be the amount payable to the mortgagee under the mortgage, and where the mortgagee himself has purchased the mortgaged property in execution of a decree for sale obtained by him without joining a subsequent mortgagee as a party, the latter must, if he wishes to exercise the right of redemption left open to him, pay to the prior mortgagee the full amount of the purchase money. It is true that if the purchase money be not equal to the amount of the mortgage, the mortgagee decree-holder would have the right to ask for a decree against the mortgagor under s. 90, but if after the sale a subsequent mortgagee who has not had an opportunity to redeem the prior mortgage redeems it, a decree under s. 90 cannot be passed. Similarly, if a part only of the mortgaged property has been purchased by the mortgagee under the circumstances mentioned above, the whole of his mortgage will be discharged upon redemption by a subsequent mortgagee. But in either case, where the prior mortgagee is himself the purchaser, a subsequent mortgagee must, in our opinion, in order to redeem such prior mortgagee, pay him the full amount due upon his mortgage. This view is supported by rulings of the High Courts of Calcutta and Bom-[532] bay, of which it will be sufficient to refer to *Ganga Pershad Sahu* v. *The Land Mortgage Bank* (1) and *Dadoba Arjunji* v. *Damodar Raghunath* (2). In the case first mentioned the learned Judges of the Calcutta High Court observed:—"It is hardly necessary to remark that the amount payable would not be the amount of the purchase money paid by the plaintiff, but the amount due under his mortgage." The case went up in appeal to the Privy Council, and their Lordships allowed to the mortgagee purchaser compound interest in accordance with the terms of his mortgage deed. In the case in the Bombay High Court the prior mortgagee purchased the mortgaged property for Rs. 13 and the lower appellate Court decreed redemption upon payment of that amount. On appeal to the High Court, Sargent, C. J., after holding that the defendants, who had not been made parties to the mortgagee's suit, "were entitled to have an opportunity to redeem the property from the plaintiff," said:—"We have only to consider whether the terms on which the Court below has allowed them to do so, against which the plaintiff appeals, are correct. Had the defendants been made parties to the mortgage suit they would have been entitled to redeem on payment of what was then due on the mortgage, and such are the terms on which they must now be allowed to redeem." A decree was made for redemption upon payment of Rs. 398.

We were much pressed with the ruling of this Court in *Baldeo Bharthi* v. *Hushiar Singh* (3) as supporting the contention of the plaintiffs respondents that they are entitled to redeem the defendant upon payment only of the purchase money paid by him. The Court below also has relied on this ruling. We are, however, of opinion that that case is distinguishable from the case before us. That was a suit for sale brought upon a subsequent mortgage against the representatives of the mortgagors and of one Gurdayal Jati, who had purchased the mortgaged property in execution of a simple decree for money held by himself. A lien, however, was

(1) 21 C. 366. (2) 16 B. 486. (3) 15 A.W.N. (1895) 15.

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[533] created in favour of Gurdayal Jati under a compromise for the amount of his decree. The mortgage in favour of the plaintiff to that suit was of a date subsequent to that of the creation of the lien. It was held that the representatives of Gurdayal Jati were entitled to use the lien as a shield for their protection against the claim of the plaintiff to the extent only of the price paid by him for the property and not to the full extent of the amount for which the lien was granted. The reasons for that conclusion were thus stated:—"It is obvious that if the three villages in question had been sold to three different parties, each one of such parties could not have claimed a lien to the full extent of the money due under the decree as a shield in his case. Again, it is obvious that, if at the time of the sale the amount due under the decree of the 24th of September 1858, far exceeded the purchase money paid at the sale, the purchaser could only have got the protection of the lien to the extent of the money paid by him *pro tanto* in discharge of the mortgage, and that he would not be entitled to stand in the shoes of the mortgagee as to the balance remaining due. The full right of the mortgagee to recover the balance due to him would not, on the realization of part of the money due to him by sale of the mortgaged property, pass, as to the balance remaining due, to the purchaser at the sale, and the rights cannot be in two persons at the same time." Those reasons do not apply to this case. This suit is not, like the suit in that case, a suit by a subsequent mortgagee for sale, and the defendant has not been made a party *qua* purchaser, like the representatives of Gurdayal Jati. As a purchaser whose purchase money went to the partial discharge of a prior charge, Gurdayal Jati could not use that charge as a shield except to the extent to which the prior charge was satisfied by his purchase. In this case subsequent mortgagees are suing to redeem the prior mortgage, and as the property of which the plaintiffs are the subsequent mortgagees was liable for the whole amount of the prior mortgage, they cannot relieve that property from liability under the prior mortgage without paying the whole of that amount. The fact that the mortgagee himself has purchased [534] the property cannot in our opinion make any difference in this respect. Had a third party purchased the property, and had his purchase money discharged the prior mortgage in full, he would undoubtedly have been entitled to claim that a subsequent mortgagee who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole amount of the prior mortgage. The subsequent mortgagee would in our opinion have to pay the full amount due upon the prior mortgage but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due. Where there are more purchasers than one, the apportionment should be made between them *pro rata* and the balance should go to the mortgagee. But in no case can redemption be allowed except upon payment of the whole amount due under the mortgage.

In the case before us the first mortgagee himself is the purchaser. We consider that he is entitled to the whole amount due under his mortgage on the date of his auction purchase, and not simply to the purchase money paid by him. The bulk of the property was purchased by him on the 20th of December 1890. The Court below has found, on

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the issue referred to it under s. 566 of the Code of Civil Procedure, that on that date the amount of principal and interest due was Rs. 7,164-5-0, and that nothing was realized from the debtor after that date. The correctness of the amount so found to be due has not been questioned. It has been urged that the profits realized from the property by the defendant after his purchase should be set off against the mortgage money. We are, however, of opinion that, having regard to the amount of the profits arising from the property, it would be fair not to take the profits into consideration, and at the same time not to allow interest on the mortgage money for the [535] period subsequent to the date of the defendant's auction purchase. In our judgment the plaintiffs should have been granted a decree for redemption on their paying to the defendant Rs. 7,164-5-0. We vary the decree below by substituting Rs. 7,164-5-0 for Rs. 2,100, as the amount upon payment of which, with the proportionate costs of the defendant-appellant here and in the Court below, the plaintiffs will obtain redemption of the property in suit. We extend the time for the payment of the said amount to the 15th of December 1897, and we award to the plaintiffs costs proportionate to their success here and in the Court below.

Decree modified.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

PRAG NARAIN (*Defendant*) *v.* MUL CHAND AND OTHERS (*Plaintiffs*).* [18th June, 1897.]

Act No. IX of 1872 (Indian Contract Act), s. 107—Sale—Non-payment of purchase money—Resale—Right of resale to be exercised within a reasonable time of breach—Measure of damages.

In the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract.

If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise the right of re-sale given to him by s. 107 of the Indian Contract Act, 1872, not only is the vendor bound to wait a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach.

[R., 10 Bom. L.R. 1113 (1124).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

Messrs. *W. K. Porter* and *E. C. F. Greenway*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit for damages for breach of a contract entered into with the plaintiffs respondents on the 11th of September 1891, by Munshi Nawal Kishore, the original defendant to the

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* First Appeal No. 74 of 1895, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Cawnpore, dated the 16th December 1895.

suit, who has died since its institution and is now represented by the appellant, whereby Munshi Nawal [536] Kishore purchased from the plaintiffs 500 shares owned by them in the Cawnpore Cotton Mills Company for a consideration of Rs. 40,000. A contract in writing was signed by Munshi Nawal Kishore. It was agreed that the price should be paid and the share-certificates delivered on the 25th of September 1891. On that date the plaintiffs sent a telegram to Munshi Nawal Kishore reminding him of the fact that the price was due and asking him to send it promptly. No payment was made. Both the parties agree that a few days afterwards a conversation took place between Munshi Nawal Kishore and Jaggi Lal, one of the plaintiffs, at the office of the Victoria Cotton Mills Company at Cawnpore. As to the nature of the conversation the parties are at variance. While Munshi Nawal Kishore alleged that Jaggi Lal released him from liability under the contract, Jaggi Lal denies that he did so. On the 10th of October 1891, Munshi Nawal Kishore caused a letter to be despatched from Lucknow to the address of the plaintiffs at Cawnpore in which he stated that the contract had by mutual consent been cancelled, and asked Jaggi Lal to intimate that fact to Munshi Nawal Kishore by letter. Whether that letter reached the plaintiffs or not is a matter in issue between the parties. Nothing took place afterwards until the 6th of August 1892, when Messrs. Sanderson and Company, Solicitors, on behalf of the plaintiffs wrote a letter to Munshi Nawal Kishore demanding from him Rs. 40,000, the price of the shares purchased by him, with interest thereon at Rs. 7 per cent. and informing him that if payment was not made and delivery of the shares was not taken within one week of the date of the letter the shares would be sold at his risk and he would be sued for the difference. To this letter Munshi Nawal Kishore replied through his pleader denying that he had entered into any contract for the purchase of shares in the Cawnpore Cotton Mills Company. On the 17th of September 1892, the plaintiffs caused the 500 shares to be sold at auction by one Mr. Noronha, and they realized Rs. 28,810. The plaintiffs brought the present suit claiming the difference of Rs. 11,190, together with interest, the amount of commission alleged to have been paid to [537] Mr. Noronha, and the fees paid to Messrs. Sanderson and Company for the letter of demand. The total amount claimed was Rs. 14,812-11-6. The lower Court has made a decree in favour of the plaintiffs for Rs. 11,190 and dismissed the remainder of the claim. Against this decree the defendant has preferred this appeal, and the plaintiffs have taken objections under s. 561 of the Code of Civil Procedure.

The pleas raised on behalf of the appellant are twofold, first that the Court below has erroneously held that the allegation of the defendant as to his having been released from liability by the plaintiffs was not proved, and secondly, that in any case the plaintiffs ought to have resold the shares within a reasonable time from the date of the breach of contract by Munshi Nawal Kishore, and that they could only claim as damages the difference between the contract price and the market price of the shares on the date of the breach of contract.

As regards the first plea we agree with the conclusion arrived at by the Court below. The statement of Munshi Nawal Kishore was that after he had entered into the contract on the 11th of September, 1891, he came to Allahabad and there learnt that the affairs of the Company were in an unsatisfactory condition and that he would sustain a loss by his purchase; that in October following he met Jaggi Lal and Mul Chand, plaintiffs, at

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the office of the Victoria Cotton Mills Company in the presence of Mr. West, the Manager of that Company; that he spoke to Jaggi Lal about what he had learnt at Allahabad; that thereupon Jaggi Lal said to him that if he, Munshi Nawal Kishore, apprehended any loss he need not take the shares; that he might write and say that the transaction was cancelled and that he, Jaggi Lal, would send an answer to the same effect. Munshi Nawal Kishore further stated that in accordance with this conversation he wrote the letter of the 10th of October, 1891, referred to above and sent it under a cover addressed to Mr. West; that subsequently in November he met Jaggi Lal and Mul Chand at Cawnpore, and on that occasion also Jaggi Lal reaffirmed what he had said before as to the cancellation of the [538] contract. Jaggi Lal on the other hand has sworn that when Munshi Nawal Kishore asked him to cancel the contract of sale, he, Jaggi Lal, refused to do so and said he would bring a suit, and that Munshi Nawal Kishore would have to pay the money with interest at 7 per cent. He denies having received the letter of the 10th of October. We are unable to accept in its entirety either version of the conversation which took place at the office of the Victoria Cotton Mills Company between Munshi Nawal Kishore and Jaggi Lal. It seems to us to be in the highest degree improbable that Jaggi Lal, who on the preceding 25th of September had telegraphed to Munshi Nawal Kishore for payment and was evidently anxious to enforce the contract, at once consented to release Munshi Nawal Kishore from liability for the breach of contract, which had already taken place, as soon as Munshi Nawal Kishore asked him to do so. It is true that it has been proved that the letter of the 10th October printed at page 30 of the appellant's book was despatched from Lucknow on that date, and it is probable that it reached Jaggi Lal. But the circumstances of Jaggi Lal's not replying to it and of his retaining in his hands the written contract signed by Munshi Nawal Kishore leave no room for doubt that Jaggi Lal never acceded to Munshi Nawal Kishore's request to discharge him from liability. The truth seems to lie between the statements made by Munshi Nawal Kishore on the one hand and Jaggi Lal on the other. It is most likely that Jaggi Lal, instead of refusing positively to accept Munshi Nawal Kishore's proposal, gave him an evasive answer, and that Munshi Nawal Kishore, not having received Jaggi Lal's assent to his proposal, wrote the letter of the 10th of October 1891, simply with a view to make evidence. The answer sent on behalf of Munshi Nawal Kishore in reply to the letter received by him from Messrs. Sanderson and Company was, to say the least of it, disingenuous. He certainly knew that he had signed a contract, the other party to which was the plaintiff Mul Chand, and it was certainly not the fact, upon his own admissions, "that he never had any negotiations or agreement with Lala Mul Chand regarding the [539] sale of shares in the Cawnpore Cotton Mills Company, Limited," as stated in the letter of his pleader, dated the 18th of August, 1892, printed at page 19 of appellant's book. We are therefore unable to accept Munshi Nawal Kishore's statement that Jaggi Lal released him from liability.

As regards the second plea we agree with the contention of the learned counsel for the appellant that in the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of the damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of promise. This is evident from illustrations (*a*) and (*d*) to s. 73 of the Indian Contract Act. In this case the plaintiffs have, under s. 107 of that Act, claimed compensation for the

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loss sustained by them on the re-sale of the shares purchased by the defendant on which the plaintiffs had a lien for the unpaid price. It has been contended on behalf of the appellant that if the plaintiffs elected to exercise the right of re-sale which they had under s. 107, they were bound not only to re-sell the property after a reasonable time from the date of their giving notice to the buyer of their intention to re-sell it, but they were bound to exercise their right of re-sale within a reasonable time after the date of the breach. Section 107 in explicit terms requires that if the seller who has a lien for the unpaid price wishes to re-sell the goods sold, he must allow a reasonable time to elapse between the date of his giving notice to the buyer of his intention to re-sell and the date of the re-sale. But the section does not in terms provide that the right to re-sell should be exercised within a reasonable time from the date of the breach of contract. On this point the section is silent. We have therefore to look to general principles as a guide for determining the question whether a buyer who wishes to re-sell the goods sold must do so within a reasonable time from the date on which the contract was broken or whether he may do so at any time after the date of the breach. A buyer, it is true, may claim the price at any time after the stipulated date for payment has [540] expired, if not precluded from doing so by the law of limitation, but if he chooses to enforce his right to re-sell, he must, it seems to us, do so within a reasonable time from the date of the breach, and should not allow the value of the goods to depreciate by making undue delay in re-selling them. In Mayne on demages, 5th edition, p. 176, it is stated on the authority of *Pott* v. *Flather* (1) that "as there is no obligation on the part of the vendor to sell at all, so if he refrains from selling at the time of the breach he takes upon himself all risk arising from further depreciation." In Addison's Law of Contract, 9th edition, p. 526, the rule on the subject is thus stated:—"If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale will not afford a true criterion of the damage." These are authorities for holding that if the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer. A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. In the case of a re-sale, the buyer is entirely deprived of his property, and that distinguishes the case of a claim for damages upon a re-sale from that of a claim for the unpaid price. In the latter case the buyer would get the property and be in a position subsequently to compensate himself by waiting for a rise in the market. In our opinion the plaintiffs ought to have re-sold the shares sold by them within a reasonable time from the date on which the contract was finally repudiated by Munshi Nawal Kishore. We may take the 10th of October, 1891, [541] as the date on which such repudiation finally took place. The plaintiffs would have been justified in waiting for a reasonable time

(1) 16 L. J. Q. B. 366.

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before electing to re-sell, and they were bound under s. 107 of the Indian Contract Act to allow a reasonable time to elapse between the date of their giving notice to the buyer of their intention to re-sell, and that of the actual re-sale. We hold that under the circumstances of this case the reasonable time after which the shares in question should have been re-sold expired on the 31st of December 1891, and that the plaintiffs are entitled to recover as damages the difference between the contract price and the price of the shares which prevailed on the 1st January, 1892. There is no evidence on the record which can enable us to ascertain the value of the shares on the date last mentioned. The Subordinate Judge in our opinion improperly excluded an important piece of evidence, namely, the register of the transfer of shares of the Cawnpore Cotton Mills Company, Limited. We accordingly refer to the Court below the following issue under s. 566 of the Code of Civil Procedure:—

What was the value of the shares in question on the 1st of January 1892?

The Court below will receive such further evidence as may be tendered by the parties. On receipt of the finding ten days will be allowed for objections.

Issue referred.

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FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

HARGU LAL SINGH (*Plaintiff*) *v.* GOBIND RAI AND ANOTHER (*Defendants*).* [2nd July, 1897.]

Mortgage—Sale by mortgagor of part of the mortgaged property—Suit by mortgagee for sale without joining vendees—Subsequent suit to eject mortgagor's vendees—Cause of action.

A mortgagor, who had given a simple mortgage over certain land, sold some of the mortgaged property. The mortgagee, after such sale had taken [542] place and without making the vendees parties to his suit, brought a suit for sale on his mortgage, and having caused the mortgaged property to be sold, including that portion which had been sold by the mortgagor, purchased it himself. The mortgagee then sued to eject the vendees of the mortgagor. *Held* that the suit would not lie inasmuch as the plaintiff mortgagee had at its commencement no title to present possession of that particular portion of the mortgaged property as against anyone.

[F., 21 A. 235 (238); 30 M. 500 = 17 M.L.J. 431; 11 C.W.N. 314; R., 29 A. 339 = 9 Bom. L.R. 659 (660) (P.C.) = 4 A.L.J. 329 = 5 C.L.J. 563 = 11 C.W.N. 561 = 17 M.L.J. 263 = 34 I.A. 102; 5 C.L.J. 527 (536); 21 M.L.J. 218 (227) = 9 M. L. T. 431 = 9 M.L.T. 499 = (1911) 1 M.W.N. 165 (175) = 9 Ind. Cas. 513 (520); D., 22 A. 377 (379); 25 A. 214 (228) = A.W.N. (1903) 21 (26); 26 A. 464 = A.W.N. (1904) 108; 7 O.C. 243.]

THE facts of this case sufficiently appear from the judgment of the Full Bench.

Mr. *Abdul Raoof*, for the appellant.

Pandit *Moti Lal*, for the respondents.

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* Second Appeal No. 452 of 1896, from a decree of J. W. Muir, Esq., District Judge of Saharanpur, dated the 2nd May 1896, reversing a decree of Pandit Kanhaya Lal, Munsif of Saharanpur, dated the 3rd August 1895.

The judgment of the Court (EDGE, C.J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C.J.:—

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FULL BENCH.

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JUDGMENT.

EDGE, C.J.—The plaintiff obtained a simple mortgage from one Abdul Kadir in 1879. On the 18th of September, 1886, the mortgagor sold 27 bighas of the mortgaged property to Gobind Rai and Tulshi Rai, the defendants in the suit. Mr. *Abdul Raoof* for the plaintiff, appellant, informs us that the plaintiff brought a suit for sale, on his mortgage of 1879 against Abdul Kadir after the 18th of September, 1886. To that suit Gobind Rai and Tulshi Rai were not parties. On the 28th of March, 1891, the plaintiff obtained a decree for sale in his suit against Abdul Kadir; he brought the property to sale, got permission to buy, and purchased the property at the sale held in execution of his decree. He has now brought this suit, claiming to eject Gobind Rai and Tulshi Rai from a portion of the 27 bighas above-mentioned, the equity of redemption in which had been sold to them in 1886 by Abdul Kadir by a registered deed. The Court of first instance gave the plaintiff a decree for possession with a conditional right to these defendants to redeem. The lower appellate Court in appeal dismissed the plaintiff's suit.

The plaintiff can only succeed in this suit for possession on proof of title to a present possession at the date of his suit. His simple mortgage did not entitle him to possession as against any one. His decree for sale, being in a suit to which these defendants were not parties, had no effect as against them, and his purchase [543] at the sale held under the decree conferred on him no title as against these defendants. The result is that the plaintiff had no title to possession at the commencement of the suit against these defendants, and his suit was properly dismissed, though on other grounds. We dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

HIRA LAL (*Opposite Party*) *v.* KISHAN LAL AND ANOTHER (*Applicants*).* [2nd July, 1897.]

Act No. IV of 1882 *(Transfer of Property Act), s.* 85 *— Mortgage — Prior and subsequent mortgages—Effect of non-joinder in a suit on a mortgage of persons interested in the mortgaged property.*

Certain mortgagees holding a second mortgage obtained a decree against their mortgagor and a subsequent mortgagee, one H.L., for sale of the mortgaged property. At the time of the suit there was subsisting on the same property a prior mortgage held by one D. P. D.P., was not made a party to that suit. After the decree in that suit was passed, but before execution, D.P., brought a suit for sale on his mortgage, but did not make the second mortgagees, parties to that suit. In that suit D. P. obtained a decree in execution of which he brought a portion of the mortgaged property to sale, and some of it was purchased by H.L. On application by the second mortgagees for an order absolute for sale in execution of their decree it was held that the property purchased by H. L. in

*Second Appeal No. 556 of 1895, from a decree of Babu Bepin Behari Mukerji, officiating Subordinate Judge of Aligarh, dated the 19th February, 1895, reversing a decree of Muhammad Abdur Razzak, Munsif of Koel, dated the 21st April 1894.

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execution of D.P.'s decree on his prior mortgage could not be brought to sale in execution of the second mortgagee's decree. *Mata Din Kasodhan* v. *Kazim Husain* (1), referred to.

[R., 1 C.L.J. 337 (351).]

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THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Banerji*, for the respondents.

19 A. 543 = 17 A.W.N. (1897) 153.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The respondents brought a suit for sale upon a mortgage of 1873 and obtained a decree for sale in 1891 against their mortgagor and against Hira Lal, the present [544] appellant, who was impleaded as a subsequent mortgagee. At the time when that suit was brought there was subsisting on a portion of the mortgaged property a prior mortgage in favour of one Durga Prasad. Durga Prasad was not made a party to the respondent's suit. Durga Prasad got a decree, upon his mortgage in 1881, but he also did not join the respondents as parties to his suit. After the respondents had obtained their decree, Durga Prasad put his decree of 1881 into execution and caused a portion of the property mortgaged to the respondents, amounting to one-sixth of 10 bighas, to be sold and Hira Lal purchased it. The respondents having applied for an order absolute for sale under s. 89 of Act No. IV of 1882, Hira Lal objected to the one-sixth share out of 10 bighas being ordered to be sold in satisfaction of the respondent's mortgage decree on the ground that he had acquired priority over the respondents in respect of that portion of the property by virtue of his auction purchase under the decree of Durga Prasad obtained on a mortgage of a date prior to that of the respondents. The Court of first instance allowed his objection, but on appeal the lower appellate Court overruled it and ordered the sale of the share which formed the subject-matter of the objection. Hira Lal has preferred this second appeal, and the first plea urged on his behalf is that no appeal lay to the lower appellate Court.

The plea was founded on the argument that Hira Lal in objecting to the sale of the share referred to above was doing so, not in his character as judgment-debtor to the decree obtained by the respondents, but as a third party who was the auction purchaser in execution of a decree under a prior mortgage. We are unable to sustain this objection. This case comes within the principle of the Full Bench ruling in *Seth Chand Mal* v. *Durga Dei* (2).

We think, however, that the second plea taken in appeal must prevail. Hira Lal having purchased the property in question in execution of Durga Prasad's decree under his prior mortgage, stands in the shoes of Durga Prasad. It is true that the respondents were not parties to Durga Prasad's suit, and are therefore [545] entitled to redeem Hira Lal, but that circumstance will not entitle them to treat the decree as non-existent and to bring the property to sale free from the prior incumbrance in favour of Durga Prasad. As they also did not make Durga Prasad a party to their suit, and did not redeem Durga Prasad's prior mortgage, that mortgage must be taken to be a subsisting mortgage as against them. According to the ruling of the Full Bench in *Matta Din Kasodhan*

(1) 13 A. 432.

(2) 12 A. 313.

v. *Kasim Husain* (1) a subsequent mortgagee is not entitled to bring the mortgaged property to sale subject to a prior mortgage. Therefore the respondents cannot sell the property in question subject to the prior mortgage of Durga Prasad. On this part of the case the lower appellate Court did not arrive at a right conclusion. The case stands thus:—The respondents are not entitled to sell the property in question free from the prior mortgage of Durga Prasad, and they are not entitled to sell it subject to that mortgage. Therefore they are not entitled to sell it at all under the decree obtained by them. On this point we must set aside the judgment of the lower appellate Court. As that Court did not decide the other questions raised, we remand the case under s. 562 of the Code of Civil Procedure to that Court with directions to readmit it under its original number in the register and to dispose of it according to law. The appellant will have his costs of this appeal.

Appeal decreed and cause remanded.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

HARI RAJ SINGH (*Defendant*) *v.* AHMAD-UD-DIN KHAN (*Plaintiff*).*

[5th July, 1897.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *s.* 82—*Mortgage—Contribution—Principles upon which contribution is to be assessed.*

On the 4th of July, 1874, thirty-eight villages were mortgaged by Kadir Ali and Umrao Begam to Raja Shiu Raj Singh, the father of the appellant. On the 28th of February 1878, the mortgagee obtained a decree for sale on his mortgage. At the date of this mortgage, some of the villages comprised therein were [546] liable under one or both of two decrees obtained on prior mortgages. Subsequently to the decree of the 28th of February 1878, four of the villages affected by that decree were sold in execution of a simple money decree and were acquired from the purchasers by one Ahmad-ud-din Khan. On the 20th of August, 1879, and the 20th of August, 1882, these same four villages were brought to sale in execution of the decree of the 28th of February, 1878, and were sold for Rs. 44,500. Thereupon the former purchaser, Ahmad-ud-din Khan, brought a suit against the representative of the mortgagee of 1874 and certain other persons for contribution, alleging that the said four villages had been sold for considerably more than the amount for which they were proportionately liable under the mortgage decree; that the defendants were owners of villages which were equally liable with his (the plaintiff's) villages under the decree of the 28th of February 1878, but which had contributed nothing towards the satisfaction of that decree; that six of those villages and an eighth share in a seventh had been purchased by Raja Shiu Raj Singh (the predecessor in title of the defendant Raja Hari Raj Singh) in execution of simple money decrees, and that a share in an eighth village had been similarly purchased by the predecessor in title of the other defendants. Against these villages the plaintiff sought contribution.

Held that in calculating the amount to which the plaintiff was entitled by way of contribution, the plaintiff was bound to take into account the liabilities which existed on most of the villages in respect of which the suit was brought under the two prior mortgages; that the plaintiff was entitled to obtain contribution from those villages only which had not been sold in execution of the decree of the 28th of February 1878; that the unrealized balance of that decree must be regarded as the amount which the villages purchased by the decree-holder

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* First Appeal, No. 256 of 1893, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 5th June 1893.

(1) 13 A. 432.

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himself had contributed to the decree, and further that in determining the amount which the plaintiff is entitled to recover regard must be had to the claims for contribution of the owners of such of the other mortgaged villages as had been sold in execution of the decree of the 28th of February 1878, and had, like the plaintiff's villages, fetched more than their quota of liability for the decree.

[R., 23 A. 355 ; 26 A. 407 (435) = A.W.N. (1904) 74 (84).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *T. Conlan*, Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the appellant.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit for contribution and arose out of the following circumstances. On the 4th of July. 1874, thirty-eight villages were mortgaged by Kadir Ali and Umrao Begam to Raja Shiu Raj Singh, the father of the [547] appellant. On the 28th of February, 1878, he obtained a decree for sale under the said mortgage in suit No. 77 of 1877. This decree we will refer to in this judgment as decree No. 77 to distinguish it from two other decrees, Nos. 65 and 66, to which reference will also be necessary. In consequence of certain proceedings which it is unnecessary to detail, nine villages and a fourth share of a tenth village ceased to be liable under decree No. 77, which therefore had effect only as against twenty-eight and three-fourths villages. Four of the villages affected by this decree were sold in execution of a simple money decree, and were acquired by the plaintiff from the purchasers. Those villages were brought to sale on the 20th of August, 1879, and 20th of August, 1882 in execution of decree No. 77, and they fetched at auction Rs. 44.500. The plaintiff states that the proportionate amount due from his villages on account of the decree No. 77 was Rs. 22,370-1-0. He sues to recover the difference from the defendants on the ground that the defendants are owners of villages which were equally liable with the plaintiff's villages under decree No. 77, but which have contributed nothing towards the satisfaction of that decree. Six of those villages and an eighth share in a seventh were purchased by Raja Shiu Raj Singh, in execution of simple money decrees, and a share in an eighth village was similarly purchased by Janki Das, the predecessor in title of defendants Nos. 2 to 5. It is from these villages that the plaintiff seeks to obtain contribution. He has got a decree for the principal amount of his claim, but without interest. Against this decree the defendants have preferred this appeal and First Appeal No. 299 of 1893, and the plaintiff has filed a cross-appeal (No. 287 of 1893) in respect of the refusal of interest. It is contended on behalf of the defendant-appellant that the principle upon which the plaintiff has apportioned among the several villages liable to contribute to the decree No. 77, the amounts of their proportionate liability is erroneous; that he has not taken into account the liabilities which existed on most of those villages under the prior mortgages upon which decree Nos. 65 and 66 were passed; that the plaintiff is [548] entitled to claim contribution from those villages only which have not been sold in execution of decree No. 77 ; that the unrealized balance of that decree must be regarded as the amount which the villages purchased by the decree-holder himself have contributed to the decree, and that in determining the amount which the plaintiff is entitled to recover regard

must be had to the claims for contribution of the owners of such of the other mortgaged villages as have been sold in execution of decree No. 77 and have, like the plaintiff's villages, fetched more than their quota of liability for the decree.

In our opinion these contentions are valid and must prevail.

By s. 82 of Act No. IV of 1882 "where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of mortgage." This rule is based on the principle "that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone."—(Fisher on Mortgages, 4th Edition, p. 659). It therefore follows that such of the mortgaged properties as have been sold for realization of the mortgage-money and have thus contributed to the mortgage-debt are not liable to a claim for contribution, and that such a claim can only be advanced by the owners of those villages which have contributed more than their rateable share of the debt and against those portions of the mortgaged property only which have not contributed to the mortgage-debt and have benefited by the sale of the property of the claimants for contribution. The unsold portion of the mortgaged property affords the fund out of which the claims of all the persons whose villages have contributed more than their own share of liability must be satisfied. This is a consideration which the plaintiff has entirely kept out of view in putting forward his claim.

[549] The next observation which we deem it necessary to make is that the villages which were liable to contribute to the decree No. 77 were not all the villages comprised in the mortgage on which that decree was passed, but those of the mortgaged villages only against which the decree could be enforced. Such of the mortgaged villages as had been sold in execution of decrees obtained upon prior mortgages could not be proceeded against for realization of the amount of decree No. 77. It is admitted by both the parties that the entire villages Aurangzebpur and Lakhiwala, 17½ biswas of Begampur Haru and 1¼ biswas of Mansa were sold in satisfaction of prior mortgages. Those villages were not therefore liable under the decree No. 77, and should, in addition to the nine and a quarter villages to which we have referred at the commencement of this judgment, have been excluded from the list of villages affected by that decree.

Under s. 82 of Act No. IV of 1882, the liability of the villages from which the holder of the decree No. 77 was entitled to realize the amount of that decree is proportionate to the value of each village, after deducting from such value the amount of the incumbrance or incumbrances to which each village was liable on the date of the mortgage on which decree No. 77 was passed, that is, on the 4th of July 1874. The plaintiff in preparing the account filed with his plaint has wholly ignored the provisions of s. 82, and the admitted fact that several of the villages liable under the decree No. 77 were also liable under decrees Nos. 65 and 66, or one of them, on the date of the mortgage which formed the basis of the decree No. 77. The proportionate amount for which those villages were liable under decrees Nos. 65 and 66 should have been deducted from the value of those villages as required by the aforesaid section.

The plaintiff has calculated the rateable share of the liability of the several villages with reference to the amount of Government revenue

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assessed on and payable by each village and not according to its actual market value. This course has been adopted by the Court below also. Exception was at first taken on behalf of the [550] appellant to this mode of calculation, but the objection was subsequently waived and the learned counsel on both sides agreed that the amount of revenue payable for each village should be taken as the measure of the profits yielded by each. The learned counsel for the appellant has asked us to hold 18 times the annual revenue to be the value of each village for the purposes of this suit. Having regard to the prevailing selling price of property of this description, which varies from 16 to 20 years' purchase, we think that 18 years' revenue may reasonably be assumed to be the fair value of the villages in question, and that for the purpose of apportioning to each village the amount of its rateable share of the mortgage debt we may take 18 times the Government revenue to be the value of each. From this value should be deducted the proportionate amount of the incumbrances to which each village was subject under the decrees Nos. 65 and 66 at the date of the mortgage.

The learned counsel on both sides have agreed that out of the 31 villages against which decree No. 65 was passed, one, namely, Haji Muhammadpur was sold by auction in satisfaction of a prior mortgage, and was not therefore liable under that decree. It is also agreed that the same village, which was one of the 28 villages against which decree No. 66 was passed, was for the same reason not liable under the decree No. 66. It is further agreed that of the villages which were liable to contribute to the decree No. 77, the following, namely, Chela, Cheli, Jafarpur Kot, Ghalib Alipur, Chandki and Chak Khojawala were not included in decrees Nos. 65 and 66, and were not therefore subject to any incumbrance under those decrees, and that the villages Muhammadpur Tilok, Bhagwanpur Partab and Yar Muhammadpur Pirthi, were not liable under decree No. 66. It is further admitted that the villages Tanda Maidaswala, Sipah and Basanta were, before the date of the mortgage of the 4th of July, 1874, upon which decree No. 77 was passed, sold by auction in execution of decree No. 65 and purchased by Umrao Begam and that Umrao Begam mortgaged them to Raja Shiu Raj Singh under the mortgage-deed of [551] the 4th of July, 1874. Those villages were not therefore subject to any prior incumbrance on that date. This being so, no deduction should be made on account of any prior incumbrance from the value of nine out of the twelve villages mentioned above, and from the value of three, namely, Muhammadpur Tilok, Bhagwanpur Partab and Yar Muhammadpur Pirthi, a rateable deduction should be made on account of decree No. 65 only.

The next question to be considered is—what, on the 4th of July, 1874, were the amounts of incumbrances under decrees Nos. 65 and 66 on the villages liable to contribute to decree No. 77?

As regards decree No. 65 it appears that prior to that date three of the villages affected by that decree were sold by auction and Rs. 39,516 was thus realized. Whilst it is urged on behalf of the plaintiff that the balance of the decretal amount should be regarded as the sum for which the villages affected by decree No. 77 were liable, it is contended by the learned counsel for the defendant-appellant that the whole amount of decree No. 65 should be taken into account, inasmuch as the owners of the villages which were sold in execution of that decree were entitled to claim from the unsold villages contribution for the amount realized from their villages in excess of their legitimate share of liability, and consequently the unsold

villages continued to be liable for the proportion of the decretal amount for which they were originally liable. The former contention has found favour with the Subordinate Judge, but in our opinion it is unsound and untenable. It is true that the mortgagee realized by the sale of some of the mortgaged villages a large portion of the decretal amount, and that under the decree itself the unsold villages were liable for the balance of that amount only. But, as the appellant rightly argues, the owners of the villages which were sold for the realization of the decretal amount were entitled to claim contribution from the unsold villages in respect of the amount realized from their villages in excess of that for which they were liable. As a matter of fact the owners of the villages which have been sold have brought suits for contribution and obtained decrees. [552] The unsold villages, therefore, continued to be liable, not only for the balance of the decretal amount, but also for the excess amounts contributed by the villages which were sold. So that the extent of their original liability remained the same. For this reason, the proportionate amount for which the unsold villages were liable under decree No. 65 should be calculated with reference to the full amount which would have been due under that decree on the 4th of July, 1874, had no sale taken place under it. We find from the office report printed at p. 3 of the respondent's book that Rs. 49,515-7-9 were due on the 10th of August, 1874. Excluding interest for the period between the 4th of July and the 10th of August, 1874, the amount payable on the 4th July 1874, was Rs. 49,233-7-9, or in round numbers Rs. 49,230, which we adopt for facility of calculation. The proportionate liability of the villages subject to the operation of decree No. 65 should be calculated with reference to the above amount.

As for decree No. 66, the parties are agreed that the amount due upon that decree on the 18th of July, 1874, was Rs. 20,283-13-3, as found by the Court below in its answer to the reference made by us under s. 566 of the Code of Civil Procedure. That date was referred to through an oversight. We hold that the amount due on the 4th of July, 1874, was Rs. 20,240 in round figures.

As we have said above, the plaintiff in preparing the statement showing the amounts of the rateable liability of each village, has not complied with the provisions of s. 82 of Act No. IV of 1882. He has altogether ignored the prior incumbrances existing on those villages on the date of the mortgage of the 4th of July, 1874. For preparing a correct statement the amount of liability of each village under decree No. 65 should have been first calculated. Then should have been calculated the amount for which the villages were liable under decree No. 66, and in doing so, the amount of the prior incumbrance to which those villages were subject under the mortgage which resulted in decree No. 65 should [553] have been deducted. The decree No. 66 was passed upon a mortgage bond, dated the 28th of April, 1873. The bond upon which decree No. 65 was made was dated the 12th of December, 1867, and was for Rs. 31,000 bearing interest at the rate of 12 annas per cent. per mensem. The suit in which the decree No. 65 was passed was instituted on the 22nd of July, 1873, and the amount of principal and interest claimed as due on that date was Rs. 44,155-8. The amount due on the 28th of April, 1873, the date of the bond on which decree No. 66 was founded, was therefore Rs. 43,500 in round figures. This is the amount of the prior incumbrance to which the villages affected by the decree No. 66 were subject on the 28th of April, 1873, and which should be deducted from the value of those

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villages. A statement prepared in this manner would have given the correct value of each village liable to contribute to decree No. 77 with reference to which its proportion of liability was to be apportioned.

There is no dispute between the parties as to the amount due upon the decree No. 77 on the 20th of August, 1879, the date on which the major portion of the plaintiff's villages were sold. That is the date with reference to which the plaintiff has made his calculations, and counsel for the appellant have consented to that date being adopted for convenience of calculation as the date on which the plaintiff became entitled to claim contribution.

The next question to be determined is whether the unrealized balance of the decree No. 77 should, as urged on behalf of the appellant, be treated as the amount contributed by the villages purchased by Raja Shiu Raj Singh to the discharge of the decree. It is stated that it was on the assumption that the purchase of those villages had discharged the amount of the balance, that no steps were taken to realize that balance by execution of the decree and that the appellant Raja Hari Raj Singh, who is now the holder of decree No. 77, is ready and willing to enter complete satisfaction of that decree. We are of opinion that the balance due upon the decree No. 77 should be treated as the **[554]** amount contributed by the villages purchased by the mortgagee decree-holder.

All the mortgaged villages were liable, in the absence of a contract to the contrary, to contribute to the mortgage-debt in proportion to their value. The villages purchased by the mortgagee were therefore liable to bear their share of the debt. The mortgagee decree-holder was not entitled to take out execution of his decree without crediting towards the decretal amount the sum which represented that share: were he allowed to act otherwise, he would have the advantage of throwing the whole burden of the mortgage-debt on the mortgaged villages other than those purchased by himself and thus of relieving the villages last mentioned of the liability which s. 82 of Act No. IV of 1882 imposes on them. Those villages must therefore be held to have contributed the balance of the decretal amount as their quota of the debt. We are unable to accede to the contention of Mr. *Sundar Lal*, the learned counsel for the respondent, that by taking into account the whole amount of the decree in calculating the share of liability of the plaintiff's villages, the plaintiff has given credit for all that the mortgagee decree-holder is entitled to, and that if he be allowed to treat the balance of the decretal amount as the contribution of his villages he would get credit for that amount twice over. As we have said, each of the mortgaged villages was bound to bear its rateable share of the debt. The plaintiff's villages, equally with the villages purchased by the mortgagee, were liable for their share. The amount of the plaintiff's share has been realized by the sale of his villages. The amount contributed by the mortgagee to the discharge of his share is the balance due upon the decree. The mortgagee is therefore entitled to ask that, equally with the plaintiff, he should be allowed credit for the amount which his villages must be deemed to have contributed. By giving him credit for that amount we shall not be crediting him twice over with the same sum. The balance of the decretal amount appears from the statement filed by the plaintiff with his plaint to be Rs. 9,274-9-10, being the **[555]** difference between Rs. 86,071-9-10, the amount of the decree, and Rs. 76,797, the portion of it which has been realized by the sale of several villages, and the correctness of these figures has not been questioned.

This sum of Rs. 9,274-9-10 should be apportioned amongst the several villages purchased by Raja Shiu Raj Singh as the quota of contribution of each of them.

The only question which now remains to be considered is whether the plaintiff is entitled to recover the whole amount contributed by his villages in excess of their own share of liability from such of the unsold villages as have not contributed either the full amount of their rateable share or a portion of that amount. In our judgment he is not entitled to do so. As we have said, unsold villages which have not contributed their full proportion of the debt afford the fund out of which the claims of all the persons who are entitled to contribution should be met. In this case the statement filed by the plaintiff himself shows that it is not the villages of the plaintiff only which have contributed more than their own quota, but that there are eight other villages which have made similar contributions. The owners of those villages are entitled to claim contribution equally with the plaintiff, and they also have to look to the fund to which we have referred above. If that fund is large enough to meet the claims of all, those claims must be satisfied in full, but if, by reason of some of the villages sold not realizing their full value at auction, the fund be insufficient fully to discharge all the claims, a rateable reduction must be made. In that case the claims will only be satisfied proportionately.

We have caused accounts to be prepared in the mode indicated above, one relating to decree No. 65, another to decree No. 66 and a third to decree No. 77. This last account shows that the plaintiff's villages contributed Rs. 14,421-1-10 in excess of the rateable amount for which they were liable under decree No. 77; and that other villages have similarly contributed Rs. 7,653-9-3 in excess of their share of liability. The owners of those villages were also entitled to claim contribution on the date of the [556] plaintiff's suit. The statement further shows that the fund which is available to all the persons whose villages have contributed in excess of their quota of the mortgage debt is Rs. 7,064-9-3, being the amount which the unsold villages have not contributed. The reason why this amount falls short of the sum necessary to recoup in full the owners of the villages which have contributed in excess of their quota, is that four of the villages, sold in execution of decree No. 77 realized much less than their proper value and did not contribute the full amount of their proportionate liability. Contribution, however, cannot, as we have said above, be claimed from them. The total amount which the plaintiff is entitled to recover from the unsold villages is Rs. 4,614-9-2. Out of this sum the villages purchased by Raja Shiu Raj Singh are liable for Rs. 2,195-12-1 and those purchased by Nand Kishore, Sundar Lal, Jugal Kishore and Dhanpat Rai are liable for Rs 2,418-13-1. The plaintiff had not, however, claimed, probably by an oversight, to recover from Nathiwali, one of the villages purchased by Raja Shiu Raj Singh, but not sold in execution of decree No. 77, its share of liability for the amount due to the plaintiff. Therefore Rs. 87-9-4, the proportionate amount of liability of that village should be deducted from the Rs. 2,195-12-1 mentioned above, and the plaintiff will recover the balance of Rs. 2,108-2-9 from the remaining villages purchased by Raja Shiu Raj Singh, namely Begampur Haru, 2½ biswas, and the entire villages Kanrawala, Kadirganj, Murtazabad, Rajpur, Bhajrawala, and Kandiwala each village being declared liable for its own share out of that amount. He will similarly recover from the shares in the village Mansa purchased by

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Nand Kishore and other defendants Rs. 2,418-13-1, each share being liable for its own quota only.

In our opinion the plaintiff is not entitled to obtain interest on those amounts, and the Court below has rightly rejected this part of his claim. He purchased the property in respect of which he claims contribution for the small sum of Rs. 500, and he has now advanced this claim for upwards of Rs. 36,000. He made the purchase evidently as a speculative bargain. The auction sale of [557] his villages in execution of decree No. 77 took place so far back as August, 1879, only a few months after his own purchase, and, although his right to claim contribution accrued in that month, he did not institute his suit until twelve years afterwards. Under such circumstances the Court below has, we consider, exercised a wise discretion in refusing to award interest to the plaintiff for the period prior to the date of the institution of the suit. For the period subsequent to that date till realization he should, in our opinion, obtain interest at 6 per cent. per annum.

The result is that we allow the appeal and vary the decree below by making a decree in favour of the plaintiff for recovery of Rs. 2,108-2-9 with interest thereon at the rate of 6 per cent. per annum from the 20th of August 1891, the date of the institution of the suit, to the 1st of December 1897, which we hereby fix as the date for the payment of the amount decreed by us, or to the date of payment, if payment be made before the 1st of December 1897, together with proportionate costs here and in the Court below, by sale of the following villages purchased by Raja Shiu Raj Singh, the father of the defendant-appellant, namely, Begampur Haru, 2½ biswas, and Kanrawala, Kadirganj Murtazabad, Rajpur, Bhajrawala and Kandiwala, each village being liable to sale in the event of the proportionate amount of its liability not being paid on or before the 1st of December 1897. The decree will set forth the amount of the proportionate liability of each of the villages abovementioned for principal, interest and costs. The appellant Raja Hari Raj Singh will get his costs here and in the Court below proportionately to the portion of the claim dismissed as against him.

Decree modified.

20 A. 1 (F.B.) = 17 A.W.N. (1897) 207.

FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Burkitt and Mr. Justice Aikman.

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20 A. 1 (F.B.) = 17 A.W.N. (1897) 207.

QUEEN-EMPRESS *v.* ISHRI.* [2nd February, 1897.]

Criminal Procedure Code*, ss. 35 *and* 367—*Concurrent sentences not authorised by the Code.

There is no provision in the Code of Criminal Procedure by which a Court is empowered, on convicting an accused person of two or more offences at the same time, to direct that the sentences imposed in respect of such offences shall run concurrently.

THIS case was referred to a Bench at the instance of Aikman, J., in view of the rulings of the Court in *Queen-Empress* v. *Wazir Jan* (1) and *Queen-Empress* v. *Dalip* (2). The facts of the case, so far as they are necessary for the purposes of this report, appear from the order of the Court.

ORDER.

KNOX, BURKITT and AIKMAN, JJ.—This case was called for on a perusal of the Sessions statement of the Bareilly District for the month of October 1896. The Sessions Judge had convicted an accused person of separate offences falling under ss. 420, 467 and 471 of the Indian Penal Code. For each offence he sentenced the accused to suffer rigorous imprisonment for three months and directed that the sentences should run concurrently. The passing of concurrent sentences is nowhere authorised by the Code of Criminal Procedure. Section 35 of that Code provides that when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences to separate terms of imprisonment, but provides [2] that the separate terms of imprisonment shall commence one after the expiration of the other in such order as the Court may direct. These words show that the passing of concurrent sentences was not in the contemplation of the Legislature for cases in which convictions take place at one trial. Section 397 of the Code provides that in case of a person already undergoing a sentence of imprisonment and such person being sentenced to another term of imprisonment, such latter imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced. We cannot but regret that a power to pass concurrent sentences has not been conferred by the Code. Numerous cases occur to us in which such a power would be very salutary. As the law at present stands, we must hold that the concurrent sentences passed are illegal. We accordingly set aside the sentences passed in this case, and direct that for each offence the accused suffer rigorous imprisonment for a term of one month. These terms of imprisonment will run consecutively from the date of the original conviction. Let the papers be returned.

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* Criminal Revision No. 38 of 1897.

(1) 10 A. 58.

(2) 18 A. 246.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

NABBU KHAN (*Plaintiff*) *v.* SITA (*Defendant*).* [6th July, 1897.]

Civil Procedure Code, ss. 440 et seqq.—*Lunatic—Act No* XXXV *of* 1858—*Lunatic, not adjudged to be so, may sue through a next friend or defend through a guardian* ad litem.

The provisions of Chapter XXXI of the Code of Civil Procedure are not exhaustive, and where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is a defendant. *Porter* v. *Porter* (1), *Venkat* [3]*ramana Rambhat* v. *Timappa Devappa* (2), *Tukaram Anant Joshi* v. *Vithal Joshi* (3), *Uma Sundari Dasi* v. *Ramji Haldar* (4) and *Jonnagadla Subbaya* v. *Thatiparthi Senadala Buthaya* (5), referred to.

[F., 23 B. 633 : 33 C. 1094=4 C.L.J. 306=10 C.W.N. 719 ; 24 M. 504 (508) ; 3 L.B.R. 169 ; 31 P.R. 1905=54 P.L.R. 1905 ; U.B.R. (1905), 3rd Qr., C.P.C., 30.]

THE facts of this case are as follows: During the years 1887—1890 three sons of one Mendu Khan sold certain shops belonging to the family to Gajju Mal, and the deed of sale was signed also by one of the brothers on behalf of a fourth brother, Nabbu Khan, who was of unsound mind. In 1894 the present suit was brought by Nabbu Khan's aunt, Musammat Chhoti, as his next friend to recover a one-fourth share in the shops sold on the ground that Nabbu Khan at the time of the sale had been insane and incapable of contracting. Nabbu Khan was admittedly insane and had been so from his birth, but he had never been adjudged a lunatic under Act No. XXXV of 1858.

The Court of first instance (Munsif of Koil) decreed the claim, holding that, there being in fact no doubt as to the plaintiff's lunacy, there was no reason why he should not sue through a next friend, even though he had not been adjudged a lunatic.

The defendant (the representative of the original vendee) appealed. The lower appellate Court (District Judge of Aligarh) decreed the appeal, holding that it was necessary that the plaintiff should have been adjudged a lunatic under Act No. XXXV of 1858, and further because the plaintiff did not seek to recover possession of his share of the property on payment of a proportionate share of the purchase-money paid by the husband of the defendant-appellant. The plaintiff thereupon appealed to the High Court.

Lala *Gulzari Lal*, for the appellant.
Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought on behalf of one Nabbu Khan, who is alleged to be a lunatic, by his aunt, Musammat Chhoti, as his next friend. Nabbu Khan has not been adjudged to be a [4] lunatic under Act

* Second Appeal, No 292 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th December 1894, reversing a decree of Syed Abdur Razzak, Munsif of Koil, dated the 5th June 1894.

(1) L.R. 37 Ch. D. 420. (2) 16 B. 132. (3) 13 B. 656.
(4) 7 C. 242. (5) 6 M. 380.

No. XXXV of 1858, but the lower appellate Court has found it to be an admitted fact that he is a lunatic. That Court has, however, held, on the authority of certain rulings to which it has referred, that s. 440 and the following sections of the Code of Civil Procedure are, with reference to the provisions of s. 463, inapplicable to the case of a lunatic not adjudged to be so, and that therefore the aunt is not competent to sue on his behalf as his next friend. On this ground and on another ground, to which we shall refer hereafter, the learned Judge has dismissed the suit.

It is contended, in this second appeal which has been preferred on behalf of Nabbu Khan, that the fact that he was not adjudged a lunatic does not render the suit brought by him through a guardian an invalid suit. In our opinion this contention must prevail.

By s. 463 of the Code of Civil Procedure the provisions of ss. 440 to 462 are made applicable to the case of persons of unsound mind adjudged to be so. But that section does not, in our opinion, forbid the institution of a suit by next friend on behalf of a person of unsound mind, who is in fact a lunatic, but has not been adjudged to be so, or the appointment of a guardian *ad litem* for the purpose of defending a suit brought against such a person. It is true, as held in *Uma Sundari Dasi* v. *Ramji Haldar* (1), that, so long as a person has not been adjudged to be of unsound mind, he cannot be deemed to have lost his civil rights and to be consequently incompetent to sue in his own name. But from this it does not follow that a person who is really of unsound mind, but has not been declared to be so, cannot sue through a next friend or defend a suit through a guardian *ad litem*. If we were to hold that a person of unsound mind is not entitled to sue by a next friend or defend by a guardian *ad litem* until he has been adjudged to be a lunatic, serious failure of justice might result. For example, if a trespasser were doing irremediable damage to the property of a lunatic, the interests **[5]** of the latter could not promptly be protected and the trespass could not be restrained by suit till an adjudication had been obtained that he was of unsound mind. Similarly if a lunatic causes serious injury to another, the latter will not be in a position to sue the lunatic without getting him declared to be so. And if he be allowed to sue the lunatic without getting a guardian appointed for the suit, the lunatic will be seriously prejudiced, as the fact of his being of unsound mind will prevent him from defending the action. As observed by Bowen, L. J., in *Porter* v. *Porter* (2) :—"When there is a person of unsound mind, who, although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court as regards his property, real or personal, or as regards any portion of his property, then, supposing he would, if sane, be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind. It is obvious that in the absence of the principal person who is concerned his property ought to be left, as far as possible, and so far as his interest does not render the opposite thing necessary to be done, in the condition in which it was—*quieta non movere*. But still, if it is for his protection and for his obvious benefit, then the Court ought to interfere to give him, while his senses are sleeping, the same sort of protection to which he would be entitled if his senses were awake and he could act for himself." These observations state in more forcible

(1) 7 C. 212.

(2) L.R. 37 Ch. D. 420 (429, 430).

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terms than we can employ, the reasons which ought to induce a Court to permit a person of unsound mind, although not adjudged to be so, to sue or defend through his next friend or his guardian *ad litem*, as the case may be. In our opinion the provisions of the Code of Civil Procedure are not in this respect exhaustive, and we hold that if a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or any other law for the time being in force, he should, if a plaintiff, be [6] allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is the defendant. This was the view of Sargent, C.J., and Birdwood, J., in *Venkatramana Rambhat* v. *Timappa Devappa* (1), and apparently of Jardine and Candy, JJ., in *Tukaram Anant Joshi* v. *Vithal Joshi* (2). In the former case it was held that "although s. 443 of the Code of Civil Procedure (XIV of 1882), read with s. 463, does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind except in the case where he has been adjudged to be of unsound mind under Act XXXV of 1858, still upon general principles and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds on inquiry that he is of unsound mind so as to be unfit to defend the suit." In the latter case the learned Judges seem to have been of opinion that, irrespective of the provisions of Chapter XXXI of the Code of Civil Procedure the next friend of a person of unsound mind not so adjudicated could maintain a suit, if, having regard to the nature of the suit and "the principles of equity as applied in the practice of tribunals," such an action could be brought by a next friend. In the particular case before the learned Judges they referred to the rule stated in Daniell's Chancery Practice, 6th Edn., Vol. 1, p. 116, on the authority of *Halfhide* v. *Robinson* (3), namely, that "if the object of the action is to deal with the real estate of a person of unsound mind (as an action for partition or for sale in lieu thereof) the action cannot be brought by a next friend," and held that the suit, which was one for a partition of ancestral property, could not be maintained by the next friend of the lunatic. It has, however, been decided in the later case of *Porter* v. *Porter* (4), to which we have referred above, that an action which is *prima facie* for the benefit of a person of unsound mind (*e.g.*, a partition action) may be brought by the next friend (Pope's Law and Practice of Lunacy, 2nd Edn., p. 325). So that [7] the rule on the subject in England is no longer the rule stated in Daniell's Chancery Practice.

In *Jonnagadla Subbaya* v. *Thotiparthi Senadala Buthaya* (5) all that was decided was that a guardian *ad litem* for a defendant who has not been declared to be a lunatic under Act No. XXXV of 1858 cannot be appointed under Chapter XXXI of the Code of Civil Procedure. We are, however, of opinion, for the reasons stated above, that upon general principles, and irrespective of the provisions of that chapter, a person of unsound mind, although not adjudged to be so, may sue by a next friend, and that a guardian for the suit for such a lunatic may be appointed by the Court.

In the case before us the claim is to recover possession of property alleged to belong to the lunatic Nabbu Khan which has been sold by his brothers. Such a suit is for the benefit of the lunatic, and could, in our opinion, be brought by his next friend. The Court below has erred in

(1) 16 B. 132. (2) 13 B. 656. (3) L.R. 9 Ch. 373.
(4) L.R. 37 Ch. D. 420. (5) 6 M. 380.

dismissing it on the ground that it could not be so brought. The lower appellate Court has also held the suit to be untenable on the ground that the sale was a *bona fide* one for adequate consideration, and that the plaintiff did not offer to pay a proportionate part of the purchase-money. In our opinion this was not a valid ground for dismissing the suit. The learned Judge ought to have found whether the lunatic had benefited by the sale. If he had not, the mere fact of the purchaser paying full value would not give him any title to the share of the lunatic, which the brothers of the lunatic had no right to sell, nor would that entitle the purchaser to a proportionate share of the purchase-money. Moreover, if it be found that the plaintiff, lunatic, benefited by the sale, that would not entail a dismissal of the suit, but the decree for possession should be made conditional upon his making restitution to the purchaser.

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We allow the appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court under s. 562 [8] of the Code of Civil Procedure. with directions to re admit it under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PURAN MAL (*Plaintiff*) *v.* KRANT SINGH (*Defendant*).*

[6th July, 1897.]

Civil Procedure Code, s. 544—Appeal—Ground of appeal common to all the judgment-debtors—Reversal or modification of decree as against all on appeal by one only.

Section 544 of the Code of Civil Procedure does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under s. 544 any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. *Protab Chunder Dutt* v. *Koorbanissa Bibee* (1), referred to.

[F., 22 A. 386 (392); 9 C.L.J. 461 (463)=4 Ind. Cas. 166; 15 C.P.L.R. 118; R., 8 C.W.N. 496 (499).]

THE facts of this case are fully stated in the judgment of Banerji, J.

Babu *Durga Charan Banerji*, for the appellant.

Babu *Satya Chandar Mukerji*, for the respondent.

JUDGMENT.

BANERJI, J.—This was a suit for possession of certain property purchased at auction in 1882 by the plaintiff-appellant as the property of one Ajab Singh and his son Umed Singh. The suit was brought against

* Second Appeal, No. 1163 of 1895, from a decree of W. Tudball, Esq., Additional Judge of Aligarh, dated the 9th September 1895, reversing a decree of Maulvi Abdur Rahim, Munsif of Kasganj, dated the 27th November 1894.

(1) 14 W.R. 130.

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these persons only. Krant Singh, another son of Ajab Singh, intervened, under s. 32 of the Code of Civil Procedure, and was added as a defendant. Ajab Singh did not enter an appearance. Umed Singh defended the suit by alleging that after the auction sale a compromise took place between him and the plaintiff, under which the plaintiff received **[9]** the purchase money from him and surrendered the property to him. Krant Singh's defence was to the effect that the property originally belonged to his grandmother Musammat Pohpa; that after her it passed to him, Krant Singh, and to his brothers Umed Singh and Dhaukkal Singh; that the plaintiff acquired by his auction-purchase only the one-third share of Umed Singh, and that his claim in respect of two-thirds of the property was untenable. The Court of first instance decreed the claim against all the three defendants. Neither Ajab Singh nor Umed Singh appealed, and they allowed the decree to become final as against them. Krant Singh alone preferred an appeal, and contended, first, that the plaintiff did not acquire more than a third share of the property by virtue of his auction-purchase; and, secondly, that under a private arrangement, which took place after his auction-purchase, the plaintiff withdrew from his purchase. He thus urged for the first time in appeal a ground which he had not taken in his defence in the Court of first instance. The lower appellate Court held this ground of appeal to be a valid one, and, purporting to act under s. 544 of the Code of Civil Procedure, it set aside the decree of the Court of first instance and dismissed the suit. The other grounds of appeal were not tried at all.

In my opinion the learned Judge has erred in applying s. 544 to this case. That section does not enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under s. 544 any one of the defendants may appeal against the whole decree and the appellate Court may **[10]** reverse or modify that decree in favour of all the defendants. This view is supported by the ruling of the Calcutta High Court in *Protab Chunder Dutt* v. *Koorbannisa Bibee* (1). In this case there was no ground common to the defence set up by Umed Singh and that put forward by Krant Singh. On the contrary, the case of the latter was inconsistent with that of the former. Whilst Umed Singh urged that the whole of the property claimed had been reconveyed to him by the plaintiff after the auction sale, Krant Singh contended that Umed Singh had no more than a third share in the property, and that the plaintiff had acquired that share only under his auction-purchase. The Court of first instance also considered the case of Umed Singh separately from that of Krant Singh. It held that Musammat Pohpa, the owner of the property had died before Krant Singh and Dhaukkal Singh were born and the property passed to Umed Singh alone. It found that the allegation made by Umed Singh that the plaintiff had surrendered the property to him on receipt of the sale consideration had not been proved. That Court therefore in making its decree did not proceed upon a ground common to all the

(1) 14 W.R. 130.

defendants. Consequently Krant Singh was not competent to appeal against the whole decree and the lower appellate Court had no authority, under s. 544, to reverse or modify that decree in favour of all the defendants on the appeal of Krant Singh alone.

The Court has, in my opinion, erred in allowing Krant Singh to set up in appeal a case inconsistent with that put forward by him in the Court of first instance. As I have said above, his contention in the Munsif's Court was that Umed Singh owned only a one-third share in the property, and that consequently the plaintiff's claim for the remaining two-thirds of the property was untenable. Inconsistently with that defence he urged in appeal that the plaintiff had no right whatever to the property, inasmuch as he had withdrawn from his auction-purchase. This last contention suggests that the plaintiff had purchased the [11] whole property. Such an inconsistent plea he could not be allowed to raise in appeal, and the lower appellate Court ought not to have considered that plea and to have decided the appeal with reference to that plea.

I would allow the appeal as between the parties to it, and, setting aside the decree below, remand the case to the lower appellate Court under s. 562 of the Code of Civil Procedure for a trial of the other questions raised in the appeal before that Court. The appellant will get his costs of this appeal.

AIKMAN, J.—I concur in the judgment of my brother Banerji and in the decree proposed by him. As this appeal is allowed "as between the parties to it," it will not affect any benefit which the defendants to the suit who are not parties to it may have obtained by the decree of the lower appellate Court.

Appeal decreed and cause remanded.

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FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.

AMJID ALI AND OTHERS (*Plaintiffs*) *v.* MUHAMMAD ISRAIL AND OTHERS (*Defendants*).* [7th July, 1897.]

Act No. VII *of* 1870 (*Court Fees Act*), *ss.* 12 *and* 28—*Court fee—Finality of decision of Court on question of Court fee.*

The decision of the Court on a question of the Court fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit" must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a decision based upon the report of a Munsarim before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court.

Hence where a Court of first instance held on the report of the Munsarim that a plaint presented to it had been insufficiently stamped, but subsequently, both parties being before the Court and arguments having been heard, decided that the Court fee originally paid was sufficient; it was *held* that the latter decision was the decision which was final as between the parties within the meaning of s. 12 of the Court Fees Act, 1870.

[Not F., 173 P.L.R. 1903 = 74 P.R. 1903.]

* Second Appeal, No. 889 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 26th July 1894, confirming a decree of Maulvi Aziz-ul Rahman, Subordinate Judge of Agra, dated the 12th March 1894.

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[12] THE plaintiffs in this case sued for pre-emption in respect of a sale deed executed on the 19th of October 1892. Their plaint was presented in the Court of the Subordinate Judge on the 16th of November 1893, the first day on which the Court was open after the Dasserah vacation. On that day the Munsarim reported that the Court fees paid on the plaint were insufficient, and that the plaint required to be amended in respect of a claim for redemption. Upon this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended, and with the deficient Court fee duty, within four days. On the following day (November 17th) the plaintiffs appeared before the Subordinate Judge and objected to his order in the matter of the Court fee payable on their plaint. They contended that the amount of Court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay, and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient Court fee duty to be paid, which was done, and the plaint was then admittted and registered and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment. At the hearing of the suit the defendants raised the objection that the suit was barred by limitation, the plaint not having been properly stamped when presented on the 16th November, and the deficiency not having been made good within time. The Court, having heard arguments on this point, reconsidered its former *ex parte* decision, and held that the Court fee originally paid on the plaint was sufficient. The suit was ultimately dismissed on the merits.

The plaintiffs appealed, and the defendants preferred an objection under s. 561 of the Code of Civil Procedure raising the same point of limitation. The lower appellate Court (District [13] Judge of Agra) allowed the objection and dismissed the suit on the ground that it was barred by limitation.

The plaintiffs thereupon appealed to the High Court.

Mr. *D. N. Banerji*, for the appellants.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BURKITT, J.—The suit in which this second appeal has arisen is one for pre-emption. The sale-deed on which the cause of action for pre-emption is alleged to have arisen bears date of the 19th of October 1892. The plaint was presented in the Court of the Subordinate Judge on November 16th, 1893, the first day on which the Court was open after the Dasserah vacation. Therefore, so far as the day on which it was presented is concerned, the plaint was within limitation under s. 5 of the Limitation Act. On November 16th, the Court Munsarim reported that the Court fees paid on the plaint were insufficient and that the plaint required to be amended in respect of a claim for redemption. On this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended and with the deficient Court fee duty, within four days. Now in passing that order the Subordinate Judge exceeded his powers, as has been held in the case of *Jainti Prasad* v. *Bacchu Singh* (1). The last day of the limitation

(1) 15 A. 65.

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period during which the plaint could have been presented so as to be a valid plaint was November 16th, 1893. If the plaint as presented on that day was not sufficiently stamped, and if the deficient duty were not paid on that day, it was not a valid plaint. The Subordinate Judge had no power to extend the period of limitation provided by Act No. XV of 1877 by permitting the intending plaintiffs to pay in the deficient court fee after November 16th. The case is not one to which the proviso to s. 28 of the Court Fees Act applies, and therefore no payment subsequent to November 16th of any deficient court fees could validate the plaint. As matter of fact the plaint was not returned to the plaintiffs, for on the following day (November 17th) they appeared **[14]** before the Subordinate Judge and put in a petition in which they objected to his order as to the amount of court fees paid on the plaint being insufficient. They contended that the amount of the court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient court fee duty to be paid, which was done, and the plaint was then admitted and registered, and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment.

One of the pleas taken by the defendants at the hearing was that the suit was barred by limitation. Their contention was that the plaint as presented on November 16th, 1893, was not a valid plaint, as it was not sufficiently stamped, and that as the deficient duty was not paid till the following day, when the limitation period had expired, there was not before the Court any valid plaint to which they could be called on to plead. The plaintiffs replied that the Court fees paid originally on the plaint on November 16th were sufficient, and that the Court had acted erroneously in compelling them to pay a larger sum. They contended that the plaint as presented on November 16th was a valid plaint. On these pleadings the Subordinate Judge, having heard argument on an issue as to whether the suit was barred by limitation or not, decided that it was not so barred, holding that the stamp duty paid on November 16th was sufficient, that the plaint was "legal and valid" on the day on which it was presented, and that "subsequent proceedings cannot invalidate a valid plaint." The suit was ultimately dismissed on the merits.

On appeal by the plaintiffs the defendants put in an objection under s. 561 of the Code of Civil Procedure. Their contention was that the Subordinate Judge was wrong in holding **[15]** that the suit was not time-barred and that the plaint was properly stamped when presented on November 16th. The District Judge on these pleas held that "the plaint being insufficiently stamped on November 16th was not a plaint," and that that day being the last day of limitation, the Subordinate Judge was not competent to give time to amend the plaint or make good the deficiency. The learned Judge further gave his reasons for holding that the plaint when presented was insufficiently stamped.

On second appeal to this Court the case has been referred to a Bench of three Judges. Before us the case has been almost entirely argued on the effect of the words "such decision shall be final as between the parties

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to the suit" in s. 12 of the Court Fees Act, a point which apparently was not raised before the District Judge, and which, I must say, is not in so many words taken in the memorandum of appeal to this Court. The section cited above provides that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or a memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit." The question we have to decide is—which of the orders passed by the Subordinate Judge in this case is the "decision" which is to be considered "final" under s. 12.

Putting aside as immaterial the order passed on November 17th, it being merely a repetition of the order passed on the 16th, there are two orders which we have to consider. The first is the order of November 16th, by which the Subordinate Judge held that the plaint was not sufficiently stamped and directed the deficient duty to be made good within four days. It is admitted that if that order is the "decision" which s. 12 makes final as between the parties, the case is at an end, the plaint not having been stamped within limitation to the amount required by that order. The second order is that passed at the hearing of an issue raised between the parties. by which it was held that the plaint when presented was sufficiently stamped. and so was a valid plaint. **[16]** If that order be the "decision" referred to in s. 12 of the Court Fees Act, it is admitted that this appeal must so far be allowed.

In my opinion the latter of the two orders must be considered to be the "decision" referred to in s. 12 of the Court Fees Act. To hold otherwise would, it appears to me, be most unjust and productive of hardship in many cases. The first order was not one passed between the parties. Indeed on November 16th, when that order was passed, there can hardly be said to have been any parties or any suit. The plaint had not been admitted nor registered, and the defendants had not been summoned. I find it difficult to understand how a decision can be arrived at, which will be final as between parties, at the making of which practically neither party was heard. On the presentation of the plaint, all that happened was that the Munsarim made a report to the Court which the Court adopted, apparently without even calling on the plaintiffs. On the following day, when the plaintiffs did contest the correctness of the order as to the insufficiency of the court fees, it was too late, limitation having expired, and, according to the respondents' contention, this decision, though passed without hearing either party, is final and deprives the plaintiffs of all redress. I am unable to believe that the Legislature intended the word "decision" to be so interpreted. I cannot think that it was intended to mean a mere *ex parte* order by the Court, passed without argument and in the absence at least of one of the parties—the defendants. I take it that in a case in which the defendants have appeared and in which one or other side challenges the correctness of the court fees paid on the plaint, in that case the Court will have jurisdiction, and will be bound, to decide the question of valuation as between the parties, and may conceivably take a view different from that which it took when the plaint was presented and before it was admitted and registered. The latter order is, in my opinion, simply an interlocutory order which the Court may vary as long as it has seisin of the case. In this connection the word "filed" used in s. 12 is significant. **[17]** That word certainly means something more than "presented" for admission. It implies that the plaint or memorandum

of appeal has been admitted and put on the files of the Court. That is the sense in which the same word is used in s. 28 of the Court Fees Act, and I see no reason why I should give a different meaning to it in s. 12. And indeed the words of the section read in their natural and literal sense are wholly inapplicable to a case in which the plaint had not been filed, and in which there was therefore no existing suit, and no parties to such suit. To accept the opposite construction, the section would have to be read "is presented for admission and filing" and "such decision shall be final as between the persons intended to be impleaded in a suit sought to be instituted." I know no principle of law which would justify so unnatural a construction.

When the Legislature intends to confer the status of finality upon an *ex parte* decision, it does so in plain and explicit terms as in s. 5 of the Court Fees Act. In the absence of clear and unequivocal language to the contrary, I must hold that a decision to be "final as between the parties" must be a judicial decision upon a hearing in which the general judicial maxim of "*Audi alteram partem*" has been observed. If then, a plaint or memorandum of appeal has been so "filed," (and under the Rules of this Court it cannot be so filed without a report by the Munsarim that the court fees paid on it are sufficient) it surely would be open to the defendant at the hearing to contend that the fees paid were insufficient, and that for that reason the plaint on the files of the Court was not a valid plaint. On deciding such a plea—as is the case here—the Court would in my opinion come to the "decision," which, under the wording of s. 12 of the Court Fees Act, would be final as between the parties. As an illustration I would take a case in which Rs. 10 was the amount of court fees legally chargeable on a plaint, but in which from ignorance the Munsarim reported to the Court that Rs. 1,000 ought to have been paid, and that the Court adopted and acted on that report. If then the plaintiff pay that sum—as indeed he [18] must do or have his plaint rejected—surely the defendant at the hearing would be entitled to plead that the proper court fee chargeable on the plaint was Rs. 10, and that he—if the decree went against him—ought not to have to pay the extra Rs. 990 in costs. I certainly hold that he could ask the Court to decide the valuation for court fees chargeable on the plaint, and to hold that it had acted erroneously in calling on the plaintiff to pay the Rs. 990, and that the plaintiff, if successful in obtaining a decree, could not recover that sum as part of the costs. This no doubt would be hard on the plaintiff who simply obeyed the order of the Court, but the defendant would not be in fault, and the plaintiff would not be entitled to pass the loss on to the defendant and to make him responsible for the mistake of the Court.

In the above observations I desire to guard myself against its being supposed that in this judgment I have had in my contemplation any of the cases under s. 54 of the Code of Civil Procedure in which the Court may *reject* a plaint. None of these cases come within the scope of the present appeal.

Some argument was addressed to us on an analogy which it was sought to draw from the practice of the High Court in cases under s. 3 of the Court Fees Act. The procedure enjoined by statute and the practice of the High Court and of the District Court is, however, so very different in those matters that no useful analogy can be drawn from them.

For all the above reasons I am of opinion that the order passed by the Court of first instance at the hearing of the suit on March 12th, 1894,

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was the "decision" which, under s. 12 of the Court Fees Act, is final as between the parties.

I would therefore allow this appeal, and, setting aside the decree of the lower appellate Court, I would remand the case under the s. 562 of the Code of Civil Procedure for a decision on the merits, the lower appellate Court having decided the suit on a preliminary point. I would direct that costs should abide the event.

[19] KNOX, J.—I fully concur and have nothing more to add.

BLAIR, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree on the preliminary point reversed, and the case remanded under s. 562 of the Code of Civil Procedure to the lower appellate Court with directions to readmit the case on its file of pending appeals and to dispose of it according to law. Costs will abide the result.

Appeal decreed and cause remanded.

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20 A. 19 (F.B.)=17 A.W.N. (1897) 160.

FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.

NAND LAL (*Plaintiff*) v. BANSHI (*Defendant*).*

[7th July, 1897.]

Pre-mortgage—Wazib-ul-arz—*Co-sharer*—*Mortgagee of a co-sharer not himself a co-sharer.*

Two co-sharers in a village. A and G. mortgaged their proprietary interest, with possession, to L. L made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to B, with a foreclosure clause in case of non-payment. B afterwards transferred to X for an unexpired period of sixteen years and eleven months the interest in the property which he had acquired from L. One N L, a co-sharer in the village, thereupon brought a suit for pre-mortgage in respect of the transfer to X, on the basis of the village *wajib-ul-arz*, which gave a right of pre-emption or pre-mortgage when the share of a co-sharer should be sold or mortgaged.

Held, that, inasmuch as B could not be regarded as a co-sharer, no right of pre-mortgage arose in favour of N L in respect of the transfer of the mortgagee interest from B to X. The principle laid down in *Khair-un-nissa Bibi* v. *Amin Bibi* (1) and in *Ali Ahmad* v. *Rahmat-ul-lah* (2) followed.

[R., 25 A. 421 (427) ; 6 Ind. Cas. (930) 931=6 N.L.R. 86 (88).]

THE material facts of this case are fully stated in the judgment of BURKITT, J.

Munshi *Madho Prasad*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

JUDGMENT.

BURKITT, J :—The question we have to decide in Full Bench in this second appeal has arisen in the following manner. Two co-sharers named Asa and Gopal mortgaged their proprietary interest with possession to

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* Second Appeal No. 338 of 1896, from a decree of Munshi Mata Prasad, Subordinate Judge of Banda, dated the 3rd February 1896, reversing a decree of Babu Jailal, Munsif of Hamirpur, dated the 3rd December 1896.

(1) 7 A.W.N. (1887) 93.

(2) 14 A. 195.

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Musammat Laria. The latter made [20] either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to one Baldeo, with a foreclosure clause in case of non-payment. Baldeo afterwards transferred for an unexpired period of sixteen years and eleven months to the defendant-respondent Bansi the interest in the property which he had acquired from Musammat Laria. It is unnecessary to decide whether the instrument of transfer in his favour was an assignment by conditional sale of a mortgage or was a sub-mortgage. The plaintiff-appellant, Nand Lal, being a co-sharer in the village, thereupon instituted this suit for pre-emption, or rather pre-mortgage, under the terms of the village, *wajib-ul-arz*, which gives a right of pre-emption and of pre-mortgage when the share of a co-sharer is sold or mortgaged.

Now it is admitted that neither Musammat Laria nor her assignee Baldeo, nor Baldeo's assignee Bansi, is a co-sharer in the village. They are all of them strangers. It is also admitted that the plaintiff made no attempt to assert his alleged rights when the first or the second alienations were made.

The question we have to decide is—did the third transfer noted above give to the plaintiff-aopellant any cause of action on which he could maintain the present suit? The contention for the appellant is that a mortgagee in possession of the share of a co-sharer is *ipso facto* a co-sharer, and that if he give an assignment of his mortgage or execute a sub-mortgage to one who is not a co-sharer, the same result ensues as in the case of an alienation by a co-sharer.

In my opinion that contention is unsound and cannot be supported. A co-sharer, even though he has mortgaged with possession his interest in the mahal, and so has temporarily abandoned his right to actual possession of the land, is still nevertheless a co-sharer. As such he continues to enjoy many privileges in the village. He continues to be recorded in the *khewat* as proprietor, and above all he retains the right of redemption. No doubt the mortgagee in possession has by contract or by statute many of the rights, and is subject to many of the liabilities, of his mortgagor. [21] For instance, he may be entitled to sue the tenants for rent, if such be the condition of the mortgage, and he may be liable to pay Government revenue. But to my mind these very facts prove that the mortgagee in possession cannot be considered to be in law a co-sharer. For if that were his legal status, then it would require neither a contractual agreement nor any statutory provision to confer on him those rights or to render him subject to those liabilities. The vakil who appeared for the appellant was logically compelled to go so far as to contend that a lessee for a few days or weeks or months in possession of a portion, however small, of a co-sharer's property became *ipso facto* a co-sharer. Such a position is quite untenable. Indeed, to accede to the contention of the appellant would be in many cases to defeat the whole object of the law of pre-emption. A co-sharer in the proprietary rights of a mahal would have only to let in as mortgagee with possession or as lessee for some limited time a perfect stranger, and then on the strength of that limited right the mortgagor or lessor might sell to him as a co-sharer his mortgagor or lessor rights, and thus by two separate steps confer upon him the whole of such mortgagor's or lessor's rights in the property, which he could not by law have conferred upon him by one single grant so long as any co-sharer chose to exercise his pre-emptive right. Such a contention to be successful must be supported by a strong consensus of authority.

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In support of the appellant's contention the case of *Salik Sahu* v. *Jafar Ali* (1) was cited. In that case it was held that "the term 'co-sharer' must be taken to mean the transferee for the time being of a co-sharer's interest." I am unable to concur in that dictum if it is to be taken as one of general applicability, though it may have been correct in the case in which it was pronounced. For I notice that in that case the defendants-respondents were co-sharers, who had alienated by conditional sale to a stranger a portion of a share which they had acquired by enforcing their own pre-emptive rights as co-sharers against one Ishri Singh, another [22] co-sharer. They clearly offended against the *wajib-ul-arz* none the less because the property which they alienated to a stranger had come into their hands by pre-emption from a stranger to whom another co-sharer had alienated it. I do not consider that case as being of any authority in the present appeal. The case of *Lachman Singh* v. *Ghasi* (2), cited for the appellant, does no more than lay down that mortgagees in possession liable to pay Government revenue may be sued by the lambardar under the Rent Act. The case of *Ganga Prasad* v. *Chunni Lal* (3) is not at all in point.

On the other hand in *Khair-un-nissa Bibi* v. *Amin Bibi* (4) it was held that a Muhammadan widow in possession, under an order of Court, of a share in the village in lieu of dower was not a co-sharer within the meaning of the *wajib-ul-arz*, and was not competent to maintain a suit for pre-emption as a co-sharer. The Court in deciding that case remarked that such a person "cannot be in a better position than that of a mortgagee in possession," meaning of course that a mortgagee in possession was not a co-sharer. The last case to which I would refer is that of *Ali Ahmad* v. *Rahmat-ul-lah* (5), in which the Court, after deciding that a certain document was a mortgage by conditional sale, the term of which had not expired, went on to remark that the "plaintiff (the conditional vendor) had not by reason of the mortgage ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for pre-emption." The above two cases show that a mortgagee in possession is not a co-sharer, and that a co-sharer who has mortgaged his interest, even by conditional sale, still remains a co-sharer and continues to enjoy the privileges of that status, and amongst others the right of pre-emption. In the rule laid down in those cases I fully concur.

Turning now to the present case I hold that the original mortgagors, Asa and Gopal, did not, by reason of the mortgage they executed in favour of Musammat Laria, lose the status of [23] co-sharers in respect of the mortgaged property, and that neither Musammat Laria nor her assignee (or sub-mortgagee) Baldeo became a co-sharer by virtue of their respective mortgages. When therefore Baldeo assigned or sub-mortgaged to Bansi, that which he transferred was not a a co-sharer's interest, but an assignment of a mortgage of (or a sub-mortgage of) an interest executed by a stranger and not by a co-sharer. To such an alienation the terms of the *wajib-ul-arz* do not, in my opinion, apply. I would therefore affirm the decree of the lower Court and would dismiss this appeal with costs.

KNOX, J.—I agree with my brother BURKITT, and have nothing

(1) 1 A.W.N. (1881) 84. (2) 15 A. 137. (3) 18 A. 113.
(4) 7 A.W.N. (1887) 93. (5) 14 A. 195.

further to add to what he has said. I would affirm the decree of the lower Court and dismiss this appeal with costs.

BLAIR, J.—I concur.

BY THE COURT.—This appeal is dismissed with costs.

Appeal dismissed.

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FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

NAND KISHORE (*Plaintiff*) v. RAJA HARI RAJ SINGH AND OTHERS (*Defendants*).* [9th July, 1897.]

Act No. IV of 1882 (Transfer of Property Act), s. 60—Mortgage—Purchase by mortgagee of portion of the mortgaged property—Mortgage not thereby necessarily extinguished.

The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage.

Ahmad Wali v. *Bakar Husain* (1) overruled. *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2), *Nilakant Banerji* v. *Suresh Chandra Mullick* (3), *Mahtab Singh* v. *Misree Lall* (4), *Bitthul Nath* v. *Toolsee Ram* 5), [24] *Kesree* v. *Seth Roshun Lal* (6), *Kuray Mal* v *Puran Mal* (7), *Mahtab Rai* v. *Sant Lal* (8), *Sumera Kuar* v. *Bhagwant Singh* (9), *Chunna Lal* v. *Ananda Lal* (10), *Khwaja Bakhsh* v. *Imaman* (11), *Ballam Das* v. *Amar Raj* (12) and *Bisheshar Singh* v. *Laik Singh* (13), referred to.

[R., 22 A. 284 (289, 291); 31 A 373 (374) = 6 A L.J. 451; 26 B. 88 = 3 Bom. L.R. 628 (638); 11 C L.J. 639 = 15 C.W.N. 800 (802) = 6 Ind. Cas 843 (844); 12 Ind. Cas 131 (134) = 10 M.L T. 240 (246) = (1911) 2 M.W.N. 342 (347); D., 24 M. 96 (112).]

THIS was a reference to a Full Bench of a question which is thus stated in the referring order:—

"In this case certain villages were mortgaged to the same person, namely, Raja Sheoraj Singh, the predecessor in title of the respondents, under two mortgages, upon which decrees for sale were obtained. One of the decrees is No. 66, and the other is No. 77. The latter decree was obtained upon a mortgage of date subsequent to that of the mortgage upon which the other decree was passed A portion of the property mortgaged under decree No. 66, was purchased by the mortgagee in execution of a simple money decree. Another portion of the mortgaged property, which was subject to both the mortgages, was sold in execution of decree No. 77, and was purchased by the decree-holder mortgagee.

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* Second Appeal No. 677 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 21st March 1892, reversing a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Moradabad, dated the 26th September 1891.

(1) 8 A.W.N. (1883) 61. (2) 18 M.I A. 404. (3) 12 C. 414.
(4) N.W P. H.C.R. (1867) 88. (5) N.W.P. H.C.R. (1866) 125.
(6) 2 N.W.P. H.C.R. 4. (7) 2 A. 565. (8) 5 A. 276.
(9) 15 A.W.N. (1895) 1. (10) 19 A. 196. (11) 5 A.W.N. (1885) 210
(12) 12 A. 537. (13) 5 A. 257.

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"The question has been raised whether these purchases had the effect of fully discharging decree No. 66, without regard to the value of the property sold and the price paid for it by the purchaser."

Mr. *T. Conlan* and Pandit *Moti Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the respondents.

The following judgments were delivered :—

JUDGMENTS.

KNOX, J.—Two questions have been referred to us for decision. The form in which they have been referred admits of some improvement. They may be set out as follows:—(1) Does the purchase at a Court auction-sale (held in execution of a simple money decree) by a mortgagee of part of the property covered by the mortgage-deed have the effect of fully discharging the whole mortgage debt, without regard to the value of the property **[25]** sold and the price paid for it by the purchaser? (2) Does the purchase at a Court auction-sale (held in execution of a decree obtained upon a subsequent mortgage-deed) by the mortgagee of part of the property covered by a mortgage-deed of earlier date held by the same mortgagee, have the effect of fully discharging the whole of the prior mortgage debt without regard to the value of the property sold and the price paid for the purchase?

The authority for holding that either of the above purchases would extinguish the whole mortgage debt is to be found in a case decided by this Court—*Ahmad Wali* v. *Bakar Husain* (1).

In that case the mortgagee purchaser held a decree enforcing a mortgage in his favour over several properties. One of these properties was put up for sale in execution of another decree against the original mortgagor, and the mortgagee, finding this, had it notified that the property advertized was being sold subject to the mortgage which he held, and at the sale which followed himself became the purchaser. He then sought to enforce his decree against the rest of the mortgaged property.

It was held that the fact of the purchase made by him of the portion of the property subject to his mortgage lien extinguished the mortgage debt *in toto*.

No principle of law is laid down as being the principle upon which this judgment proceeded. The judges contented themselves with setting out what appeared to be the facts of the case, and then without any further reason laid down the law which they considered applicable.

But it will be found that this judgment stands quite alone and is in conflict with the view held by this Court from 1866 to 1897, and by other Courts in a large number of reported cases, which under similar circumstances recognize the prior mortgage debt as still subsisting, and go on to lay down the principles upon which the mortgagor or a purchaser or assignee from the mortgagor of the equity of redemption over the whole or portion of **[26]** the remaining mortgaged property, may redeem such property or portion of it, a result which, it is needless to say, is quite incompatible with the conclusion that the prior mortgage debt extinguished by the fact of the mortgagee purchasing a portion of the mortgaged property subject to the prior incumbrance.

In *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2) their Lordships of the Privy Council held that the appellant, who was transferee of the

(1) 3 A. W. N. (1883) 61.

(2) 13 M I.A. 404.

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interest of the original mortgagee, and who had subsequently become the owner by purchase of the equity of redemption in twelve and three-quarters of the sixteen mauzas of which the mortgaged property was comprised, if desirous of retaining possession of the villages (in which he had not purchased the equity of redemption) as mortgagee, was entitled to do so against the plaintiff who had purchased the equity of redemption in one of the villages (Hosseinpore) and that the plaintiff's right in that case was limited to the redemption and recovery of Hosseinpore upon payment of so much of the sum as represented the portion of the mortgage debt chargeable on that village.

The same principles were again laid down by the Privy Council in *Nilakant Banerji* v. *Suresh Chandra Mullick* (1).

So far back as the year 1867, in *Mahtab Singh* v. *Misree Lall* and *Mussamat Soondur* (2), this Court held that a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's interests that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden and must discharge it. **[27]** It will be further seen from the cases cited below that, so far from any inclination to hold that the mortgage debt was discharged by the fact of the mortgagee purchasing a portion of the mortgaged property under such circumstances as are set out in the reference, this Court has consistently, with the one reported exception of *Ahmad Wali* v. *Bakar Husain* (3), held that the mortgage debt still subsisted, if not satisfied by the mortgagee's purchase, and had to be satisfied by any one seeking to redeem the remainder of the property. See *Bitthul Nath* v. *Toolsee Ram* (4); *Kesree* v. *Seth Roshun Lal* (5); *Kuray Mal* v. *Puran Mal* (6), *Mahtab Rai* v. *Sant Lal* (7). In the very recent cases of *Sumera Kuar* v. *Bhagwant Singh* (8) and *Chunna Lal* v. *Anandi Lal* (9) the same principle has been re-affirmed.

The law laid down in the above cases appears to have found a place in the last clause of s. 60 of the Transfer of Property Act, wherein it is provided that nothing in s. 60 shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Where the mortgagee or mortgagees has or have acquired in part the share of a mortgagor, a person interested in a share only of the mortgaged property is entitled to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, a clear recognition that the mortgage debt in part still subsists.

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(1) 12 C. 414.
(2) N.W.P. H.C.R. (1867) 88.
(3) 3 A. W. N. (1883) 61.
(4) N.W.P. H.C.R. (1866) 125.
(5) 2 N W.P. H.C.R. 4.
(6) 2 A. 565.
(7) 5 A. 276.
(8) 15 A.W.N. (1895) 1.
(9) 19 A. 196.

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Several cases to the same effect will be found in the reported decisions of other High Courts.

The learned counsel for the appellant made some show of relying upon the case of the *Khwaja Bakhsh* v. *Imaman* (1) as an [28] authority in favour of his client: but in that case the mortgagee held two incumbrances over the same property and brought it to sale in execution of the puisne incumbrance after notifying that the sale was being made subject to the prior incumbrance. It was rightly held that the purchase, having been made subject to the prior incumbrance held by the purchaser himself, operated by the rule of merger to extinguish the prior incumbrance, there being no intervening equities in the case.

The same remarks apply to the case of *Bullam Das* v. *Amar Raj* (2) which was decided upon the same principles.

These cases are perfectly distinct from the cases previously cited.

* [We have no hesitation therefore in holding that the precedent *Ahmad Wali* v. *Bakar Husain* (3), must be overruled in answering both the questions submitted to us in the negative.

We direct that with this answer the record be returned to the Bench which made the reference.]

BURKITT, J.—I concur with my brother Knox and have nothing to add to his judgment.

BLAIR, J.—The plaintiff-appellant represents the mortgagor interests and the respondent-defendant the mortgagee interests in this suit. The question referred to us is whether the mortgagees by purchasing certain portions of the mortgaged property sold in execution of money decrees have thereby extinguished their mortgages over the whole of such property. In other words—does the confluence of the mortgagor and mortgagee interests in one person in a part of the property included in a mortgage or mortgages, operate as an extinguishment of the mortgagee's interests in the entire property?

The first case cited for the appellant was that of *Ahmad Wali* v. *Bakar Husain* (3). It boldly answers the question in the affirmative. The learned Judges give no reason and rely upon no authority. No doubt their decision was based on the general doctrine of the indivisibility of mortgages. That case was professedly followed by a Division Bench of this Court (including one of the judges who decided it) in the case of *Khwaja Bakhsh* v. *Imaman* (1). The reason given in the judgment was that the mortgagee-purchaser bought at a sale at which the prior [29] incumbrance was notified, and must therefore be taken to have bought at a price in which the amount of the notified incumbrance must have been taken into account. Apparently the learned Judges failed to observe the distinction between the case they were deciding and the case they supposed themselves to be following. The decision in *Khwaja Baksh* seems to me open to no exception, and is certainly no authority for the proposition that the purchase by a mortgagee of part of the mortgaged property does *per se* extinguish the whole mortgage. What was purchased in *Khwaja Baksh* v. *Imaman* was the whole and not part of the mortgaged property. To reconcile the principle upon which the two cases were decided, we should have to suppose that in the case of *Ahmad Wali* v. *Bakar Husain*, the Judges were of opinion that the whole amount of the notified incumbrance must have been taken by the bidders to have been exigible

* The paras in rectangular brackets form a portion of the judgment. They do not find a place in the I.L.R. Series.

(1) 5 A.W.N. (1885) 210. (2) 12 A. 537. (3) 3 A.W.N. (1883) 61.

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from that part of the mortgaged property so sold and bought. If that doctrine were universally applied, the result would be that if several parts of the mortgagor's equity of redemption were sold separately with notice of the incumbrance in execution of separate money decrees, and the purchasers were each one to take into consideration in the price paid, the amount of the whole incumbrance, the mortgagor would be mulcted in the amount of the whole incumbrance just as many times as there were sales. *E converso*, if the mortgagee were the purchaser in one of such sales and paid a price in which the whole value of his incumbrance was deducted from the price he would have paid in the absence of incumbrance, then it would only be equitable to hold that his incumbrance was discharged by such purchase. In *Khwaja Bakhsh* v. *Imaman*, the equity bought was co-extensive with the property mortgaged: that case therefore furnishes no answer to the question put to us.

The case of *Ballam Das* v. *Amar Raj* (1) appears simply to have followed the two previous rulings which I have discussed; but the Court apparently did not notice the distinction between [30] them. To the decision in that case in my opinion no just exception can be taken, but it is no authority for the much larger proposition contended for by the appellant.

Indeed both these later cases are consistent with the principle laid down by the Lords of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (2). It is remarkable that each of the Judges who decided the case of *Ahmad Wali* v. *Bakar Husain* has lent the weight of his authority to some other decision, the principle of which it seems practically impossible to reconcile with the judgment in that case. *Vide* the case of *Bisheshar Singh* v. *Laik Singh* (3) and that of *Ballam Das* v. *Amar Raj* (1).

The later judgments of this Court have consistently followed the principle of allocating to each part of a divided equity an *ad valorem* share of the mortgage debt to which the whole property is subject. The Calcutta rulings are to the same effect. A vast preponderance of authority based, as it seems to me, upon sound considerations of justice and equity, constrains me to answer the question put to us in the negative. It is not in my opinion a sound general principle of law that the purchase by a mortgagee at a sale under a decree of part of the mortgaged property extinguishes the mortgagee's rights against the whole.

BANERJI, J.—The question referred to us is substantially this:—Has the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage?

My answer to the question is that such purchase does not necessarily discharge the mortgage in full and extinguish it. As I said in my judgment in *Chunna Lal* v. *Anandi Lal* (4) "such purchase has in some instances the effect of discharging the whole of the mortgage debt, but I am unable to hold that it has that [31] effect in every case." If a part of the mortgaged property be acquired by a sole mortgagee, or by all the mortgagees where there are more mortgagees than one, the integrity

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(1) 12 A. 537.
(2) 13 M. I. A. 404.
(3) 5 A. 257.
(4) 19 A. 196.

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of the mortgage is thereby broken up and the owner of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage. But the mortgage does not, by reason of such purchase, of necessity become extinct. This is clear from the provisions of the last paragraph of s. 60 of Act No. IV of 1882, and the rulings cited in his judgment by my brother Knox. That paragraph would be unnecessary and superfluous, if, as is contended on behalf of the appellant, the purchase of a part of the mortgaged property by the mortgagee has the effect of fully discharging the mortgage in every instance. That property may be sold subject to a mortgage and that the mortgagee himself may purchase the mortgagor's equity of redemption in whole or in part, either by private sale or at auction in execution of a decree, can admit of no doubt. If, however, a part of the property comprised in a mortgage is sold subject to the mortgage, and the mortgagee himself buys it, certain equities arise between the mortgagee or his respresentative in interest on the one hand and the mortgagor or the mortgagor's representative in interest on the other, to which a Court is bound, as a Court administering justice and equity, to give effect. One of those equities is that the mortgagee by purchasing a part of the mortgaged property should not place the mortgagor in a worse position than that in which the mortgagor would have been had any other person purchased the property. Where several properties are mortgaged to secure one debt, such properties are, under s. 82 of Act No. IV of 1882, liable, in the absence of a contract to the contrary, to contribute rateably to the debt, the extent of the liability of each property being proportionate to its value at the date of the mortgage. If the mortgagee himself purchases one of the properties liable to contribute rateably to the mortgage debt, he must bear a rateable share of the debt, and he cannot be allowed to benefit himself and to prejudice the mortgagor or the owner of the [32] remainder of the property by throwing on it the whole burden of the debt and making that property solely responsible for the debt. He must bring into account the value of the property purchased by himself. When property is sold subject to a mortgage, the price which the purchaser pays for it is ordinarily the difference between the market value of the property and the amount due upon the mortgage. If the mortgagee himself be the purchaser, and, as generally happens in such cases, the price paid by him, is not the full market value of the property, he should not be allowed to keep in his pocket the difference between the market value and the price paid by him and thereby damnify the mortagagor or other owner of the remainder of the mortgaged property. That is the reason why the mortgagee must bring into account the value of the property purchased by himself. As a result of his doing so, the mortgage may, in some instances, be found to have been fully discharged by his purchase. But there is no principle of law or equity under which it may be held that the fact of the mortgagee buying, subject to his mortgage, a part of the property comprised in his mortgage, is in itself sufficient to extinguish the mortgage. Suppose the mortgaged property consists of a large zamindari. Surely, it cannot be said that if the mortgagee buys a few acres of land in the zamindari, the whole mortgage will thereby be discharged. It is conceivable that the mortgagee may for special reason, *e.g.*, proximity to property owned by himself, be anxious to purchase a small portion of the mortgaged property, and may therefore pay full value for it, the remainder of the property being sufficient security for the mortgage-debt. If he pays full value for the portion purchased by him, the purchase cannot

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in any way damnify the mortgagor so as to create an equity in his favour as against the mortgagee. It is true that if a person other than the mortgagee buys a part of the mortgaged property, he can only protect the part which he has purchased from the claim of the mortgagee, by payment of the whole of the mortgage money due, but he would have the right of contribution as against the other properties comprised in the mortgage. There appears to be no [33] reason why, if the mortgagee be the purchaser, he should be in a worse position than any other purchaser. For the above reasons, I am of opinion, that the fact of the mortgagee buying a part of the mortgaged property, does not necessarily extinguish the mortgage. To what lesser extent such a purchase may be held to have discharged the mortgage, is not a question which we are called upon to decide on the reference before us. All I need say on that question is that the answer will depend upon the circumstances of each individual case.

The only reported ruling in which a view contrary to that stated above was adopted is that of *Ahmad Wali* v. *Bakar Husain* (1). The report is very meagre, but it appears from the record of the case, to which we have referred, that in that case a subsequent mortgagee purchased a part of the property comprised in his mortgage in execution of a decree obtained by another mortgagee upon a prior mortgage. Strangely enough the property sold under the prior mortgage was sold subject to the lien created by the subsequent mortgage. Oldfield and Brodhurst, J.J., held "that if the sale was made subject to the lien which he [subsequent mortgagee] had, his debt must be held as satisfied." The learned Judges referred to no authority or principle of law which supported their view. They did not consider whether the difference between the market value of the property and the price paid for it was equal to the amount of the subsequent mortgage, and they held without any qualification that the fact of the mortgagee buying a part of the mortgaged property subject to his mortgage was enough fully to discharge the mortgage. For the reasons I have stated above I am unable to agree with the opinion of the learned Judges. I notice that in *Bisheshar Singh* v. *Laik Singh* (2), one of those learned Judges came to a conclusion inconsistent with the view adopted by him three days afterwards in *Ahmad Wâli* v. *Bakar Husain*.

The next case which was referred to on behalf of the appellant was that of *Khwaja Bakhsh* v. *Imaman* (3). That was a case [34] in which the whole of the mortgaged property was purchased by the mortgagee in execution of a decree obtained by him upon a subsequent mortgage, after notifying to intending purchasers the prior incumbrance held by him. It was held that the prior mortgage was discharged by the purchase. One of the learned Judges based his opinion on the doctrine of merger, which cannot certainly apply to the case of the purchase by the mortgagee of a part only of the mortgaged property. In such a case there cannot be a complete fusion of all the rights of the mortgagor and the mortgagee in the same person. That ruling, therefore, is no authority for the proposition for which the appellant contends.

In the case of *Ballam Das* v. *Amar Raj* (4) the mortgagee appears to have purchased the mortgaged property with the leave of the Court at a sale held in execution of a decree obtained by him upon his prior mort-

(1) 3 A.W.N. (1883) 61.
(2) 5 A. 257.
(3) 5 A.W.N. (1885) 210.
(4) 12 A. 537.

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gage. I fail to see how such a purchase could have the effect of extinguishing a subsequent mortgage held by him over the same property.

The opinion I have expressed above is in accord with the ruling in *Sumera Kuar* v. *Bhagwant Singh* (1).

I would answer the question referred to us by saying, as I have said above, that the purchase by the mortgagee of a part of the mortgaged property under the circumstances stated in the order of reference, does not necessarily extinguish the mortgage.

AIKMAN, J.—I concur with my learned colleagues in thinking that the case of *Ahmad Wali* v. *Bakar Husain* (2), was wrongly decided, and I concur in the judgment of my brother Banerji.

BY THE COURT.—We have no hesitation therefore in holding that the precedent *Ahmad Wali* v. *Bakar Husain* (2), must be overruled, and in answering both the questions submitted to us in the negative.

We direct that with this answer the record be returned to the Bench which made the reference.

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20 A. 35 (F.B.) = 17 A.W.N. (1897) 193

[35] FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Burkitt.

FRANCIS LEGGE (*Defendant,*) *v.* RAMBARAN SINGH AND ANOTHER (*Plaintiffs*).* [12th July, 1897.]

Declaratory decree—Suit for a declaration of title to and possession in immoveable property—Limitation—Act No XV of 1877 (*Indian Limitation Act*), *sch* ii, *arts* 120 144.

A suit for a declaration of right to and of actual possession in immoveable property is governed by the limitation prescribed by art. 120 of the second schedule to the Indian Limitation Act, 1877. *Moru Bin Patlaji* v. *Gopal Bin Satu* (3); *Durga* v. *Hidar Ali* (4); *Bhikaji Baji* v. *Pandu* (5), and *Mahomed Riasat Ali* v. *Hasin Banu* (6) referred to. The judgment of Oldfiled, J., in *Debi Prasad* v. *Jafar Ali* (7) not followed.

[F., 31 A. 9=5 A.L.J. 637=A.W.N. (1908) 252=1 Ind. Cas. 557=4 M.L.T. 444; 2 O.C. 79 (83); 61 P.R. 1905=108 P.W.R. 1905; R., 10 A.L.J. 413 (415); 1 C.L.J. 73: 10 Ind. Cas. 11 (13); 15 Ind. Cas. 545 (546); 18 Ind. Cas. 463 (464); 93 P.L.R. 1903=56 P.R. (1903); D., 12 O.C. 321 (332)=4 Ind. Cas. 159; 25 P.L.R. 1900=140 P.R. 1907.]

THIS was a suit to obtain a declaration of the plaintiffs' right to and their possession of certain immoveable property. The plaintiffs alleged that on the 28th of June, 1883, the Settlement Officer had expunged their names from the revenue papers relating to the property in suit and had wrongfully caused the name of the defendant to be entered. They claimed to be in possession, and to have remained in possession all along, notwithstanding the settlement record, and they sued only for a declaratory decree.

The Court of first instance (Munsif of Jaunpur) found as a fact that the plaintiffs were not in possession, and dismissed the suit, applying s. 42 of the Specific Relief Act.

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* Second Appeal No. 591 of 1896, from a decree of Babu Brijnath, District Judge of Jaunpur, dated the 6th May, 1896, reversing a decree of Babu Promotha Nath Banerji, Munsif of Jaunpur, dated the 21st December, 1895.

(1) 15 A.W.N. (1895) 1. (2) 3 A.W.N. (1883) 61. (3) 2 B. 120.
(4) 7 A. 167. (5) 19 B. 43. (6) 21 C. 157.
(7) 3 A. 40.

The plaintiffs appealed. The Court of first appeal (Subordinate Judge of Jaunpur) found that the plaintiffs were in possession and decreed their claim.

The defendant thereupon appealed to the High Court.

Mr. *Amir-ud-din*, for the appellant.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the respondents.

JUDGMENT.

KNOX, BLAIR and BURKITT, JJ :—This second appeal which has been referred to us for decision raises the important question by what limitation rule is a suit for a declaration of right to and [36] of actual possession in immoveable property governed? The point arises in this way. The plaintiffs, who are respondents before us, allege that they are entitled to possession of and are in possession of certain property in mauza Bataura. They say that by an order dated the 28th of June, 1883, the Settlement Officer, who was then conducting settlement proceedings in the Jaunpur district, on the application of the defendant, expunged their names from the village papers in respect of the property in dispute and recorded the name of the defendant as being in possession. They further allege that they were, at the time the Settlement Officer made this entry, in possession, and that they have been in actual possession ever since up to the date of the suit, namely, the 15th of May, 1895. Now, when twelve years have almost elapsed since the day when the Settlement Officer made the entry in the village papers of which they complain, and which they set forth as their cause of action, they come forward with this suit, in which they ask for a declaration both of right and of actual possession at the date of the suit in respect of the property in suit. The contention raised before us is that their suit was barred at the time they instituted it. The appellant bases his contention upon this, that there is no article in sch. II of the Indian Limitation Act of 1877 which would apply to the suit as brought, and that therefore it must fall within the purview of art. 120, an article which provides only six years within which to bring the suit from the date of the cause of action. If this contention is right, the suit is undoubtedly barred. The respondents seek, on the other hand, to bring the suit, though expressly described as a suit for a declaration of right to and of possession in immoveable property, under art. 144, which provides for suits for possession of immoveable property or of any interest therein. It seems to us that there is the widest possible difference between a suit for a declaration such as is asked for in this suit and a suit for actual possession of immoveable property. In a suit to which art. 144 would apply, there must be a prayer, express or implied for the dispossession of some one from the property or from the interest in it which the suit claims. In the present suit [37] the plaintiffs have most distinctly asserted that they are and have all along been in possession of the property. There is no one to be dispossessed from it or from any interest in it. All that they want removed is a cloud, which they say was cast upon their title almost twelve years before the institution of the suit. We ought to notice that before this contention was laid before us it was contended by the learned vakil for the respondents that this was a suit to which, to use his own words, no limitation applies. He cited in aid s. 23 of the Limitation Act, and contended that this was a case of a continuing wrong, that as long as what he contended to be the wrong entry in the village papers continued on record, so long a fresh cause of action accrued every day. In the first

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place, this is not the allegation in the plaint, which sets forth a distinct cause of action as having accrued and become complete on the 28th of June 1883. Secondly, the act of the Settlement Officer, if it was a wrong to the plaintiffs was a wrong committed once for all, and was very properly described as being the cause of action upon which the plaintiffs came into court.

With regard to the contention that the suit fell within art. 144, the learned vakil cited as the leading case in his favour *Moru Bin Patlaji* v. *Gopal Bin Satu* (1). That case, if we may so put it, was a very frail reed on which to rest so heavy a contention. The two judges who were first seised of the case differed in opinion. One of them, it is true, appeared to be in favour of the view now urged upon our notice by the respondents. The judges being divided in opinion, the plaintiff in that suit preferred an appeal under the Letters Patent, and thereupon it was held that the question of limitation was not one which could properly be raised in the suit. Another case which certainly does favour the respondents' contention is that of *Debi Prasad* v. *Jafar Ali* (2). We cannot concur in the remarks of Mr. Justice Oldfield in that case, which are set out on page 45. The learned judge himself must soon have felt considerable doubt as to the view he took in that case, for **[38]** we find him in *Durga* v. *Haidar Ali* (3) expressly holding that claims declaratory in their nature were governed by art. 120 of the Indian Limitation Act of 1877. To the same effect is the case of *Bhikaji Baji* v. *Pandu* (4) which was brought to our notice by the learned counsel for the appellant. The same learned counsel drew our attention to what the Privy Council had held in *Mahomed Riasat Ali* v. *Hasin Banu* (5). At page 163 their Lordships discuss the limitation applicable to such a suit, and say that art. 120 should be applied unless it is clear that the suit is within some other article. We can find no such article, and no such article has been pointed out to us. We hold that the suit when instituted was barred by limitation and could not be maintained. We therefore allow this appeal, set aside the judgment and decree of the Court below and direct that the suit stand dismissed.

As regards costs, we think that, as the point was not raised in any of the Courts below, we should make no order, and we make none.

Appeal decreed.

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20 A. 38 = 17 A.W.N. (1897) 194.

MISCELLANEOUS CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

CHAIL BEHARI LAL (*Defendant* v. RAHMAL DAS AND ANOTHER (*Plaintiffs*).* [13th July, 1897.]

Civil Procedure Code, ss. 372, 582—Parties to an appeal—Attaching creditor of decree-holder respondent seeking to be brought on to the record as a respondent.

Held that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal under ss. 372 and 582 of the Code of Civil Procedure.

[R., 7 Ind. Cas. 66 = 20 M.L.J. 524 = 8 M.L.T. 237.]

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* Application in First Appeal No. 232 of 1894.

(1) 2 B. 120. (2) 3 A. 40. (3) 7 A. 167.
(4) 19 B. 43. (5) 21 C. 157.

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JULY 13.

MISCELLANEOUS CIVIL.

20 A. 38 = 17 A.W.N. (1897) 194.

THE facts of the case sufficiently appear from the order of the Court.
Munshi *Madho Prasad*, for the applicant.

ORDER.

BANERJI and AIKMAN, JJ.—This is an application under s. 372 of the Code of Civil Procedure, read with s. 582 of that Code, to be added as a respondent to an appeal **[39]** pending in this Court. The applicant is a judgment-creditor of the respondent, and he caused the decree appealed against to be attached in execution of a decree held by him against the respondent. It is contended on his behalf that by reason of this attachment he has acquired an interest pending the suit and is therefore entitled to be joined as a party to the appeal under s. 372. In our opinion the applicant is not a person in whose favour there has been an assignment, creation or devolution of any interest pending the appeal. It is conceded that he is not an assignee of the decree. What Mr. *Madho Prasad* urges on his behalf is that an interest has been created in favour of the applicant by operation of law, that is, by the attachment which he has obtained over the decree held by the respondent. With this contention we are unable to agree. As stated on page 264 of Daniell's Chancery Practice, Vol. I.—"It is a general rule that no one should be made a party to an action against whom, if brought to a hearing, no order can be made." The test therefore is whether the applicant is a person in whose favour or against whom a decree can be made in the appeal. We think that he is not such a person. Mr. *Madho Prasad* relied upon the case of *Wallis* v. *Smith* (1). That case in our opinion has no bearing upon the present question. That was a case in which, after decree had been obtained, the decree-holder, plaintiff, took out a garnishee order against one of the debtors of his judgment-debtor. The London and South Western Bank, which held a decree against the decree-holder plaintiff, and which had got the plaintiff's decree attached, applied to be made a party to the proceedings taken out by the plaintiff against his judgment-debtor, and that application was granted. A case like that is provided for by section 273 of the Code of Civil Procedure, according to which a judgment-creditor who has caused a decree to be attached may under certain circumstances himself apply for the execution of that decree and may take all the steps necessary to realise the amount of the decree attached by him. That is a very different **[40]** thing from holding that an attaching creditor has a right to be heard as to the merits of the decree attached by him which is *sub judice* in appeal. For the above reasons we refuse the application with costs.

Application refused.

(1) 51 L. J. Eq. 577.

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APPEL-
LATE
CRIMINAL.

20 A. 40 =
17 A.W.N.
(1897) 173.

20 A. 40 = 17 A.W.N. (1897) 173.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* CHIDDA AND OTHERS.* [14th July, 1897.]

Criminal Procedure Code, ss. 337 and 529—Pardon—Tender of pardon by a Magistrate having powers under s. 337, but not being the Magistrate before whom inquiry was being held.

A dacoity was committed in the district of Muttra and was being inquired into in that district. Pending such inquiry, one Partap Singh appeared before the Magistrate of the neighbouring district of Etah and obtained from him a tender of pardon in respect of the said dacoity, on the strength of which pardon he was examined as a witness by the Magistrate of the Etah district and made a statement implicating himself and others in the dacoity. Subsequently, on the case being committed to the Court of the Sessions Judge of Agra, the tender of pardon made by the District Magistrate of Etah was ignored and Partap Singh was tried and sentenced for the dacoity.

Held, on appeal to the High Court, that the Magistrate of Etah District had no jurisdiction under the circumstances to make the tender of pardon which he did, and that his action in that respect was not covered by s. 529 of the Code of Criminal Procedure.

[**R.**, 12 M.L.T. 585 (586); **D.**, 5 A.L.J. 691 (696) = A.W.N. (1908) 259; 8 Cr. L.J. 445 (447); 4 C.W.N. 821 (822).]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Messrs. *A. E. Ryves* and *A. H. C. Hamilton*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

KNOX and BURKITT, JJ.—Chidda, Kallu, Kana, Partap Singh, Sona and Tunya have been convicted of an offence under s. 395 of the Indian Penal Code and have one and all been sentenced to transportation for life. They have all appealed, and their appeals are now before us for decision. One of them, Partab Singh, pleaded guilty in the Court of Session, but in that Court he also pleaded in bar of sentence the fact that he had obtained what he considered a pardon under s. 337 of the Code of [41] Criminal Procedure from the District Magistrate of Etah. In his memorandum of appeal here he pleads the same fact in bar of sentence. We will deal with his case first. The dacoity with which he is charged took place in the district of Muttra. The only inquiry connected with it that we know of was conducted from first to last in the district of Muttra. After that inquiry had continued for a considerable time in the district of Muttra; after one Balwanta had been arrested and obtained an offer of pardon from the District Magistrate of Muttra, and had named certain persons, and among them this very Partab Singh, who is himself a resident of Muttra, as having taken part in the dacoity, Partab Singh betook himself to the District of Etah, there presented himself before the District Magistrate, and, by some representations, of which we know nothing, obtained a tender of pardon from that Magistrate. The District Magistrate of Etah was not the District Magistrate before whom the offence of the dacoity was under inquiry, and he was certainly not one of the other persons

* Criminal Appeal, No. 584 of 1897.

mentioned in s. 337 of the Code of Criminal Procedure. This being the case, he had no jurisdiction to tender a pardon to Partap Singh. Partap Singh was, however, examined as a witness by the Magistrate of Etah, and it is contended from the fact that he was so examined under a tender of pardon, however wrongly granted, that that tender of pardon, cannot now be set aside. The last clause of s. 529 is cited in support of this contention. In our opinion s. 529 refers to quite different circumstances. It is a section which deals with acts done by a Magistrate in no way empowered by law to do those acts; it has no reference to a Magistrate empowered otherwise under the Act to tender pardon, but not possessing jurisdiction over the particular offence. The Magistrate of Etah, as Magistrate of the district Etah, is undoubtedly empowered to tender pardon in respect of offences inquired into in the Etah district which are covered by the provisions of s. 337 of the Code of Criminal Procedure: but he has no such jurisdiction in respect of an offence of the same kind committed in the district of Muttra. On the other [42] hand a second or third class Magistrate in the Muttra district not inquiring into the offence or not empowered by the Magistrate of the district, has no power by law to tender a pardon to a person accused of having committed an offence covered by s. 337 within the district of Muttra, but if such a Magistrate should tender a pardon in such a case, his proceedings would not be set aside merely on the ground of his not being so empowered. Under these circumstances the Court of Session was, in our opinion, right in ignoring the pardon tendered by the District Magistrate of Etah to Partap Singh, and the so-called pardon cannot be pleaded in bar of sentence. The appeal of Partap Singh is, therefore, dismissed.

[The remainder of the judgment being occupied chiefly with a discussion of the facts of the case, is not reported.—ED.]

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20 A. 42 = 17 A.W.N. (1897) 195.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

TIKA RAM AND ANOTHER (*Defendants*) *v.* SHAMA CHARAN (*Plaintiff*).* [15th July, 1897.]

Hindu Law—Adverse possession—Limitation—Suit by reversioner to Hindu female heir—Appeal from order of an appellate Court—High Court bound by findings of fact of the Court below—Civil Procedure Code, ss. 562 and 588.

Where property which should by be law in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse also as against the reversioners of such female heir as well as against the female heir, and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad* v. *Bhagauti Prasad* (1) approved.

The Full Bench decision in *Ram Kali* v. *Kedarnath* (2) has been impliedly overruled by the judgment of the Privy Council in *Mussummat Lachhan Kunwar* v. *Anant Singh* (3).

In an appeal from an order of an appellate Court the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the lower appellate Court. *Gauri Shankar* v. *Karima Bibi* (4) approved.

[F., 3 Ind. Cas. 283 (284) = 6 M.L.T. 198; R., 25 A. 435 (438); 13 C.P.L.R. 81 (83); 140 P.L.R. (1904) = 14 P.R. (1904); 41 P.R 1903; Disappr., 26 C. 285.]

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* First Appeal, No. 24 of 1897, from an order of E. J. Kitts, Esq., District Judge of Bareilly, dated the 1st April, 1897.

(1) 19 A. 357. (2) 14 A. 156. (3) 22 I. A. 25. (4) 15 A. 413.

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[43] THE facts of this case are fully stated in the judgment of the Court.

Mr. *E. Chamier*, for the appellants.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C.J., and BLAIR, J.:—In 1869 Jit Singh, who was possessed of a 12-biswa share in the village of Sitalpur, died. He left a son, Sewa, and a widow, Raika. Sewa and Raika obtained mutation of names in the Revenue papers each in respect of six biswas out of the twelve biswas. In 1873 Sewa died and left a widow, Musammat Pan Kunwar. He left no son. Musammat Pan Kunwar got mutation in her favour in the Revenue papers of the six biswas which had been entered in Sewa's name. Disputes began between Pan Kunwar and Raika after Sewa's death. They commenced to live separately. Each collected in respect of an 8-anna share of the 16 annas of the original 12 biswas, and in 1880 these ladies partitioned the 12 biswas between them. The Court of first instance found that Raika's possession was adverse from the first, that is, from the death of Jit Singh. The Court of first appeal found that Raika's possession of the 6 biswas did not become adverse until the death of Sewa. There was evidence to support the latter finding. After the partition in 1880, Raika mortgaged the 6 biswas of which she was in possession to Puran Lal, who was the father of the defendants in this suit, who are appellants here. Puran Lal subsequently brought a suit for sale under the Transfer of Property Act on his mortgage, got a decree for sale, and on the 20th of October 1887, at the sale under that decree, purchased the 6 biswas which had been in the possession of Raika. In 1888 Raika died. On the 22nd of December 1893 Musammat Pan Kunwar died. After her death the defendants 3, 4 and 5 in this suit, who were reversioners of Sewa, sold all their rights, whatever they were, in the 12 biswas, to the plaintiff. In December 1895 the plaintiff brought his suit against the representatives of Puran Lal to obtain possession of the 6 biswas which had been held by Musammat Raika. The suit was dismissed in the first Court on the finding that Raika had had adverse [44] possession since 1869. The Court of first appeal, holding that her adverse possession did not commence until 1873, and applying the Full Bench ruling of this Court in *Ram Kali* v. *Kedarnath* (1) set aside the decision of the first Court and made an order of remand under s. 562 of the Code of Civil Procedure. From that order this appeal has been brought by the defendants-appellants.

Their contention is that the decision of their Lordships of the Privy Council in *Mussummat Lachhan Kunwar* v. *Anant Singh* (2) impliedly overruled the decision in *Ram Kali* v. *Kedarnath* (1) and that on the finding of Raika's possession being adverse from the death of Sewa in 1873, the Court of first appeal was bound to dismiss the appeal to that Court and affirm the decree of the first Court dismissing the suit, and had no power to make an order of remand.

On the other hand, it is contended for the respondents that their Lordships of the Privy Council in the case to which we have referred did not overrule the Full Bench decision of this Court in *Ram Kali* v. *Kedarnath* (1); that that decision applied, and, as there had been no suit by or

(1) 14 A. 156.
(2) 22 I.A. 25=22 C. 445. *s. v. Lachhan Kunwar* v. *Manorath Ram.*

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against Mussammat Pan Kunwar in which Raika's adverse possession had been established or Raika's adverse claim had been made, art. 141 of sch. II of the Indian Limitation Act, 1877, applied, and limitation commenced to run, not from 1873, but from the death of Mussammat Pan Kunwar in 1893, when the succession opened up to the defendants 3, 4 and 5. It was further contended on behalf of the respondent that the finding of the Court of first appeal that the possession of Raika became adverse on the death of Sewa in 1873, was a bad finding in law, it being alleged that there was no evidence in support of it.

This is an appeal from an order of remand made by a Court of first appeal. The findings of fact of that Court of first appeal **[45]** are therefore in our opinion binding on us, unless they are contrary to law, if partly of law and partly of fact, or unless there was no evidence to support them. We agree with the decision in *Gauri Shankar* v. *Karima Bibi* (1). This question of the legality of the order of remand could be raised, as it was here, by an appeal under s. 588 of the Code of Civil Procedure. It was open, according to the rulings of this Court, the propriety of which we need not discuss, as they are binding on us, to these appellants to have refrained from bringing an appeal against the order and to have raised the question of the legality or propriety of that order in an appeal against the decree which might ultimately be made by the Court of first appeal. That is the construction which has been put by this Court upon s. 591 of Act No. XIV of 1882. In second appeal, we are bound by the findings of fact of the Court of first appeal. We cannot question them, unless they are based upon a misconception of the law or have no evidence to support them. It would be an anomaly if, in an appeal from an order in the same suit of the Court of first appeal, we could do that which we could not do in an appeal from a decree of the Court in that suit, namely, question the findings of fact of the Court of first appeal, except upon one of the grounds to which we have alluded. We find that there is evidence on the record which shows that, at least from the death of Sewa in 1873, Mussammàt Raika took up an independent position and claimed the profits of the 6-biswa share entered in her name and obtained them for her own use. As the widow of Jit Singh, she had absolutely no title to the 6-biswa share or any part of it. Her only interest, so to speak, during the lifetime of her son, and on his death during the lifetime of his widow, was a right to be maintained. Consequently, it not having been found, and there being no evidence, that she was allowed possession for maintenance, the Court below rightly found that, at least from 1873, Raika's possession was adverse. In truth, the plaintiff had not set up that Raika had permissive possession, possession by courtesy, or possession in lieu of maintenance. The plaintiff came **[46]** into Court on the simple case, which was entirely disproved, that Raika never was in possession at all.

Now, on the findings of the Court of first appeal, if the Full Bench decision in *Ram Kali* v. *Kedarnath* was right, the order of the lower Court was right. If that decision has been impliedly overruled by the decision of the Privy Council to which we have referred, the defendants were entitled to move the Court of first appeal to dismiss the appeal to that Court. The Full Bench decision in *Ram Kali* v. *Kedarnath* was based on a Full Bench decision of the Calcutta Court in *Srinath Kur* v. *Prosunno Kumar Ghosh* (2). It appears to us that their Lordships of the Privy Council

(1) 15 A. 413.

(2) 9 C. 934.

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in the case of *Lachhan Kunwar* v. *Anant Singh*, to which we have referred, have impliedly overruled the Full Bench decision of this Court, and that article 141 of the second schedule to Act No. XV of 1877 does not apply where a trespasser has held, as against the widow of a sonless and separated Hindu, adverse possession, and that adverse possession must in such a case be counted, for the purposes of limitation, from the time when such trespasser or other person first began to hold adversely to the widow. In our opinion the law on this point and on article 141 is explained clearly by our brother Burkitt in *Hanuman Prasad Singh* v. *Bhagauti Prasad* (1). We allow this appeal with costs, and, setting aside the order under appeal, we dismiss the appeal to the Court of first appeal with costs, and restore and affirm the decree of the first Court dismissing the suit with costs.

Appeal decreed.

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20 A. 46=17 A.W.N. (1897) 210.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

HUSENI BEGAM AND OTHERS (*Defendants*) *v.* THE COLLECTOR OF MORADABAD (*Plaintiff*).* [16th July, 1897.]

Civil Procedure Code, s. 539—Trust—Suit for removal of trustee—Parties—Alienees of trustees not necessary parties.

A suit may properly be brought and a decree made under s. 539 of the Code of Civil Procedure for the removal of a trustee. *Narasimha* v. *Ayyan* [47] *Chetti* (2), *Sathappayyar* v. *Periasami* (3), *Rangasami Naickan* v. *Varadappa Naickan* (4), *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (5), *Tricumdass Mulji* v. *Khimji Vullabhdass* (6), *Sayad Hussein Mian* v. *The Collector of Kaira* (7), *Sajedur Raja* v. *Baidyanath Deb* (8) *Mohi-ud-din* v. *Sayid-ud-din* (9) and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (10) referred to, *Subbayya* v. *Krishna* (11) followed.

In such a suit as above it is not necessary to make the alienees from the trustee defendant parties to the suit. *Bishen Chand* v. *Syed Nadir* (12), *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (5) and the *Attorney-General* v. *The Port Reeve and others of Avon* (13) referred to.

[F., 21 A. 200 (203); 10 Ind. Cas. 712 (713)=14 O.C. 65 (67); R., 33 C. 789 (804, 805)=10 C.W.N. 581; 2 C.L.J. 431; 2 C.L.J. 460 (468); 5 O.C. 110 (112);]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellants.

Mr. *E. Chamier*, for the respondent.

JUDGMENT.

BURKITT, J. (KNOX, J., concurring).—The suit out of which this first appeal has arisen was instituted by the Collector of Moradabad (under instructions from the Local Government) under the provisions of s. 539 of the Code of Civil Procedure.

The case for the plaintiff is that one Miran Shah, the ancestor of all the defendants, had, before his death some fifty years before suit, made

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* First Appeal, No. 36 of 1896, from a decree of G.J. Nicholls, Esq., District Judge of Moradabad, dated the 1st May, 1895.

(1) 19 A. 357. (2) 12 M. 157. (3) 14 M. 1. (4) 17 M. 462.
(5) 15 B. 612. (6) 16 B. 626. (7) 21 B. 48. (8) 20 C. 397.
(9) 20 C. 810. (10) 24 C. 418. (11) 14 M. 186. (12) 15 I.A. 1.
(13) 33 L.J. N.S. Ch. 172.

a *waqf* of mauza Haibatpur for religious and charitable purposes, for the up-keep of a mosque and *imambara* he had founded, for the expenses of an annual "*urs*" or religious assembly to commemorate the Pir Ghaus Azam, to feed the poor at the "*urs*" and to keep his (Miran Shah's) tomb in repair. It is admitted that mauza Haibatpur had been granted revenue-free to Miran Shah, who was a man of great piety and sanctity among Mussalmans; that the revenue-free grant was made by the Oudh Government, and that the village still remains *muafi*, not having been resumed at either of the two settlements which have taken place since the British Government came into possession. It was alleged for the plaintiff that the village came into the possession [48] of Miran Shah's heirs as trustees, and that they for a considerable time performed properly their duty as such; but latterly (having become Shiahs) they have, in breach of the trust, treated the trust property as their own, have mortgaged and otherwise alienated some portions of it, and have pulled down some of the trust buildings and appropriated to their own use the value of the materials. The plaintiff accordingly prayed for the appointment of new trustees—which of course implies the dismissal of the existing trustees; that the property be declared to be *wakf*, and the defendants be required to furnish accounts and to pay sums which they had improperly appropriated in breach of the trust. It was also prayed that a scheme for the management of the trust should be settled.

Those of the defendants who appeared first of all raised a plea of limitation to the effect that they had been dealing with the property as their own for more then twelve years. There does not seem to have been any discussion as to this plea at the hearing. Clearly, once the trust was established, such a plea could not prevail. They next pleaded want of parties, that their transferees should have been made parties. This plea was overruled by the lower Court. In the fourth paragraph of the written statement, the defendants deny the fact of the endowment, alleging that "the property in dispute was never endowed for charitable purposes as alleged by the plaintiff on behalf of any party, *i.e.*, for the purposes set forth in the plaint." This paragraph, while denying the plaintiff's case as to the trust, may perhaps be regarded as an admission that the objects of the alleged *waqf* as set forth in the plaint are charitable purposes. In subsequent paragraphs, the defendants deny that the income of the property in dispute was ever applied to the purposes mentioned in the plaint. They also deny the demolition of an *imambara* in Haibatpur and of an ancestral house in Sambhal. The first portion of this plea—like the first paragraph of the written statement—takes advantage of a blunder in the plaint, afterwards amended. The *imambara*, mosque, &c., were not in [49] Haibatpur, but in an adjoining mohalla of the town of Sambhal. There is nothing in the plaint about an ancestral house. The seventh paragraph of the written statement is important. In that paragraph the defendants admit that the property in dispute descended to them from Miran Shah, and they add that they spend money on the mosque, *imambara* and tomb according to their respective positions, a statement which at the hearing of this appeal was explained to mean that they were not legally bound to spend any money on such purposes, but did so of their own free will and pleasure. These are the only pleas which call for notice.

The District Judge gave the plaintiff a decree. The defendants appeal.

The first plea argued for them was that the suit was bad because the

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transferees from the defendants had not been impleaded. That plea was overruled, and we think rightly, by the learned District Judge. In support of this contention the learned advocate for the appellants cited the case of *Bishen Chand* v. *Syed Nadir* (1), in which, at p. 9, their Lordships found themselves unable, in a suit in which all the parties interested were not before them, to decide the extent of certain trusts, and whether any surplus remained over to the *mutawalli* for his private use. We cannot see that this case is any authority for the proposition that to a suit for the execution and administration of a trust the alienees of the trust property, who have an interest adverse to the trust are necessary parties. In the case of *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (2) which was a suit under section 539 of the Code of Civil Procedure for the execution and administration of a trust and for removal of the trustees, who had incumbered and alienated a large portion of the trust property, the incumbrancers and alienees were not considered necessary parties. And in the case of *The Attorney General* v. *The Port Reeve and others of Avon* (3), it was held by the **[50]** Lords Justices that persons claiming title adverse to a trust cannot be made parties to a suit for the execution of the trust. No case has been shown to us in which, in a suit under s. 539 of the Code of Civil Procedure, the alienees or incumbrancers have been made parties, and indeed it does not appear what relief could be granted against them under that section. We think that a prayer for recovery of possession from such persons could not be entertained under that section. The plaintiff in this suit could not institute a suit for possession. Such a suit could be instituted only by the trustee. We therefore overrule this plea.

Next it is contended that the *waqf* set up by the plaint is bad, as it is not for public religious or charitable purposes. The briefest consideration of the purposes of the *waqf* set out above is in our opinion abundantly sufficient to show that they are public charitable and religious purposes. That plea also fails.

The last plea of law raised by the appellants is that the suit is bad because a suit to remove a trustee cannot be entertained under s. 539 of the Code As far as we can ascertain the first doubt whether such a suit would lie was suggested by an *obiter dictum* in the case of *Narasimha* v. *Ayyan Chetti* (4), where the learned Judges are reported to have said that "it is not at all clear that a suit to remove a trustee can be maintained under s. 539." The question was not decided in the next case, *Sathappayar* v. *Periasami* (5), as it was held that that case did not come under s. 539, the object of the endowment being for private religious purposes, namely to perpetuate the spiritual family of a *guru*. But in the case of *Subbayya* v. *Krishna* (6) the question was very elaborately argued before a Bench of three Judges, and it was held by a majority of the Court that a suit to remove a trustee could be maintained under s. 539 of the Code of Civil Procedure. The same question again came before the Madras High Court in *Rangasami Naickan* **[51]** v. *Varadappa Naickan* (7), when a Bench of three Judges (one of whom was the dissentient Judge in the case of *Subbaya* v. *Krishna* just mentioned) held that a suit to remove a trustee could not be maintained under s. 539 of the Code. In *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (2), a case already cited, the question was not raised.

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(1) 15 I.A. 1. (2) 15 B. 612. (3) 33 L. J. N. S. Ch. 172.
(4) 12 M. 157. (5) 14 M. 1. (6) 14 M. 186.
(7) 17 M. 462.

It appears to have been taken for granted that such a suit could be maintained. In the case *Tricumdass Mulji* v. *Khimji Vullabhdas* (1), which was a suit to administer a public charitable trust, to compel a trustee to account, and for the removal from office of that trustee and for the appointment of a new trustee, it was held, following the decision of the majority of the Bench in *Subbayya* v. *Krishna* (2), that the suit came under s 539, and could not be maintained, as the sanction of the Advocate-General had not been obtained. The most recent case in the Bombay Court is that of *Sayad Hussein Mian* v. *The Collector of Kaira* (3), and in it the decision in the previous case following the ruling of the majority of the Judges in *Subbayya* v. *Krishna* was affirmed. There are also two cases in the 20th volume of the Indian Law Reports, Calcutta Series, namely, *Sajedur Raja* v. *Baidyanath Deb* at p. 397 and *Mohiuddin* v. *Sayiduddin* at p. 810, the rule laid down in which is to the same effect as in the Bombay cases and in *Subbayya* v. *Krishna* (2). The case of *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (4), the report of which was published after we had reserved judgment in this appeal, follows and approves of the decision of the majority of the Bench in *Subbayya* v. *Krishna* (2).

In this conflict of authority there is undoubtedly a preponderance of judicial decisions in favour of the proposition that a suit to have a trustee removed and another appointed in his place is a suit which is covered by the provisions of s. 539 of the Code of Civil Procedure. We have considered and studied the elaborate judgments of the Madras High Court in the cases in **[52]** the 14th and 17th volumes of the Madras Reports. After mature consideration our opinion is in conformity with that expressed by the majority of the Bench in *Subbayya* v. *Krishna* (2). We entirely concur in the elaborate judgment of Mr. Justice Weir and in the reasons he gives for the conclusion at which he arrived. We feel we can add nothing to it. We hold therefore that this suit is not bad because of the prayer for the removal of the existing trustees.

On the merits we are of opinion that the appellants have failed to make out their case. That mauza Haibatpur was granted free of revenue to Miran Shah, though a Sunni, by the Shiah Government of Oudh, on account of his character for holiness and sanctity is not denied. It is also admitted that the British Government has continued the *muafi* to Miran Shah's family up to the present day. The exhibits Record Nos. 18C and 19C show the reason why Government at the last settlement, instead of resuming the *muafi* grant (as it might have done), allowed it to continue. The first paragraph of the *wajib-ul-arz* No. 18C shows the reason for the continuance of the *muafi* to be because mauza Haibatpur is a mahal "appropriated to charitable expenses in connection with a mosque, *imambara* and '*urs*' of Ghaus Azam." And the same reasons for the continuance of the *muafi* are given in Record No. 19C drawn up some three years later. We think these facts are most significant and important. It is admitted that Miran Shah left no son living at his death and that he was succeeded by his daughters (three in number), whose descendants are now in possession of Haibatpur. Why should the grant have been continued to them revenue free, unless because of Miran Shah having dedicated Haibatpur to charitable and religious purposes? It is not even suggested that these descendants of Miran Shah in the female line had any personal claims to receive

(1) 16 B. 626. (2) 14 M. 186. (3) 21 B. 48. (4) 24 C. 418.

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a revenue-free grant at the hands of the British Government, nor is it suggested that, either at the settlement of 1846 or at the subsequent [53] settlement of about 1874-75, any such personal claims were put forward. Clearly the *muafi* was continued at settlement because of the reasons stated in Record Nos. 18C and 19C. Here we would refer to the attested copy (Record No. 74C.) of a deposition by Sayyed Hasan, a pleader who appeared for Musammat Huseni Begam (one of the appellants here), in a partition case, in which it was sought to have mauza Haibatpur partitioned among the descendants of Miran Shah in 1889. The pleader in that deposition on behalf of his client, the defendant-appellant Musammat Huseni Begam, in the clearest terms declared mauza Haibatpur to be endowed property, the income of which was applied to the mosque, the *imambara* and the "*urs*," and that it was so applied by his client as *mutawalli* jointly with the other *mutawallis*. To the same effect is a petition, No. 75C of the record, filed in the same partition proceedings by Musammat Muhamdi, one of the defendants to this suit, now deceased. The genuineness of the petition is proved by the evidence of Muhammad Husen, son of Musammat Muhamdi. This petition is much to the same effect as the deposition just mentioned above. It states that mauza Haibatpur is endowed property, and that it was granted *muafi* in 1840 to Miran Shah for charitable purposes. No. 76C of the record is an attested copy of another deposition made by the pleader Sayyed Hasan in July 1889, on behalf of Musammat Huseni Begam in the partition case. This deposition emphasizes the pleader's former statement, and further makes mention of papers relating to the settlement of 1846, copies of which papers the witness produced to the official making the partition. The appellants have not attempted to produce any of the papers just mentioned, though, as they were produced by Musammat Huseni's pleader in 1889, it may be presumed she has possession of them now. There are further on record two petitions, Nos. 78C and 79C, dated the 21st of January and 24th of February 1890, filed by Sayyed Asghar Hasan (one of the defendants-appellants) before the revenue authorities in mutation of names proceedings, in both of which he asserts that [54] mauza Haibatpur is an endowed village, the revenue of which is devoted to the mosque, *imambara*, *urs* of Ghaus Azam and support of the *mutawallis*. In No. 78C it is alleged that the *wajibularz* (record No. 18C) was prepared as proof of those facts. The documentary evidence detailed above establishes in our opinion a very strong case in favour of the plaintiff respondent.

The defendants appellants did not produce any documentary evidence. They have contended themselves with calling four witnesses, three of whom are worthless, while the deposition of the fourth, Intizam Ali, is more favourable to the respondent's case than to the appellants'.

The respondent has called three witnesses, Kazi Imam Ali, Sheikh Wilayat Ali and Masiat-ullah, all of whom were acquainted with Miran Shah. Their evidence most strongly supports the respondent's case, showing as it does that Miran Shah himself built the mosque and *imambara* and expressed his intention of dedicating the income of Haibatpur to their support. One of the witnesses professes to know of, and to have been present at, the execution of the *waqf* by Miran Shah. Two of them also speak of how the descendants of Miran Shah have now discontinued the charities and demolished the buildings.

Having now discussed all the material evidence in the case, it appears to us that there is a great mass of evidence in favour of the plaintiff which

the appellants have in no way attempted to rebut. We have no hesitation in finding, concurring therein with the Court below, that Miran Shah did before his death dedicate mauza Haibatpur as a *waqf* for the religious and charitable institutions mentioned in the plaint, which he had established, the mosque, the *imambara*, the "*urs*" of Ghaus Azam, &c. We find that mauza Haibatpur devolved on the daughters of Miran Shah and on their descendants in trust for the performance of the religious and charitable purposes to which Miran Shah had dedicated the village. We concur with the lower Court in holding that the plaintiff is entitled to the declaration he has obtained as [55] to mauza Haibatpur being *waqf* property, and in the finding that the defendants are in possession as trustees of the *waqf* and have no proprietary rights in Haibatpur. We find that the trustees have grossly violated their duties as such, that they have failed to apply any portion of the income of the village to the purposes of the trust, that they have appropriated the income to their own private purposes and that they have dilapidated and dismantled the buildings constructed by Miran Shah, and have put into their own pockets the value of the materials of the *imambara*. We further find that they have wrongfully alienated portions of the endowed property and that they have denied that they are trustees and claim to be proprietors of Haibatpur in their own right. Such trustees should not in our opinion be permitted to remain any longer in possession of the trust property. We therefore direct their removal and that possession of the trust property be transferred to the *mutawalli* who has been nominated by the learned District Judge. We may add that, as no observations were addressed to us on either side either for or against the scheme for the administration of the trust prepared by the District Judge, we refrain from making any remarks as to it. The only questions argued before us are those which we have discussed in this judgment. We dismiss the appeal with costs.

Appeal dismissed.

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20 A. 55 (F.B.) = 18 A.W.N. (1898) 1.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* AMBA PRASAD.* [14th December, 1897.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 124*A*—*Exciting disaffection*—*Meaning of term "disaffection" explained.*

Any one who, by any of the means referred to in s. 124-A of the Indian Penal Code, excites, or attempts to excite, feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in s. 124-A. Such feelings are necessarily inconsistent [56] with and incompatible with a disposition to render obedience to the lawful authority of Government and to support that Government against unlawful attempts to subvert or resist it. The term "disaffection" may be taken as synonymous with "disloyalty." The ordinary meaning of the term "disaffection" as used in s. 124-A is not varied by the explanation appended to that section.

When a person is charged with having committed the offence punishable under s. 124-A of the Indian Penal Code, his intention may be inferred from one particular speech, article or letter, or from that speech, article or letter considered in conjunction with what such person has said, written or published on another

* Criminal Appeal No. 1461 of 1897.

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or other occasions. Where it is ascertained that the intention of such person was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection. *Queen-Empress* v. *Jogendra Chunder Bose* (1), *In re the petition of Bal Gangadhar Tilak* (2) referred to.

[F., 10 Bom. L.R. 848 (879) = 8 Cr. L.J. 281; R., 38 C. 253 (258) = 15 C.W.N. 141 (149) = 11 Cr. L.J. 667 (669) = 8 Ind. Cas. 531; 32 M. 3 (15) = 5 M.L.T. 1 and 16 = 9 Cr. L.J. 103 (114) = 1 Ind. Cas. 22 (26).]

[N.B.—For an early stage of the case, see 17 A.W.N. (1897), 25.—ED.]

THE facts of the case are fully stated in the judgment of the Court.

Mr. *Roshan Lal*, for the appellant.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

The judgment of the Court (EDGE, C.J., BLAIR and BURKITT, JJ.) was delivered by EDGE, C.J.:—

JUDGMENT.

Amba Prasad was committed by the Magistrate of Moradabad to the Court of Session of Moradabad for trial on a charge that on or about the 14th of July 1897, he did attempt to excite feelings of disaffection to the Government established by law in British India by publishing in a newspaper called the *Jami-ul-ulam*, of which he was proprietor, editor and publisher, an article entitled "*Azadi band hone se kabal namuna*" and had thereby committed an offence punishable under s. 124-A of the Indian Penal Code and within the cognizance of the Court of Session. In his examination before the Magistrate of Moradabad under s. 364 of the Code of Criminal Procedure, 1882, **[57]** Amba Prasad stated that he had published the issues of the *Jami-ul-ulam*, dated respectively 21st March 1897, 7th April 1897, 21st April 1897, 7th May 1897, 14th July 1897, 21st July 1897 and 28th July 1897. The article on the publication of which the charge was founded was contained in the issue of the newspaper of the 14th of July 1897.

In the Court of Session of Moradabad, Amba Prasad stated that his father's name was Gobind Prasad, a Kayesth, and that he, Amba Prasad, lived in Moradabad, and was 35-36 years of age. Upon the charge being read to him Amba Prasad pleaded guilty. Upon being asked:—"Do you wish to give any reasons as to why you should not be punished for this offence?"—Amba Prasad replied:—"I can give no reason. Through inexperience I have committed this fault, for which I am very ashamed, and I wish to throw myself unconditionally upon the mercy of the Government. This is all I wish to say." The Court of Session accordingly found Amba Prasad guilty of the offence of which he had pleaded guilty, and under s. 124-A of the Indian Penal Code sentenced him therefor to eighteen months' rigorous imprisonment. From that sentence Amba Prasad has appealed to this Court. In the petition of appeal the grounds of appeal are stated as follows:—

1. "That the prisoner appellant having pleaded guilty, having tendered an unqualified apology for the offence with which he was charged, and having thrown himself entirely upon the mercy of the Court, the

(1) 19 C. 35.

(2) 14 Times L.R. 50.

sentence of 18 months' rigorous imprisonment passed upon him by the learned Sessions Judge is too severe.

2. That the judgment of the lower Court nowhere discloses the fact that the article upon which the prisoner appellant has been convicted was of such a serious character as to make its writer liable to a very heavy punishment.

3. That the lower Court, in holding that a term of 18 months' rigorous imprisonment was in the case of the appellant a mild sentence upon the authority of the case of *Queen-Empress* v. [58] *Tilak*, has failed to take into account the differentiating circumstances which make the appellant's offence very much less serious and therefore deserving of a much lighter sentence.

4. That there is nothing on record which, after the appellant's plea and apology, would make him liable to anything more than a nominal punishment.

5. That upon the foregoing grounds the prisoner appellant prays for mitigation of the sentence passed upon him by the lower Court."

In order to determine whether or not this appeal should be allowed, and, if allowed, to what extent, it is necessary to consider s. 124 A of the Indian Penal Code and to arrive at a conclusion as to the degree of culpability in Amba Prasad to be fairly and reasonably inferred from his acts. The section is as follows:—

"124-A. Whoever by words, either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause."

That section has been under judicial consideration by Sir Comer Petheram in the *Queen-Empress* v. *Jogendra Chunder Bose* (1); by Mr. Justice Strachey on the trial of Bal Gangadhar Tilak in the Bombay High Court; by a Full Bench of the [59] Bombay High Court, consisting of Sir Charles Farran, C. J., Mr. Justice Candy and Mr. Justice Strachey, on the application of Bal Gangadhar Tilak for leave to appeal to Her Majesty in Council; by a Board of the Judicial Committee of Her Majesty's Privy Council, consisting of the Lord Chancellor, Lord Hobhouse, Lord Davey and Sir Richard Couch, on the application of Bal Gangadhar Tilak for special leave to appeal to Her Majesty in Council; and by Sir Charles Farran, C. J., Mr. Justice Parsons and Mr. Justice Ranade in the appeal of Ram Chandra Narayan and Kishnaji Dhondu from the order of conviction and sentence of the Sessions Judge of Satara in their case.

If there be any difficulty as to the true meaning of s.124-A of the Indian Penal Code it is caused by the *Explanation* which forms part of that section. In the *Queen-Empress* v. *Jogendra Chunder Bose* (1) it was contended by

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the counsel for the accused persons that "disaffection" and "disapprobation" were synonymous words and had one and the same meaning. On that contention it was observed by Sir Comer Petheram, and in our opinion correctly, having regard to the question before him:—"If that reasoning were sound, it would be impossible for any person to be convicted under the section, as every class of writing would be within the explanation." Sir Comer Petheram thus defined "disaffection" and "disapprobation" as those words are used in s. 124-A:—"Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention **[60]** of creating such a disposition in his hearers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people and that they were used with the intention to create such feeling."

The charge which was before the jury in *Queen-Empress* v. *Jogendra Chunder Bose* was that the accused had attempted to excite feelings of disaffection to the Government established by law in British India, and was not that they had in fact excited feelings of disaffection to the Government established by law in British India: and it is in relation to that charge which was before the jury that Sir Comer Petheram's direction to the jury must be read. Later on in his direction to the jury Sir Comer Petheram, in referring to the articles in respect of the publication of which the charges under s. 124-A arose, said:—"Were those articles intended to excite feelings of enmity against the Government, or, on the other hand, were they merely expressing, though in strong language, disapprobation of certain Government measures? You will bear in mind that the question you have to decide has reference to the intention, and, in fact, the crime consists of the intention, for a man might lawfully do the act without the intention. The evidence of the intent can only be gathered from the articles. The ultimate object of the writer may be one thing, but if, in attaining that object, he uses, as the means, the exciting of disaffection against the Government, then he would be guilty under section 124-A. If you think that these people, with the object of procuring the repeal of the Age of Consent Act, or of increasing the sale of their paper, disseminated these articles, intending to excite feelings of enmity, you will be bound to find a verdict of guilty."

Mr. Justice Strachey in his direction to the Jury in *Queen-Empress* v. *Bal Gangadhar Tilak*, in explaining section 124-A **[61]** in reference to the charges in that case before the jury, said:—"I agree with Sir Comer Petheram in the Bangobasi case, that disaffection means simply the absence of affection." If that sentence had stood alone and was not explained by what followed, it would no doubt have constituted a misdirection. "Disaffection" necessarily implies an absence of affection, but a mere

absence of affection is not "disaffection" within the meaning of section 124-A. Mr. Justice Strachey in that part of his direction which immediately follows the sentence which we have quoted made it perfectly plain what in his opinion "disaffection," within the meaning of section 124-A, is. He said :—

"It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite : he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial, except perhaps in dealing with the question of punishment : if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will of course find him guilty But if you should hold that that charge is not made out and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite [62] them ; so that if you find that either of the prisoners has tried to excite such feelings in others, you must convict him, even if there is nothing to show that he succeeded.

"Again it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within s. 124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion, or outbreak or forcible resistance to the authority of the Government, still, if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action, such as rebellion or forcible resistance, the test of guilt."

In directing the jury as to the meaning and effect of the *Explanation* in s. 124-A Mr. Justice Strachey said :—

"Observe first that, as I have already said, while the first clause shows affirmatively what the offence made punishable by the section is, the explanation states negatively what it is not. It says that something 'is not disaffection' and 'is not an offence within this clause.' Therefore its object

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is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the explanation is 'the making of [63] comments on the measures of the Government with a certain intention.' This shows that the explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as 'the making of comments on the measures of the Government.' It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack, not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives or its feelings towards the people, then you must put aside the explanation altogether and apply the first clause of the section. In the next place, supposing that you are satisfied that these writings can fairly and reasonably be construed as 'comments on the measures of the Government' and not as attacks upon the Government itself, still you cannot apply the explanation unless you believe that such comments were made with the intention of exciting only 'such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.' This, you will see, draws a distinction between attempting to excite feelings of 'disaffection' to the Government, and intending to excite only a certain species of 'disapprobation' of Government measures; and protects the latter only. What is the meaning of 'disapprobation' of Government measures as contrasted with 'disaffection' to the Government? I agree with Sir Comer Petheram that while disaffection means the absence of affection, or enmity, disapprobation means simply disapproval; and that it is quite possible to like or [64] be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income-Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as, for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section, and the explanation will not save him.

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"The object of the explanation is to protect honest journalism and *bona fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction he has nothing to fear. It seems to me that this view of the law secures all the liberty which any reasonable man can desire, and that to allow more would be culpable weakness, and fatal to the interest not only of the Government but of the people. But now there are other words in the explanation which we have still to consider. To come within the protection of the explanation, a writing must not only be the making of comments on Government measures with the intention of exciting only disapprobation of them as distinguished from [65] disaffection to the Government, but the disapprobation must be 'compatible' with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.

"What that means is that even exciting disapprobation of Government measures may be carried too far. For instance, if a man published comments upon Government measures which were not merely severe, unreasonable or unfair, but so violent and bitter, or accompanied by such appeals to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government, and if it could fairly be gathered from the writing as a whole that the writer or publisher intended these results to follow, then he would be guilty under the section and would not be protected by the explanation. Observe the nature of this 'disposition' which makes the whole difference between a 'disapprobation' of measures which amounts to 'disaffection' to the Government, and a disapprobation which does not. It is not merely 'a disposition to render obedience to the lawful authority of the Government.' It is a disposition *both* to render obedience and also to *support* the lawful authority of the Government against unlawful attempts to subvert or resist it. And it is a disposition to support that lawful authority against unlawful attempts not only to 'resist' it—that is, to oppose it, but also to 'subvert' it—that is, to weaken and undermine it by any unlawful means whatever. And lastly, it is a disposition to support the Government against all such unlawful attempts whenever occasion may arise, not only against any particular unlawful attempt, proceeding or impending at the time of the publication."

In refusing the application of Bal Gangadhar Tilak to the Bombay High Court for leave to appeal to Her Majesty in [66] Council Sir Charles Farran, C. J., in delivering the judgment of the Full Bench said :—

"The other ground upon which Mr. Russell has asked us to certify that it is a fit case to send to the Privy Council is that there has been misdirection, and he based his argument on one major and two minor grounds. The major ground is that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section, and we need say no more upon that ground. The first of the minor points is that Mr. Justice Strachey, in summing up his case to the

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jury, stated that disaffection meant the absence of affection ; but, although if that phrase has stood alone, it might have misled the jury, yet, taken in connection with the context, we think that it is impossible that the jury can have been misled by it. That expression is used in connection with the law as laid down by Sir Comer Petheram in Calcutta in the *Bangobasi* case. There Sir Comer Petheram, instead of using the words 'absence of affection,' said 'contrary to affection' and if the words 'contrary to affection' had been used instead of 'absence of affection' in this case, there can be no doubt that the summing up would have been absolutely correct. Taken in connection with the context it is clear that by absence of affection the Judge did not mean the negation of affection, but some active sentiment on the other side. Upon that point we cannot certify that this is a fit case for appeal. In this connection, it must be remembered that it has not been alleged that there was a miscarriage of justice. The last point is in reference to the definition of the word 'Government.' It is a very minor point : but, striking out the words (which were not in the original charge) Mr. Russell has alluded to, we cannot see that there has been any misdirection as to the meaning of the word 'Government.' We, therefore, think the application must be refused."

On the application of Bal Gangadhar Tilak to the Judicial Committee of Her Majesty's Privy Council for special leave [67] to appeal to the Queen in Council Mr. Justice Strachey's direction to the jury was elaborately criticised by an eminent counsel of the English Bar. In delivering the judgment of the Judicial Committee the Lord Chancellor is reported to have said :—"Their Lordships are of opinion, taking the view of the whole of the summing up, which is of very great length, that there is nothing in that which, in their Lordships' opinion, calls upon them to indicate any dissent from or necessity to correct what is therein contained. Looking at the summing up as a whole, and looking at each part of what was said by the light of what else was said, speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out, consistently with the rules by which their advice to Her Majesty has been guided hitherto in giving leave to appeal in criminal cases, and therefore they will humbly advise Her Majesty that this is not a case in which leave should be granted." (1).

So far as we can form an opinion from the imperfect report before us of the judgments of the Bombay High Court in the Satara case, we infer that Sir Charles Farran, C.J., held the same opinion as to the meaning and effect of s. 124A. of the Indian Penal Code as was expressed by Mr. Justice Strachey in the case of Bal Gangadhar Tilak, and that an attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance. Sir Charles Farran apparently also held, and in our opinion rightly, that a man may be guilty of the offence of attempting to excite feelings of disaffection against the Government established by law in British India although in the particular article or speech he may insist upon the desirability or expediency of obeying and supporting Government. The reports which are before us of the judgments of Mr. Justice Parsons and Mr. Justice Ranade in the Satara case are too [68] imperfect to enable us to form an opinion as to their construction

(1) 14 Times L.R. 50.

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of s. 124-A. If their construction of s. 124-A. differs materially from the construction placed upon that section by Mr. Justice Strachey, it necessarily follows that their construction would not be accepted as correct by the Judicial Committee of the Privy Council, which accepted Mr. Justice Strachey's direction to the jury in Bal Gangadhar Tilak's case as a sufficient and a not misleading direction.

In our opinion anyone who, by any of the means referred to in s. 124A. of the Indian Penal Code, excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in s. 124-A. no matter how guardedly he may attempt to conceal his real object: It is obvious that feelings of hatred, dislike, ill-will, enmity or hostility towards the Government must be inconsistent with and incompatible with a disposition to render obedience to the lawful authority of the Government and to support that lawful authority against unlawful attempts to subvert or resist it. The "disapprobation of the measures of the Government" may or may not in any particular case be the text upon which the speech is made or the article or letter is written, but if, upon a fair and impartial consideration of what was spoken or written, it is reasonably obvious that the intention of the speaker or writer was to excite feelings of disaffection to the Government established by law in British India, then a Court or a jury should find that the speaker or writer or publisher, as the case might be, had committed the offence of attempting to excite feelings of disaffection to the Government established by law in British India. To paraphrase is dangerous, but it appears to us that the "disaffection" of s. 124A, is "disloyalty;"—that is the sense in which the word "disaffection" has been generally used and understood during the century. We are further of opinion that the ordinary meaning of disaffection in s. 124A., having regard to the [69] evils at which s. 124 A strikes, is not varied by the explanation contained in the section.

The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascertained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published, could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection.

In the case before us Amba Prasad has pleaded guilty to an attempt by the publication of the article in question in the issue of his newspaper of the 14th of July 1897, to excite feelings of disaffection to the Government established by law in British India. He was well advised to plead guilty, as on an examination of that article the only possible defence open to him was that of insanity. His counsel before us could not suggest that there was the slightest justification or excuse for the gross and libellous charges against the Government contained in the article. Amba Prasad in publishing that article could have had but one object in view, and that was

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to excite amongst Her Majesty's Indian subjects, and particularly amongst Her Muhammadan subjects, feelings of disaffection, disloyalty to the Government established by law in British India. The particular article taken in conjunction with other articles published in his newspaper on dates upon which, according to his own statement in the Magistrate's Court, he published his newspaper, shows that his object was to excite not merely passive disaffection, which in itself is an offence within s. 124A. of [70] the Indian Penal Code, but active disloyalty and rebellion amongst his Muhammadan fellow-subjects. The criminal offence which Amba Prasad committed is an exceedingly grave one. That offence he committed regardless of the ruin, misery, and punishment which would have fallen on any of his fellow-countrymen who might have been so ignorant as to believe that the statements which he published were true, and who, acting on such belief, might have entered upon a course of active disloyalty to the Government. Amba Prasad is not a Muhammadan; he is a Kayesth. It may be assumed, from the fact that Amba Prasad was not for some considerable time to be found to meet this criminal charge, that, if his Muhammadan fellow-subjects had been induced by what he published to enter upon a course of active disloyalty, Amba Prasad would have been at a safe distance from the place of danger.

Amba Prasad alleges in his grounds of appeal that his plea of guilty and an apology, which he tendered after he had been committed for trial, entitled him to have only a nominal punishment inflicted upon him. His conviction was inevitable. An apology, particularly made after commitment, in such a case as this, need not be considered. Having regard to the gravity of the offence which Amba Prasad committed and to the misery, ruin and punishment which he might have brought upon ignorant people, the sentence which was passed upon him was entirely inadequate. We dismiss this appeal.

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20 A. 70=17 A.W.N. (1897) 162.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

QUEEN-EMPRESS *v.* MAKUNDA AND ANOTHER.* [8th July, 1897.]

Act No. XXII of 1881 (*Excise Act*), *ss.* 27, 28, 29, 32, 34 *and* 47—*Act No. XII of* 1896, *ss.* 36, 37, 38, 41, 57—*Excise Officer—Jurisdiction.*

Held that an officer invested with powers under ss. 27, 28 and 29 of Act No. XXII of 1881, who had power in certain events to take the case before a Magistrate under s. 32, was an "excise officer" within the meaning of s. 47 of the Act. *Queen-Empress* v. *Ram Charan* (1) overruled.

[F., 30 A. 377=5 A.L.J. 444 (446)=A.W.N. (1908) 157=8 Cr. L.J. 5; R., 103 P.L.R. 1903.]

[71] MAKUNDA and Badam were convicted of an offence under ss. 12 and 39 of Act No. XXII of 1881 (Excise Act), and sentenced to fines. They were arrested and challaned by a Police officer who had been invested with powers to act as an Excise officer under ss. 27, 28 and 29 of Act No. XXII of 1881. Against this conviction an application in revision was made to the Sessions Judge, in which it was objected, *inter alia*, that the

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* Criminal Revision No. 318 of 1897.

(1) 16 A.W.N. (1896) 105.

convictions were bad unless the Police officer concerned had been authorized as an Excise officer under s. 33 of Act No. XII of 1896, and that no proceedings were taken by the Police under ss. 39, 41 and 42 of Act No. XII of 1896. With reference to these grounds and to the ruling of the High Court in *Queen-Empress* v. *Ram Charan* (1) the Sessions Judge referred the case to the High Court under s. 438 of the Code of Criminal Procedure.

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The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C. J. and BLAIR, J.—This reference by the Sessions Judge of Saharanpur raises the question whether Muhammad Khan, a Sub-Inspector, was, on the 1st of November, 1896, an excise officer within the meaning of s. 57 of Act No. XII of 1896. He was, before the coming into force of Act No. XII of 1896, one of the class of officers on whom had been conferred powers to act as excise officers under ss. 27, 28 and 29 of Act No. XXII of 1881. By s. 2 of Act No. XII of 1896 powers conferred under any of the repealed Acts were to be deemed to have been conferred by and granted under that Act. Now Act No. XXII of 1881 had been amended by Act No. VI of 1885, which had introduced s. 34A into the Act, a section which does not appear to have been brought to the attention of Mr. Justice Blennerhassett in the case of *Queen-Empress* v. *Ram Charan* (1). Section 47 of Act No. XXII of 1881 had also been amended by Act No. VI of 1885. Under s. 27 of Act No. XXII of 1881 an excise officer under [72] certain circumstances had power to arrest. Under s. 28 an excise officer receiving a certain monthly salary had also power to arrest. Under s. 29 certain excise officers had power to arrest. Turning to s. 32 of Act No. XXII of 1881 we find that whenever an excise officer arrests any person "he shall within twenty-four hours thereafter make a full report of all the particulars of such arrest, seizure or search, to his official superior, and, unless acting under the warrant of the Collector, shall take the person arrested, or the article seized, with all convenient despatch to the Magistrate for trial or adjudication."

It appears to us that that section contemplated that the excise officer who arrested under s. 27, s. 28 or s. 29 could, unless he was acting under the warrant of the Collector, give the Magistrate jurisdiction to act, and that section can only be read in harmony with s. 47 by treating the excise officer who had power in certain events to take the case before a Magistrate under s. 32 as an excise officer within the meaning of s. 47. Sections 36, 37 and 38 of Act No. XII of 1896, correspond generally with ss. 27, 28 and 29 of Act No. XXII of 1881, and s. 41 of Act No. XII of 1896 corresponds with s. 32 of Act No. XXII of 1881. Section 57 of Act No. XII of 1896 corresponds with s. 47 of Act No. XXII of 1881. If the attention of Mr. Justice Blennerhassett had been drawn to these sections, we think his opinion might have been otherwise.

We hold that the Magistrate had jurisdiction to act, and we send the case back to the Sessions Judge with directions to reinstate the case on his file and to dispose of it.

(1) 16 A.W.N. (1896) 105.

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[73] APPELLATE CIVIL.

Before Mr. Justice Banerji.

MURAD-UN-NISSA AND ANOTHER (*Plaintiffs*) *v.* GHULAM SAJJAD (*Defendants*).* [19th July, 1897.]

Lambardar and co sharer—Suit against lambardar for profits—Liability of heir of lambardar—Act No. XII of 1881 *(N.W.P. Rent Act), s.* 93, *cl. (h).*

The liability of a lambardar to pay to a co-sharer the profits which the lambardar has failed through his gross negligence to collect is a personal liability and cannot be enforced against the lambardar's legal representative. *Gulab* v. *Fateh Chand* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. Simeon*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BANERJI, J.—This was a suit brought by the plaintiffs appellants under clause (*h*) of s. 93 of Act No. XII of 1881 for their recorded share of the profits for the years 1295, 1296 and 1297 Fasli against Abbas Ali Khan, the lambardar. The suit was brought in the Court of the Munsif and a decree was made by that Court for a portion of the amount claimed. On appeal to the District Judge, he, in exercise of the powers vested in him by s. 208 of Act No. XII of 1881 remanded the case to the Court of the Assistant Collector. During the pendency of the suit in the Court of the Assistant Collector, Abbas Ali Khan, the lambardar, died. The plaintiffs made an application to bring on the record the present respondent Ghulam Sajjad as the son and legal representative of the deceased defendant. No order was passed by the Court upon that application, and a decree was apparently made against the deceased defendant. The amount decreed included not only a share of the profits actually [74] collected by the lambardar, but also an amount which he could have collected but for his gross negligence. Ghulam Sajjad, accepting the decree as a decree by which he was affected, appealed against it.

The learned Judge of the lower appellate Court, following the ruling of this Court in *Gulab* v. *Fateh Chand* (1), held that the liability of a lambardar to pay to a co-sharer the profits which the lambardar did not collect through gross negligence was a personal liability and could not be enforced against his legal representative. The learned Judge therefore varied the decree of the Court of first instance by making a decree for a share of the profits actually realized by the lambardar. In my opinion this decision of the lower appellate Court is right with reference to the ruling on which that Court has relied. I can see no distinction in principle between the case of the representative of a lambardar who died before the institution of the suit and that of the representative of a lambardar who died after the institution of the suit; in both cases the decree which has to be made is a decree against the legal representative to the extent of the assets of

* Second Appeal, No. 783 of 1896, from a decree of A.M. Markham, Esq., District Judge of Meerut, dated the 29th July 1896, modifying a decree of H. Dupernex, Esq., Assistant Collector of Bulandshahr, dated the 8th January 1895.

(1) 6 A.W N. (1886) 32.

the deceased which have come into his hands. If the legal representative is not liable in the one case he is not liable in the other. This appeal is almost on all fours with Second Appeal No. 283 of 1895 decided by my brother Aikman on the 17th of May 1897.*

[75] In my opinion the appeal is untenable and must be, and it hereby is, dismissed with costs.

Appeal dismissed.

20 A. 73=
17 A.W.N.
(1897) 197.

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20 A. 75=17 A.W.N. (1897) 197.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

HARDEO SINGH AND OTHERS (*Defendants*) *v.* NARPAT SINGH AND OTHERS (*Plaintiffs*).† [20th July, 1897.]

Partition—Act No. XIX of 1873, ss. 111, 113, 241—*Objection to partition—Jurisdiction—Civil and Revenue Courts.*

The procedure provided by s. 113 of Act No. XIX of 1873, does not become obligatory on a Collector or an Assistant Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the the Collector or Assistant Collector is bound to issue under s. 111, and not even then unless such objection raises a question of title. Unless, therefore, such objection has been made, a Civil Court is not empowered to exercise any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition.

[Not. F., 23 A. 291 (303) (F.B.).]

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20 A. 74 N.

*The judgment in this case (*Bir Narain and another* v. *Girdhar Lal*), was as follows.—

AIKMAN, J.—The plaintiffs, who are appellants here, brought a suit under cl. (*h*) of s. 93 of the Rent Act to recover from the defendant, Girdhar Lal, who was lambardar of the village, their share of profits for the years 1298, 1299 and 1300 Fasli. The Court of first instance found that the defendant was liable not only for the profits actually collected, but also for profits calculated on the recorded rent-roll, on the ground that it was due to his gross negligence that a balance remained unrealized. The defendant lambardar appealed against the decree of the Assistant Collector, and the learned District Judge in appeal held, on the basis of a previous decision in a case between the parties, that there was no such gross carelessness on the part of the lambardar as would entitle the plaintiff to a decree for a share of profits calculated on the recorded rental, and not on the collections. The plaintiffs come here in Second Appeal. Since the appeal was instituted in this Court the defendant lambardar has died, and his minor sons have been brought upon the record as his representatives. In my opinion, the death of the original defendant renders it unnecessary for me to decide whether or not the lower appellate Court was wrong in relying upon the decision in the previous case. It was held by this Court in *Gulab* v. *Fateh Chand* (1) that the liability of a lambardar to account for profits unrealized owing to his gross negligence or misconduct, is a personal liability which cannot be enforced in a suit against his heir. It is true in the case referred to the suit was brought in the first instance against the heir, whereas in the present case, the suit was instituted against the lambardar personally. But as the plaintiff's claim is based on the alleged negligence of the deceased, and as it is not shown that in consequence of that negligence any assets came to the hands of his heirs, the claim cannot in my opinion be pursued against them. For this reason, the appeal must fail. I dismiss it with costs.

[N. B.—This case was followed in 20 A. 73.—ED.]

† First Appeal, No. 13 of 1897, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the28th January 1897.

(1) 6 A.W.N. (1886) 32.

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APPELLATE CIVIL.

20 A. 75 = 17 A.W.N. (1897) 197.

THE facts of this case sufficiently appear from the judgment of the Court.

[76] Pandit *Baldeo Ram Dave*, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

JUDGMENT.

EDGE, C.J. and BLAIR, J.—The plaintiffs brought the suit in which this appeal has arisen in effect to set aside the proceedings of an Assistant Collector in the partition of a mahal, and to have it declared that a sale-deed which was executed by some of the defendants of the lands which they obtained on partition was void, the plaintiffs alleging that those particular lands belonged to them. The partition proceedings were duly instituted under Act No. XIX of 1873. On receipt of the application for partition the Assistant Collector duly proceeded under s. 111 of that Act, and the notice required by that section was duly issued. The plaintiffs' case is that they filed objections to the partition, alleging title in themselves, and no title in certain of the other persons who were recorded as share-holders or as having interests in the mahal, and that no notice was taken of their objections, but that the Assistant Collector went on and made the partition, allotting to certain of these defendants lands of the plaintiffs, these defendants having no title. The sale-deed in question was one relating to these particular lands. The first Court dismissed the suit on the ground that it was barred by s. 241 of the Act No. XIX of 1873. The Court of first appeal, misunderstanding the decision of this Court in *Nasrat-ullah* v. *Majib-ullah* (1), and not having regard to some material sections in the Act to be considered, set aside the decree of the first Court and made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand, this appeal has been brought by the defendants.

The procedure provided by s. 113 of Act No. XIX of 1873, does not become obligatory on a Collector or an Assistant Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound [77] to issue under s. 111, and not even then unless such objection raises a question of title. The only evidence on the record which has been brought to our attention showing that any objection to the partition was taken by the plaintiffs is a reference to that subject in the rubkar of the Assistant Collector finally dealing with the partition proceedings. It appears from that rubkar that no objection of any kind was made to the partition proceedings before the day specified in the notice which was issued under s. 111. Consequently, upon the evidence on the record, the proceedings of the Assistant Collector were in compliance with law, and s. 113 of Act No. XIX of 1873, never came into application. When s. 113 of Act No. XIX of 1873, does not come into application in partition proceedings, s. 241 of that Act prohibits the Civil Courts from exercising any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition. Consequently, on the evidence upon the record, this suit could not be maintained so far as a claim to interfere with the distribution of the land in the partition is concerned, and it follows that if a Civil Court could not alter that distribution of the land, it could not entertain a suit so far as it sought to

(1) 13 A. 309.

set aside the deed of sale of land allotted in the partition to the parties who made the deed.

Mr. *Gulzari Lal* on behalf of the plaintiffs respondents has asked to be allowed time to produce evidence that the plaintiffs did in fact make an objection raising a question of title, and that such objection was made before the day specified in the notice issued under s. 111 of the Act. It appears to us that, in face of the rubkar of the Assistant Collector, it would be mere waste of time to adjourn this case for any such purpose, and further, it is not when a case comes before a Court of second appeal that a plaintiff is for the first time to begin to think about the evidence, if it exists, necessary to prove his claim. Litigation would never come to an end if we were to accede to such an application as that which is now made.

[78] The Court of first appeal should have dismissed the appeal to it. We allow this appeal with costs, and, setting aside the order of remand, we dismiss with costs the appeal to the lower appellate Court and restore and affirm the decree of the Court of first instance dismissing the suit with costs.

Appeal decreed.

1897 JULY 20. —— APPELLATE CIVIL. —— 20 A. 75 = 17 A.W.N. (1897) 197.

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20 A. 78 = 17 A.W.N. (1897) 168.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

SUNDAR SINGH (*Judgment-debtor*) *v.* DORU SHANKAR AND OTHERS (*Decree-holders*).* [22nd July, 1897]

Civil Procedure Code, s. 622—Revision—Erroneous decision on point of limitation.

The fact that a Court having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision under s. 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) and *Sarman Lal* v. *Khuban* (2) referred to.

[Rel., 16 C.W.N. 1015 (1018) = 15 Ind. Cas. 679 (681); **Appl.,** 34 A. 396 (397) = 14 Ind. Cas. 52 (53) 3 = 9 A.L.J. 365 (366); 39 C. 473 (476) = 15 Ind. Cas. 547 (548) = 15 Ind. Cas. 839 (840) = 207 P.L.R. 1912 = 102 P.R. 1912 = 213 P.W.R. 1912; **R.,** 25 A. 509 (526); 18 A.W.N. (1898) 74; 18 A.W.N. (1898) 78; 2 L.B.R. 333 (340); 4 N.L.R. 184.**]**

IN this case the decree-holders obtained a decree for money on the 2nd July, 1884. On the 12th of April 1896, the decree-holders applied for a certificate under s. 224 of the Code of Civil Procedure, and the certificate, having been prepared on the 2nd of July, 1896, was received by the Court to which the decree was sent for execution on the 4th of July, 1896. The decree-holders applied to that Court for execution on the 7th of July 1886. The judgment-debtors filed an objection to the effect that execution of the decree was time-barred. The Court (Munsif of Farrukhabad) disallowed the objection on the ground that the application for a certificate was made within time and the subsequent delay could not be imputed to the decree-holders. On appeal by the judgment-debtor, the Court of appeal (Subordinate **[79]** Judge of Farrukhabad)

* Civil Revision No. 4 of 1897, against an order of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farrukhabad, dated the 8th December 1896, confirming an order of Babu Bakhtawar Lal, Munsif of Farrukhabad, dated the 18th August, 1896.

(1) 11 C. 6. (2) 17 A. 422.

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20 A. 78 = 17 A.W.N. (1897) 168.

dismissed the appeal, agreeing with the Court below. Sundar Singh, one of the judgment-debtors, applied in revision to the High Court.

Munshi *Gulzari Lal*, for the applicant.

Babu *Jivan Chunder*, for the opposite parties.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—An application was made to transfer a decree for execution to another Court. An order for transfer was made and the certificate was duly transmitted. Thereupon the decree-holder applied to the Court to which the certificate had been sent for execution of the decree. Execution was, in fact, barred by that time by reason of s. 230 of the Code of Civil Procedure. However, the Court held that s. 230 could not be applied, as the application to transmit the decree had been made within time. As a matter of fact the Court was wrong. The making of an application to transmit the decree and the making of an order thereon did not suspend the operation of s. 230. The Court made an order for execution. We are clearly of opinion that that order was wrong and in contravention of s. 230 of the Code. But we are unable to distinguish the principle to be applied in this case from the principle applied by their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and which was also applied by a Bench of this Court in *Sarman Lal* v. *Khuban* (2). Consequently, we are reluctantly compelled to hold that we cannot entertain this application under s. 622 of the Code of Civil Procedure to revise an order which in our opinion was bad in law, as the Court had jurisdiction to consider whether s. 230 of the Code did not apply. We dismiss this application, but we make no order as to costs.

Application dismissed.

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20 A. 80 = 17 A.W.N. (1897) 198.

[80] APPELLATE CIVIL.

Before Mr. Justice Banerji.

MAKUND RAM (*Defendant*) *v.* BODH KISHEN (*Plaintiff*).*

[24th July, 1897.]

Civil Procedure Code, s. 586 - *Suit of the nature cognizable in Courts of Small Causes* —*Act No. IX of* 1887 (*Provincial Small Cause Courts Act*), s. 15.

Held, that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 596 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

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* Second Appeal No 792 of 1896 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 4th July 1896, confirming a decree of Munshi Harbandhan Lal, Officiating Munsif of Pilibhit, dated the 9th April, 1896.

(1) 11 C. 6.

(2) 17 A. 422.

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20 A. 80 = 17 A.W.N. (1897) 198.

JUDGMENT.

BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal by the learned vakil for the respondent on the ground that no appeal lies to this Court, the suit being one of the nature cognizable by a Court of Small Causes. The suit was one to recover from the defendant Rs. 130 under the following circumstances :—The defendant, in execution of a decree held by him against certain judgment-debtors, caused some property to be sold at auction and the plaintiff purchased it. Subsequently, the plaintiff applied under s. 315 of the Code of Civil Procedure to the Court which executed the decree for a refund of the sale-price paid by him on the allegation that the judgment-debtors had no saleable interest in the property sold. That application having been disallowed, he brought the present suit against the defendant, decree-holder, to recover from him the sale-price paid by the plaintiff, together with interest. It is urged on behalf of the respondent that this was a suit which was not excluded from the cognizance of a Court of Small Causes by the second schedule to Act No. IX of 1887. If the [81] suit does not come within any of the classes of suits specified in that schedule it is a suit which, under the second paragraph of s. 15 of Act No. IX of 1887, was cognizable by a Court of Small Causes. In my opinion, the suit was not covered by any of the articles mentioned in the second schedule as excepted from the cognizance of a Court of Small Causes. The learned vakil for the appellant refers to art. 23 which relates to "suits to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity." This is not a suit to set aside any order. If a decree be passed in the suit in favour of the plaintiff, it may have the effect of nullifying the order of the Munsif refusing to refund to the plaintiff the sale-price paid by him, but that circumstance would not make the suit a suit to set aside a decision, decree or order, which it does not purport to be. The amount claimed being a sum not exceeding Rs. 500, a second appeal is barred by s. 586 of the Code of Civil Procedure. The appeal is dismissed with costs.

Appeal dismissed.

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20 A. 81 = 17 A.W.N. (1897) 199.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

DOST MUHAMMAD KHAN AND OTHERS (*Defendant*) *v.* SAID BEGAM AND OTHERS (*Plaintiffs*).* [27th July, 1897.]

Civil Procedure Code, s. 13, Expl. II—Res judicata—*Muhammadan law—Dower—Suit for dower-debt after previous suit for partition amongst heirs—Effect of partition decree as constituting* res judicata *between co defendants.*

Two of the daughters of a deceased Muhammadan sued the remaining heirs for partition of the inheritance, and a decree for partition was made, which was confirmed on appeal by the High Court. Pending the appeal to the High Court, two other daughters of the deceased, who had been parties defendants in the suit for partition, brought a suit by which they claimed a large share in the estate of the deceased as part of the dower-debt due to their mother. In this suit they impleaded as defendants all the surviving descendants of their deceased father.

Held, that the claim for dower should have been made a ground of defence in the former suit by the plaintiffs, who had been defendants in the suit for [82]

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* First Appeal No. 283 of 1893 from a decree of Shah Ahmad-ul-lah, Subordinate Judge of Meerut, dated the 10th July, 1893.

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partition and that as no such defence had been set up in that suit the claim in respect of the dower-debt fell within the purview of explanation II to s. 13 of the Code of Civil Procedure, and the suit was barred, not only as against the plaintiffs to the former suit but as against the other defendants to that suit.

[F., 13 P.L.R. (1905) = 22 P.R. (1905) ; R., 32 A. 469 (474) = 7 A.L.J. 451 (456) = 6 Ind. Cas. 692 (694) ; 5 Ind. Cas. 325 (326) ; 8 C.L.J. 369 (405) ; 4 O.C. 108 (116, 117); 12 O.C 347 (375, 379) = 4 Ind. Cas. 763 (775) ; D., 1 A.L.J. 394 ; 11 O.C. 69 ; 65 P.L.R. (1908) = 55 P.R. (1907) = 96 P.W.R. (1907).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *T. Conlan*, Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Abdul Majid*, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BURKITT, J. (KNOX, J., concurring) :—This is a first appeal by the defendants from a decree of the Subordinate Judge of Meerut, dated July 10th 1893, in favour of the plaintiffs, respondents.

The plaintiffs, Musammat Said Begam and Musammat Shahzadi Begam, are daughters of the late Syed Mir Khan Sardar Bahadur of Khanpur, by his wife Hasno Begam. The plaintiffs' mother died in 1879, and their father in 1889. The present suit was instituted in May, 1892. The defendants impleaded in the suit were all the surviving descendants, male and female, of the plaintiffs' father and also his surviving widows. The plaintiffs allege that when he married their mother their father on the same day (August 11th, 1863) executed a *kabin-nama*, or deed-of-dower, by which he agreed that the dowry of his intended wife should be Rs. 12,000 in cash and one-seventh of all his immoveable property. They further allege that out of the dower-debt due to their mother one-fourth devolved on their father, as one of her heirs on their mother's death. They therefore sued for possession of three-fourths of one-seventh of the immoveable property, after deducting so much of it as might be recoverable from their shares as heirs to their father's estate, and Rs. 8,182 in cash.

The Subordinate Judge gave the plaintiffs a decree for possession of the property as claimed out of their father's estate, as it existed at his death, and for Rs. 4,091 in cash. The decree [83] for possession was made as against the whole estate left by the Sardar Bahadur. No deduction was made on account of the amount of the dower-debt payable from the plaintiff's personal share by inheritance in that estate. Out of the twenty-one defendants impleaded, nine submitted to the decree of the Court. Twelve appealed, and they impleaded as co-respondents with the plaintiffs one Syed Hasan Khan, son of the late Sardar Bahadur, because it was alleged he had purchased the interest of one of the plaintiffs in the decree. This Syed Hasan Khan is one of the defendants who did not join in this appeal.

The first plea argued on behalf of the appellants at the hearing is a plea which, if successful, must put a summary end to the suit. It is the second plea in the memorandum of appeal, and is to the effect that "the present suit was barred under s. 13 of the Code of Civil Procedure with reference to the litigation ending in decree of the Subordinate Judge of Meerut, dated January 15th, 1892."

To explain this plea, it is necessary to set out some facts respecting the previous litigation. They are as follows :—

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On January 23rd, 1890, two ladies, named Bibi Jan and Bibi Sahib Jan (the latter of whom is now deceased and is represented by the appellants Nos. 7-12), daughters of Syed Mir Khan, Sardar Bahadur, instituted a suit against all the surviving descendants, male and female, and the surviving widows of their father, to recover by partition their shares as daughters according to Muhammadan Law in their deceased father's estate. Among the defendants impleaded in that suit, were the two plaintiffs (who also are daughters of the Sardar Bahadur), Mussammat Said Begam and Musammat Shahzadi Begam, of the present suit. The latter did not put in any written defence in that suit. The only defendants who appeared were the eight sons of the Sardar Bahadur. In that suit, a decree was passed by the Subordinate Judge on January, 15th, 1892, in favour of the plaintiffs, and that decree was, on appeal to this Court, affirmed on April 23rd 1897. The present suit was instituted on the [84] 21st May, 1892, more than four months after the Subordinate Judge had given his decree in the former suit, and while that decree was pending in appeal in this Court. The contention in the present appeal is that the plaintiffs respondents might and ought to have made their present claim a matter of defence in the former suit, and that as they failed to do so, it must now be held, in accordance with the second explanation to s. 13 of the Code of Civil Procedure, that that claim was a "matter directly and substantially in issue" in the former suit and that therefore the present suit is barred. There is no dispute as to the facts. It is admitted that these plaintiffs respondents were impleaded as defendants in the former suit and they did not put in any defence. A perusal of the plaint in the former suit, a copy of which has been put in evidence in this appeal, shows that these plaintiffs respondents were, conjointly with the other defendants in that suit, impleaded as being in possession of the estate left by the deceased Sardar Bahadur their father, the estate of which the plaintiffs in that suit sought to recover their legal shares as heirs.

For the appellants here our attention was called to the decisions of their Lordships of the Privy Council in the cases of *Mahabir Parshad Singh* v. *Macnaghten* (1) and *Kameswar Parshad* v. *Rajkumari Rutnn Koer* (2) and on their authority we were asked to hold that the claim of the plaintiffs in the present suit was barred by the principle of *res judicata*.

In the former suit, the plaintiffs asked for possession by partition of 14/120 shares out of the whole of certain specified properties (set forth in schedules) which they alleged had been of the Sardar Bahadur at his decease and were at the date of the suit in possession of the persons impleaded as defendants, and amongst others of the female plaintiffs respondents to this appeal. The contention for the appellants is that those ladies not merely might but ought to have pleaded in the former suit that the plaintiffs to that suit could not get a decree for 14/120 shares in the whole immoveable property left by their deceased father, because (debts by Muham-[85]madan Law taking precedence of inheritance) they (the present plaintiffs respondents here) had a title to three-fourths of one-seventh of the estate as it stood at the date of the *kabinnama*, and to a large sum in cash, which claim should be paid before the plaintiffs of that suit could take their sharers in the estate by partition as heirs. As their father and mother had both died before 1890 the cause of action for the dower-debt had accrued before the institution of the former

(1) 16 I. A. 107.
(2) 19 I. A. 234.

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suit. In our opinion it was incumbent on these ladies when defendants in the former suit, which was a suit for partition, even if they did not on other grounds dispute the claim of the plaintiffs in that suit, to have pleaded, at least as a partial defence to that suit, that a decree for partition should not be made until the debt due to them, on the footing of their mother's dower, both in moveable and in immoveable property, had first been deducted from the property left by their father. The effect of the claim to the dower debt, if then made by these ladies and substantiated, would have been to reduce considerably the extent of the immoveable property and the cash out of which the plaintiffs in the former suit would take their 14/120 shares. We are of opinion that in that suit for partition these ladies should have informed the Court and the plaintiffs that they had a claim which would have the effect mentioned above, and should have objected *then* to the Court giving to those plaintiffs a decree for possession of 14/120ths out of their father's estate as it stood at his death, and should have represented that those plaintiffs were only entitled to a decree for possession by partition of 14/120ths of as much of that estate as remained after the dower-debt had been discharged, or due allowance made for it.

What has happened is that in the former suit the Subordinate Judge, and this Court in appeal, after deciding distributively the number of shares into which the property left by the late Sardar Bahadur should be divided, and the number of such shares to which each of the heirs (all of whom were impleaded in the suit) of the deceased was entitled, held that the plaintiffs in that suit were entitled to possession of 14/120ths of the property left by the [86] Sardar Bahadur and gave a decree accordingly. It follows therefore that, if the decree in the present case is to stand, the decree in the former suit—to which the plaintiffs in the present suit were parties—must be torn up, and considerable deductions will have to be made from the area of the immoveable property and from the amount of the moveable property, possession of which was adjudged to the plaintiffs of the former suit. Those plaintiffs have thus most unnecessarily been exposed to the trouble, annoyance and expense of a second suit, the subject-matter of which might have been decided in the former suit.

In our opinion, the second explanation to s. 13 of the Code of Civil Procedure is peculiarly applicable to such a state of things. The rule laid down in that explanation appears to us to be, to some extent at least, founded on the principle which underlies s. 43 of the same Code, namely, that of preventing a multiplicity of suits and unnecessary litigation. We have shown above that the present suit was quite unnecessary. Bearing in mind the observations of their Lordships of the Privy Council as reported at page 238 of their judgment in *Kameswar Pershad* v. *Rajkumari Ruttun Koer* (1), we have no hesitation in holding that this matter of the dower-debt ought to have been made a ground of defence by the respondents Said Begam and Shahzadi Begam when they were defendants in the former suit. It must therefore be considered to have been directly and substantially in issue in that suit. It follows therefore that the present suit is barred as a *res judicata* and should have been dismissed, certainly as far as the plaintiffs in the former suit and their representatives in title (defendants appellants in the present suit) are concerned.

As to the other defendants to this suit (some of whom have appealed and some have not), all of whom were defendants in the former suit, we

(1) 19 I. A. 234.

note that no suggestion was made at the hearing of this appeal on behalf of the respondents, that the decree under appeal should be modified so as to exempt from its operation the plaintiffs of the former suit. Irrespective of that matter we are [87] of opinion that the present suit is barred by the principle of *res judicata*, not merely against the plaintiffs (as decided above), but also as against the defendants in the former suit, and even though the plaintiffs in the present suit were co-defendants in the former suit. That suit, as we have already pointed out, was a suit for possession by partition. In such a suit the decree is not—like a decree for money or for the delivery of specific property—a decree in favour of the plaintiffs only. In a suit for partition (as the former suit was) the decree is, or ought to be, a joint declaration of the rights of the persons interested in the property of which partition is sought, and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants, and renders unnecessary any subsequent suit by any of such sharers for a declaration of his interest in the property (*vide Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (1), and *Ramchandra Narayan* v. *Narayan Mahadeo* (2). In the former suit, in order to adjudicate on the relief to be given to the plaintiffs, *i.e.*, in order to ascertain to what share in their father's property they were entitled, it was absolutely necessary to ascertain also what were the shares of all the other heirs of the Sardar Bahadur, and who they were. Those other heirs were all the defendants of the former suit, including the female plaintiffs respondents to this appeal, and the decree therefore was not merely an adjudication as to the shares in the property of which partition was sought to which the plaintiffs in that suit were entitled, but also of the shares to which each of the defendants *inter se* was entitled *out of the property left by the Sardar Bahadur* at his death. Practically each of the defendants obtained a decree for his or her fractional share *in that property*, a decree which he or she could not have obtained had the female respondents in the present suit put forward (as we think they ought to have done) and established their claim to their mother's dower-debt. The question whether all these defendants are entitled to their various shares out of the property [88] left by the Sardar Bahadur at his death, and *not* to the same fractional shares out of that property diminished by payment of the dower-debt, is, we think, just as much a *res judicata* in favour of those defendants as we have held it to be in the case of the plaintiffs in the former suit. For the above reasons, we are of opinion that the present suit is barred by the principle of *res judicata* as against all the persons impleaded as defendants in the former suit, and that it should have been dismissed as against them also.

Some arguments were addressed to us for the appellants on other points arising in the appeal, but, as in our opinion the suit fails, we consider it unnecessary to discuss them.

We allow this appeal. We set aside the decree of the lower Court and, as we hold that the suit was barred *ab initio*, we, under the provisions of s. 544 of the Code of Civil Procedure, direct that it stand dismissed as against all the persons impleaded as defendants. The respondents will pay appellants' costs in both Courts.

Appeal decreed.

(1) 8 C. 551.

(2) 11 B. 216.

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LATE
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20 A. 88 =
17 A.W.N.
(1897) 193.

20 A. 88 = 17 A.W.N. (1897) 193.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

MUHAMMAD HUSAIN (*Defendant*) *v.* NIAMAT-UN-NISSA AND OTHERS (*Plaintiffs*).* [30th July, 1897.]

Pre-emption—Muhammadan Law—Right of pre-emption not surviving to heir of pre-emptor.

According to the Muhammadan law applicable to the Sunni sect, if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption in his life-time the right to sue does not survive to his heirs.

THIS was a suit for pre-emption under the Muhammadan law. One Maqsud Hasan sold his house in Shamsabad to Muhammad Husain. The plaintiff, Muhammad Hasan, thereupon brought a suit for pre emption against the vendor and the vendee. That suit was dismissed on the 7th of October 1896, on the ground that the plaintiff had not proved his compliance with the Muhammadan law in the matter of the necessary preliminary [89] demands. On the 13th of October 1896 the plaintiff pre-emptor Muhammad Hasan died. On the 10th of November 1896 two of his heirs appealed, and on the 8th of December 1896 the remaining heir was joined as a party to the appeal. The lower appellate Court (Subordinate Judge of Farrukhabad) found that the necessary demands had been made, and passed an order of remand under s. 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court on the main ground that "the right of pre-emption being personal, the cause of action" did not survive to the heirs of the deceased plaintiff, and they could not therefore have appealed from the decree of the Court of first instance.

Maulvi *Ghulam Mujtaba*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

EDGE, C. J. and BLAIR, J:—One Maqsud Hasan sold his house in Shamsabad to Muhammad Husain. One Muhammad Hasan, thereupon, claiming under the Muhammadan law of pre-emption applicable to Sunnis of the Hanifi sect, brought his suit for pre-emption. That suit was dismissed on the 7th of October, 1896, on the ground that Muhammad Hasan, the then pre-emptor, had failed to prove that he had made the necessary demands. On the 13th of October, 1896, Muhammad Hasan the pre-emptor died. On the 10th of November, 1896, two of his heirs appealed and on the 8th of December, 1896, the remaining heir was joined as a party to the appeal. The Court below found that the necessary demands had been made, and passed an order under s. 562 of the Code of Civil Procedure remanding the case for trial on its merits. From that order this appeal has been brought.

The short point which we have to decide is—did the right of pre-emption determine upon the death of Muhammad Hasan? All the authorities of which we are aware show that it did; that the right of pre-emption is gone when the pre-emptor is a Sunni of the Hanifi sect, and has not obtained his decree during his life-time, and that the right

* First Appeal No. 6 of 1897, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 23rd December 1896.

to sue does not survive to his heirs.[90]The authorities will be found at page 505 of Baillie's Muhammadan Law, Hanifeea (2nd edition); Hamilton's Hedaya by Grady, (2nd edition, p. 560); Tagore Law Lectures 1873 (Shama Charan Sarcar), p. 534; Tagore Law Lectures, 1884. (Ameer Ali), 2nd edition, Vol. I, p. 603.

In this case Muhammad Hasan had not obtained possession. We allow the appeal, and, setting aside the order of remand, we restore the decree of the first Court, but upon different grounds. There will be no costs of the appeal to the Court below or of the appeal to this Court.

Appeal decreed.

1897 JULY 30. APPELLATE CIVIL. 20 A. 88=17 A.W.N. (1897) 193.

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20 A. 90=17 A.W.N. (1897) 203.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Burkitt.

SHEORANIA (*Plaintiff*) *v.* BHARAT SINGH (*Defendant*).*

[30th July, 1897.]

Minor—Suit on behalf of a person alleged to be, but not in fact, a minor—Procedure on discovery that the plaintiff was of full age at the commencement of the suit.

A suit was instituted on behalf of a person alleged to be a minor, through her next friend. The plaintiff obtained a decree. The defendant appealed, and on this appeal the alleged minor applied to be placed on the record in her own right as respondent, stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time when the plaint was filed. *Held* that the suit must be dismissed. *Taqui Jan* v. *Obaid-ulla* (1), dissented from.

[R., 17 Ind. Cas. 580 (581)=(1912) M.W.N. 1207 (1208); 5 O.C. 355 (357); 7 O.C. 234 (236); 11 O.C. 159 (164); 5 S.L.R. 240 (241); D., 28 A. 416=3 A.L.J. 187; 2 L.B.R. 246.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

Pandit *Moti Lal* and *Kunwar Parmanand*, for the respondent.

JUDGMENT.

KNOX and BURKITT, JJ.—The suit out of which this second appeal arises was instituted on a plaint signed and verified by one Lachmi Narain, calling himself the next friend of Musammat Sheorania, whom he described to be a minor. **[91]** Sheorania was his daughter, and the suit was instituted on the 23rd of April, 1894. On the 24th of September, 1894, a decree was given upon this plaint in favour of the plaintiff. The defendant presented an appeal, and, when the next friend got notice of the appeal, Sheorania herself came forward and applied to the Court to be allowed to carry on the suit as a major. From the affidavit which she filed, and from the affidavit which her father Lachmi Narain filed, it is proved beyond doubt that Musammat Sheorania had attained her majority some time before the institution of the suit in April, 1894.

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* Second Appeal, No. 650 of 1895, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 20th March 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 24th September 1894.

(1) 21 C. 866.

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Upon this the defendant, who was appellant in the Court below, represented to the Judge that the suit should be dismissed, and it was dismissed.

It is now contended in appeal to this Court that the Judge should not have dismissed the suit, but should have allowed the plaint to be amended and the suit to be carried on by Musammat Sheorania, or, if amendment could not be allowed, the phrase "Lachmi Narain as next friend" might be treated as mere surplusage. In support of this the learned counsel for the appellant cited the case of *Taqui Jan* v. *Obaid-ulla* (1). We find ourselves unable to follow the procedure adopted in that case. We have before us what is not a plaint by Musammat Sheorania, inasmuch as it is neither signed nor verified by her, and she, according to both her own statement and that of Lachmi Narain, is the only person, if any, entitled to sue as plaintiff. The person who signed and verified the plaint is Lachmi Narain, a person not duly authorized by Sheorania in that behalf. Musammat Sheorania was of full age when the plaint was filed, and Lachmi Narain therefore had no standing whatever in the case. The *vakalatnamahs* in the case are also signed by Lachmi Narain, and, so far as the record shows, the whole proceedings were carried on by Lachmi Narain, a man who had no interest whatever in the property in dispute and had no cause of action against the defendant. What purports to be a plaint by Musammat Sheorania is not a plaint by Musammat Sheorania, and [92] cannot therefore be amended by her. The appeal fails and is dismissed with costs in all Courts, which will be borne throughout by Lachmi Narain, the person who signed and verified the plaint on the record.

Appeal dismissed.

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20 A. 92=17 A.W N. (1897) 202.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

ABDUL HAI AND OTHERS (*Defendants*) *v.* NAIN SINGH AND ANOTHER (*Plaintiffs*).* [31st July, 1897.]

Pre-emption—Wajib-ul-arz—Partition without new wajib-ul-arz being framed—Act No. XIX of 1873 (*North-Western Provinces Land Revenue Act*), *s.* 107.

When a mahal is divided by perfect partition into two or more separate mahals a separate record of rights should be framed for each of the new mahals.

Where under such circumstances no fresh records of rights are framed for the new mahals the co-sharers in any one of the new mahals cannot, unless under very exceptional circumstances, claim, under the terms of the old record of rights applicable to the original undivided mahal, pre-emption in respect of land situated in any of the other new mahals. *Ghure* v. *Man Singh* (2) referred to.

[R., 22 A. 1 (25 ; 32 A. 265 (282)=7 A.L.J. 133=6 Ind. Cas. 17 (19 .]

THIS was a suit for pre-emption of a share in a village. The village in which the property in suit was situated had originally consisted of one mahal, but prior to the sale which gave rise to the present suit had been divided by perfect partition into two separate mahals. On this partition, however, no new *wajib-ul-arzes* had been framed for the new

* First Appeal, from Order No. 35 of 1397, from an order of H.W. Lyle, Esq., Additional Judge of Moradabad, dated the 20th April 1897.

(1) 21 C. 866.

(2) 17 A. 226.

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mahals. The plaintiffs pre-emptors were owners of shares in one of the new mahals and the share sold was a share in the other new mahal. The existing *wajib-ul-arz*, framed when the village was undivided, stated that the custom of pre-emption prevailed in the village.

The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, holding that the plaintiffs, not being sharers in the mahal in which the share sold was situated, could not claim pre-emption by virtue of the old *wajib-ul-arz*. The Court followed the ruling of the High Court in *Ghure* v. *Man Singh* (1).

[93] The plaintiffs appealed. The lower appellate Court (District Judge of Moradabad), relying on certain rulings of the High Court, *viz.*, *Gokal Singh* v. *Mannu Lal* (2), *Kuar Dat Prasad* v. *Nahar Singh* (3), *Shiam Sundar* v. *Amanant Begam* (4), and *Abbas Ali* v. *Ghulam Nabi* (5), allowed the appeal and made an order of remand under s. 562 of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and BLAIR, J.:—This was a suit for pre-emption. The share sold was in a mahal which had formed a part of a larger mahal. The co-sharers in the larger mahal had obtained a perfect partition under Act No. XIX of 1873. The plaintiff in this case is a co-sharer in the other mahal, in which the share sold is not, which formed part of the larger area. It appears that no separate *wajib-ul-arz* was prepared at the date of partition. The plaintiff's contention is that the old *wajib-ul-arz* still applies, and that, inasmuch as he is a share-holder within the area to which that *wajib-ul-arz* applied, he is entitled to pre-emption, although he is not a share-holder in the particular mahal in which the share is which was sold. The rulings on this point are somewhat conflicting; but in one of the last rulings of this Court on this subject it was said:—"The result then is that the document upon which the respondents base their right, and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed and which never contemplated the existing state of things." We have quoted from the judgment by Mr. Justice Knox in *Ghure* v. *Man Singh* (6). We believe that the decision in that case is in harmony with the view now entertained in this Court. The object with which share-holders in a mahal seek for partition is to sever their connection as co-sharers **[94]** with other share-holders of the mahal. Some desire to separate their interest from other co-sharers because the latter do not pay their quota of the Government revenue regularly, thereby bringing liability for their arrears upon all the co-sharers of the mahal. Sometimes, no doubt, partition is sought because co-sharers cannot get on comfortably with each other as co-sharers in the same mahal. In any view of the subject it would require very strong evidence to satisfy us that after share-holders in a mahal have applied for and obtained partition and consequent separation of their interest from other share-holders in the mahal they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal and become again

(1) 17 A. 226. (2) 7 A. 772. (3) 11 A. 257.
(4) 9 A. 234. (5) 11 A. W. N. (1891) 137. (6) 17 A. 226 (234).

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their co-sharers. It is obvious to our minds that, on a true construction of Act No. XIX of 1873, it is the duty of the Collector or Assistant Collector on making a perfect partition to frame a separate record of rights for each of the new mahals. Unfortunately it is not always done, and hence these endless disputes between the share-holders in different mahals which formed parts of one original mahal. If Collectors or Assistant Collectors would read s. 107 of Act No. XIX of 1873 with the definition of "Mahal" as given in s. 3 of that Act, they would see that apparently it is the intention of the Legislature that each mahal should have a separate record of rights. A decision of two Judges of this Court in *Anyan Fateh Chand* v. *Bibi Hamid-un-nissa*, Second Appeal No. 1249 of 1892, in which an order of remand was made on the 19th March, 1894, and which was decided on the 18th February, 1895, supports the opinion which we have expressed. We allow this appeal, and set aside the order of the Court below, and dismiss the appeal to that Court with costs, and restore and affirm the decree of the first Court. The appellant will have the costs of this appeal.

Appeal decreed.

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20 A 95=17 A.W.N. (1897), 196.

REVISIONAL CRIMINAL.

[95] *Before Mr. Justice Knox.*

QUEEN-EMPRESS *v.* RAM PAL.* [2nd August, 1897.]

Act No. IX *of* 1890 (*Indian Railways Act*), *ss.* 113, 132—*Act No.* XLV *of* 1860, *ss.* 40, 64—*Criminal Procedure Code, s.* 33—"*Offence*"—*Travelling on a Railway without a proper ticket—Punishment.*

A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of s. 113, cl. (4) of Act No. IX of 1890.

[R., 5 C.L.J. 47 (49) = 11 C.W.N. 100; 8 Ind. Cas. 190 (191) = 35 P.W.R. (1910) Cr.]

IN this case the Joint Magistrate of Allahabad tried one Ram Pal summarily under s. 113 of the Indian Railways Act, 1890, and ordered him under that section to pay a certain excess fare together with a penalty, and further sentenced him to ten days' simple imprisonment in default of payment of the amount. The Magistrate of the District being of opinion that the sentence of imprisonment in default was illegal, the act of the accused not amounting to an "offence" within the meaning of the Indian Penal Code, referred the case to the High Court for orders under s. 438 of the Code of Criminal Procedure.

The following order was passed:—

ORDER.

KNOX, J.—Travelling in a train by a passenger without having a proper ticket with him is not an offence under the Railway Act of 1890. It is true that s. 113 together with s. 106 and the sections which follow up to as far as s. 130 are all placed under a heading of "Other offences." The classification is unfortunate, for several of these sections cannot possibly relate to an offence at all, and s. 132 shows clearly that acts committed under s. 113 are not deemed offences within the technical meaning of that word. All the proceedings taken by the Assistant Magistrate are set aside and the record will be returned.

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* Criminal Revision, No. 408 of 1897.

20 A. 96=17 A.W.N. (1897), 1204.

[96] APPELLATE CIVIL.

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APPELLATE CIVIL.

20 A. 96=17 A.W.N. (1897) 204.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

MIR AZMAT ALI (*Plaintiff*) *v.* MAHMUD-UL-NISSA (*Defendant*).* [2nd August, 1897.]

Suit for marriage—Jactitation of marriage—Jurisdiction of Civil Courts in British India to entertain such a suit between Muhammadans.

Held that a suit for jactitation of marriage will lie in a Civil Court in British India, and is not within the ruling of the Privy Council in *Rajah Nilmony Singh* v. *Kally Churn Bhattacharjee* (1).

THE plaintiff sued in the Court of the Subordinate Judge of Meerut for a declaration that the defendant was not, as she falsely alleged herself to be, the wife of the plaintiff, and that a child to which she had given birth, and which she alleged to be his, was not his. The plaintiff's case was that the defendant had been married to one Kallu Mir, and that the marriage was still subsisting. Prior to this suit being brought the defendant had obtained from a Criminal Court an order against the plaintiff for the maintenance of her child as having been begotten by the plaintiff, though the Criminal Court did not find that the defendant was married to the plaintiff. The present suit was dismissed by the Subordinate Judge, who found that the defendant was the lawfully married wife of the plaintiff and that the child was his.

On appeal by the plaintiff the defendant respondent raised an objection that the suit was not cognizable at all by a Civil Court. This objection was sustained by the lower appellate Court, which dismissed the appeal, relying on the case of *Rajah Nilmony Singh* v. *Kally Churn Bhattacharjee* (1).

The plaintiff appealed to the High Court.

Messrs. *T. Conlan* and *D. N. Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J. :—This is a suit for jactitation of marriage which was brought by a Muhammadan named Mir Azmat Ali against one Musammat Mahmud-ul-nissa. She had taken [97] proceedings against him in the Magistrate's Court on more than one occasion to obtain orders of maintenance for herself and her child on the allegation that she was the wife of Mir Azmat Ali and the child was their child. The first Court dismissed the suit, finding for the defendant that she was the plaintiff's wife. The plaintiff appealed. The first appellate Court dismissed the appeal on the ground that such a case came within the ruling of the Privy Council in *Rajah Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), and that consequently the suit did not lie. But the case before the Privy Council was a very different one. The decision apparently is one which would forbid the institution of a novel description of suit to set aside a mere assertion. A suit for jactitation of marriage is not by any means a novel description of suit: it was a suit in which relief

* Second Appeal, No. 679 of 1895, from a decree of A M Markham, Esq., District Judge of Meerut, dated the 1st May 1895, confirming a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 24th March 1894.

(1) 2 I. A. 83.

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was given in England in the Ecclesiastical Courts, and when the jurisdiction of those Courts was transferred to the Divorce Court by the Act of 1857, the jurisdiction of the Ecclesiastical Courts in suits for jactitation of marriage was transferred to the Divorce Court. In England it was not only a well-known suit within the jurisdiction of the Ecclesiastical Courts, but it was considered proper that that jurisdiction should be continued by the Divorce Court in England, and there can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship, and his heirs may be harassed by false claims after his death. The suit for jactitation, however, is one not to be encouraged, particularly in a country like this, in which persons unfortunately are too anxious to discover forms of legal procedure by which they can annoy their neighbours. In our opinion, however, such a suit lies in a Civil Court in this country. The Court trying such a suit will of course take care, before granting a plaintiff a decree, to see that it is strictly proved that the defendant did seriously allege that the disputed marriage had taken place and that the plaintiff did not acquiesce in the claim or allegation of the [98] defendant as to the disputed marriage, and further that in fact no marriage had taken place between the parties. We set aside the decree of the lower appellate Court, and remand, the case under s. 562 of the Code of Civil Procedure to that Court to be disposed of upon the merits.

Appeal decreed and cause remanded.

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20 A. 98=17 A.W.N. (1897) 205.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

AMAN SINGH AND ANOTHER (*Plaintiffs*) *v.* NARAIN SINGH AND OTHERS (*Defendants*).* [4th August, 1897.]

Civil Procedure Code, s. 462—Compromise on behalf of a minor—Suit to set aside compromise as having been entered into without the leave of the Court.

Where the guardian *ad litem* of certain minors assented on their behalf to a compromise, which compromise was accepted by the Court, and a decree passed thereon, and was found not to be prejudicial to the interests of the minors; it was *held* that the minors could not, after the decree based upon the compromise had become final, succeed in a suit to set it aside on the sole ground that the Court had not previously given leave to the guardian to enter into the compromise. *Kalavati* v. *Chedi Lal* (1) distinguished.

[F., 8 C.L.J. 274=13 C.W.N. 163=4 Ind. Cas. 467; R., 31 C. 111 (120); 34 M. 314=12 Ind. Cas. 499 (500); 11 Ind. Cas 523=134 P.L.R 1911=2 P.R. 1912=42 P.W.R. 1912; 16 Ind Cas. 397 (398); **Doubted**, 8 C.L.J. 119 (128); **D.**, 2 O.C. 45 (48); 6 O.C. 175 (182).]

THIS was a suit to set aside a decree passed on the basis of a compromise. One of the plaintiffs was of full age, the other a minor. At the time of the compromise in question being made both had been minors, and had been represented by their mother Mussammat Ganga, as guardian

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* Second Appeal, No. 724 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 8th April, 1895, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 19th December, 1894.

(1) 17 A. 531.

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20 A. 98 = 17 A.W.N. (1897) 205.

ad litem. The Court of first instance decreed the plaintiffs' claim, holding that the conduct of Musammat Ganga in relation to the compromise was suspicious and that she had been fraudulently induced by the plaintiff in the former suit to assent to it on behalf of her minor sons.

On appeal by the defendants the lower appellate Court (District Judge of Aligarh) held that the fraud and collusion alleged by the plaintiffs had not been proved, neither was it shown that the compromise entered into on their behalf by the mother of the [99] minors was prejudicial to the minors' interest. That Court accordingly allowed the appeal and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the appellants.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J. and BANERJI, J.—This suit was brought to set aside a decree made on a compromise. The plaintiffs here were minors at the time of the previous suit, and were lawfully represented in that suit by their guardian. The guardian was an assenting party on their behalf to the compromise and to the making of the decree, and it is found in this suit that the compromise was not prejudicial to the interests of the minors; but the Court had not, before the compromise was made, given leave for its being made. Under those circumstances it is contended on behalf of the plaintiffs here that they are entitled to a decree setting aside the decree which was made on the compromise, and reliance is placed upon the judgment of this Court in the case of *Kalavati* v. *Chedi Lal* (1). It is said, as appears to be true, that the Court, although it sanctioned the compromise after it had been entered into, had not given leave to the guardian to make the compromise before it was made, and that consequently there was no good compromise in law binding upon the minors upon which a decree could lawfully have been made. In our opinion, there is a difference between a case in which the validity of a decree made upon a compromise in a suit in which a minor is a party is challenged in appeal from that decree, and a case like the present, where the validity of a decree which has become final, is sought to be questioned in a separate subsequent and independent suit between the parties.

Now in the present case, it has not been proved that the decree in the previous suit was in any respect obtained by fraud. It is not shown that the decree in the previous suit was in any respect disadvantageous to the minors. It would probably be now [100] impossible, if we were to decree this suit, to put the parties back into the same position in which they were when the decree in the previous suit was made upon the compromise. Further, we cannot overlook the fact that if we were to hold that a decree based upon a compromise which was not disadvantageous to a minor, but for the making of which leave had not been given by the Court before it was effected, could be avoided and set aside in a subsequent suit, we should be opening a door to ruinous litigation in these Provinces in cases in which the Court had in fact sanctioned a compromise before making a decree.

On these considerations, we dismiss this appeal with costs.

Appeal dismissed.

(1) 17 A. 531.

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AUG. 5.

APPELLATE CIVIL.

20 A. 100=17 A.W.N. (1897) 206.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

SERI MAL AND OTHERS (*Plaintiffs*) *v.* HUKAM SINGH (*Defendant*).*

[5th August, 1897.]

20 A. 100=17 A.W.N. (1897) 206.

Pre-emotion—Wajib-ul-arz—Sale to a stranger—Resale before suit to a co-sharer—Effect of such re-sale.

In cases of pre-emption based upon a *wajib-ul-arz*, the right of pre-emption does not survive, if the land, which is subject to pre-emotion, having been sold to a stranger, is subsequently re-sold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption.

[F., 3 A.L.J. 544=A.W.N. (1906) 215; 73 P.R. (1893); **Appl.**, 25 A. 421 (430); 3 Ind. Cas. 546 (547)=12 O.C. 229 (231, 235); 11 O.C. 290 (292); **R.**, 21 A. 374 (379); 31 A. 530 (532)=6 A.L.J. 699 (701)=3 Ind. Cas. 42; 32 A. 45 (49)=6 A.L.J. 966 (970)=3 Ind. Cas. 782 (784); 32 A. 340 (343)=7 A.L.J. 259 (262)=5 Ind. Cas. 527 (528); 7 A.L.J. 77 (78); 1 Ind. Cas. 528 (529); 3 Ind. Cas. 923 (925)=5 N.L.R. 136 (140); 4 Ind. Cas. 337=91 P.R. 1909=148 P.L.R. 1909=161 P.W.R. 1909; 2 N.L.R. 150 (154)=92 P.L.R. (1903)=43 P.R. (1903); 145 P.L.R. 1908=26 P.R. (1908)=39 P.W.R. (1908) 134 P.W.R. 1908; 91 P.W.R. (1909); **D.**, 23 A. 247.]

THIS was a suit for pre emption. One Manni Lal sold a share in a certain village on the 1st of August, 1893, to Bhawani Prasad, a stranger to the village. On the 23rd of July, 1894, Bhawani Prasad sold the share in question to one Hukam Singh. On the 24th of July 1894, the plaintiffs, who were co-sharers in the village, brought a suit for pre-emption under the terms of the village *wajib-ul-arz* on the basis of the sale of the 1st of August 1893. To this suit only Munni Lal and Bhawani Prasad were originally made defendants. Hukam Singh was subsequently added as a defendant on the 7th of November, 1894. Hukam Singh was also a co-sharer in the village having equal rights of pre-emption with the plaintiffs.

[101] The Court of first instance (Subordinate Judge of Aligarh) decreed the plaintiffs' claim, holding that the sale-deed in favour of Hukam Singh was fictitious and that Hukam Singh had forfeited his right of pre-emption by reason of his having purchased the property from Bhawani Prasad.

Against this decree, the defendant, Hukam Singh, appealed. The lower appellate Court (District Judge of Aligarh) allowed the appeal and dismissed the plaintiffs' suit as against Hukam Singh, holding that the sale to Hukam Singh was a *bona fide* transaction, and that the plaintiffs had no superior pre-emptive rights as against him.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—Shareholders in a village in which there was under the *wajib-ul-arz* a right of pre-emption amongst the shareholders, sold certain bighas of land to a stranger. Out of that sale this suit has arisen. The plaintiffs claim pre-emption as co-sharers having a right of pre-emption. One of the defendants, namely, Hukam Singh,

* Second Appeal, No. 736 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th April, 1895, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 7th February 1895.

is a co-sharer having an equal right of pre-emption with the plaintiffs. He claims under a sale-deed which has been found by the District Judge in appeal to be genuine. That sale-deed bears a date prior to the date of the institution of this suit. It was a sale-deed by which the stranger vendee sold to Hukam Singh the land which he had previously purchased from the other co-sharers. The first Court decreed the claim for pre-emption. The Court of first appeal, on appeal, dismissed the suit. From the decree of the Court of first appeal this appeal has been brought.

It has been contended here on behalf of the plaintiffs appellants that, at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action. That no doubt is true. It has been contended further that the plaintiffs, having obtained a cause of action, before the sale to Hukam Singh, are entitled to a decree of pre-emption in this suit which will deprive [102] Hukam Singh of the benefit of his purchase. For that proposition there is authority. A Judge of this Court sitting alone decided, in Second Appeal No. 649 of 1895, that in such a case the subsequent re-sale by the stranger vendee could not bar the right of a shareholder to obtain a decree for pre-emption against the purchaser shareholder from the stranger. With that proposition we cannot agree. In a coparcenary village, in which, whether by custom or agreement, there is a pre-emption for the shareholders on a sale to a stranger, each shareholder of equal right has, at the moment such a sale is effected, an equal right to pre-empt the whole property sold. The custom of the Muhummadan Law in such a case has never been applied in these Provinces in cases of pre-emption arising under a *wajib-ul-arz* like that in this case. We refer to the rule by which all persons entitled to pre-emot are entitled to a share in the pre-empted property. In our opinion, until a suit has been brought by a co-sharer for pre-emption of the property sold to a stranger, another co-sharer can purchase from the stranger the share which had been sold to the stranger. The stranger on his purchasing a share from a co-sharer obtains a vested interest in the share, and his interest acquired by such purchase can only be divested by voluntary sale by him or by a decree in a suit. Now in this case, as we have said, Hukum Singh had equal rights of pre-emption with the plaintiffs. He purchased the share from the stranger before the plaintiffs filed their suit, and in our opinion he is entitled to hold it.

We dismiss this appeal with costs.

Appeal dismissed.

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FULL BENCH.

20 A. 103 (F.B.) = 17 A.W.N. (1897) 208.

20 A. 103 (F.B.) = 17 A.W.N. (1897) 208.

[103] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, and Mr. Justice Blair.

GAYA BHARTHI (*Plaintiff*) *v.* LAKHNATH RAI (*Defendant*).*

[14th August, 1897.]

Pre-emption—Wajib-ul-arz—Construction of document.

By the clause in a *wajib-ul-arz* which related to pre-emption it was provided as follows:—

"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so, first, in favour of a near co-sharer, next, in favour of a co-sharer of his *thok*, and, lastly, in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (*i.e.*, any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share."

Held that, in the case of a conditional sale of a property to which this *wajib-ul-arz* applied, there were only two stages contemplated by the *wajib-ul-arz*, and not three. The first stage was at or about the time of the execution of the deed of conditional sale, and at that time pre-emption might be had by a co-sharer at the rate indicated in the *wajib-ul arz*. The second stage was when the conditional vendee had brought his suit for foreclosure, and at that time the pre-emptor would have to pay the amount found to be due under the deed of conditional sale. When once, however, the order for foreclosure had been made absolute, the co-sharer's right of pre-emption was gone and extinguished.

[R., 3 A.L.J. 515 = A.W.N. (1906) 247; 11 Ind. Cas. 628 (629); D., 24 A. 493 (498).]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, (for whom Babu *Jivan Chunder Mukerji*) for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C. J., KNOX and BLAIR, JJ:—This appeal has arisen in a suit for pre-emption. The appellants are the plaintiffs, who claim to pre-empt under a condition in the *wajib-ul-arz* relating [104] to the village. The condition is in that part of the *wajib-ul-arz* which bears the heading "*shafa*." It is advisable to state what the whole provision for pre-emption is. It is as follows:—"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so first in favour of a near co-sharer, next in favour of a co-sharer of his *thok*, and lastly in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (*i.e.*, any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect

* Second Appeal No. 780 of 1895, from a decree of Rai Sanwal Singh, Subordinate Judge of Azamgarh, dated the 25th March 1895, modifying a decree of Munshi Ganga Prasad, Munsif of Muhammadabad Gohna, dated the 27th June 1894.

of the property. If the term of the mortgaged share of any co-sharer is about to expire, and notice of foreclosure has been issued, and the co-sharer-mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share."

What happened in this case was this:—A co-sharer mortgaged a share in the village by a conditional sale-deed. The mortgagee, conditional vendee, subsequently brought his suit for foreclosure under Act No. IV of 1882, and obtained a decree for foreclosure and an order was subsequently made making the foreclosure absolute. Thereupon the present plaintiff appeared on the scene and claimed to step into the shoes of the mortgagee-vendee and to become in fact absolute owner, upon payment, not of the mortgage money for which the decree for foreclosure was passed, but of Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

This *wajib-ul-arz* has been before another Bench of this Court in the case of *Loknath Singh* v. *Dhajju Singh*, Second Appeal No. 359 of 1895, in which the decision of the Bench was given on the 17th July last. In that case the learned Judges differed, Mr. Justice Banerji holding that the pre-emptors in that case, who were claiming under exactly the same conditions as the pre-emptor **[105]** in this case, could not have pre-emption except upon payment of the full decretal amount of the foreclosure decree. On the other hand Mr. Justice Aikman held that, although the foreclosure decretal amount in that case was Rs. 2,226-8-0, the plaintiffs were entitled to pre-emption upon payment of Rs. 654-8-7, the latter being the amount calculated at Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

We are bound to say that, if the plaintiffs, in the case to which we have referred, had, after the making of the decree for foreclosure, any right whatsoever of pre-emption under the *wajib-ul-arz*, the only construction possible in that event to put on the *wajib-ul-arz* was, in our opinion, that which was adopted by Mr. Justice Banerji. To illustrate by that case the position contended for on behalf of the pre-emptor-appellant in this case, we may point to the following facts. There were three stages in the case. One was at the time when the co-sharer desired to mortgage his share, and mortgaged it. At that time, according to the *wajib-ul-arz*, the other co-sharers were entitled to pre-empt for Rs. 654-8-7. The next stage was after the suit for foreclosure had been brought, which would be equivalent to the service of notice of foreclosure under the Regulation which was in force when this *wajib-ul-arz* was made, and before the order absolute for foreclosure was made At that time, if the plaintiffs in the former case had sought pre-emption, they could only have obtained the rights of the mortgagee on payment of the mortgage money due at the time, that is, on payment of a sum exceeding Rs. 2,000. The decree for foreclosure absolutely fixed the amount which must be paid in order to prevent the right to redeem being foreclosed for ever. The next stage was that subsequent to the making of the order absolute for foreclosure. At this last stage, according to Mr. Justice Aikman, the co-sharer seeking pre-emption was in a more fortunate position than he would have been at the intermediate stage, and was entitled to pre-empt by payment of Rs. 654-8-7, the amount calculated at Rs. 20 and Rs. 5 per bigha, as already mentioned; and, according to Mr. Justice Aikman, in

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20 A. 103 (F.B.) = 17 A.W.N. (1897) 203.

[106] that third stage, for that sum of money, a person claiming pre-emption was entitled to step into the shoes of the mortgagor who had obtained a decree and an order absolute for foreclosure, upon payment of the Rs. 20 and Rs. 5 per bigha, irrespective of what the principal mortgage money may have been and irrespective of the amount at which the interest on that principal may have arrived. Mr. Justice Aikman was quite right in saying that in construing this class of *wajib-ul-arzes* one should endeavour to ascertain what the intention of the parties was and to construe them as far as possible with regard to that intention. In our opinion the parties to this *wajib-ul-arz* never could have had any such intention as that which would have been consistent with the construction put upon the *wajib ul-arz* by Mr. Justice Aikman.

But the real point and the real answer to the plaintiff's suit was not raised by the defendant-appellant in the appeal before those learned Judges. We are not referring to what the parties may have thought was the real answer; we are referring to what appears to us to be, upon the true construction of the *wajib-ul-arz*, the real answer to this suit and to the former suit. In our opinion this *wajib-ul-arz* contemplates only two stages, and not three. It contemplates a time when a contract of a sale or of mortgage is about to be entered into or has been entered into. The Indian Limitation Act, 1877, fixes a time within which a co-sharer desiring to claim pre-emption on a sale or on a mortgage must bring his suit. The second stage is when the conditional vendee has brought his suit for foreclosure, and before he has obtained his order absolute on the decree for foreclosure. Up to the time when that order is made absolute the co-sharer desiring to pre empt may, under this *wajib-ul-arz*, obtain pre-emption upon payment of the amount decree in the suit for foreclosure. When the order absolute for foreclosure is made the co-sharer's right to pre-empt under this *wajib-ul-arz* is in our opinion gone and extinguished. There is no provision as to what is to take place then, and a co-sharer not having availed himself of his right [107] to pre-empt before the order absolute, the decree of the Civil Court must take effect and must fully vest in the vendee the rights which he obtains under his order absolute for foreclosure. At that time the matter has reached the stage when it is beyond the scope of this custom or contract in this *wajib-ul-arz*, and the right of the decree-holder under his Civil Court decree cannot be affected.

That is our view of the law to be applied to the case. If the defendant had filed a cross appeal, we could have given effect to it by dismissing the plaintiff's suit; but all we can do now is to dismiss the plaintiff's appeal, as he has not made out a case upon which we should alter in his favour the decree of the Court below.

We dismiss this appeal with costs.

Appeal dismissed.

20 A. 107 = 17 A.W.N. (1897) 210.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Burkitt

QUEEN-EMPRESS *v.* YUSUF AND OTHERS.*

[22nd September, 1897.]

Practice—Appeal—Alteration of conviction in appeal.

Where, on appeal against a conviction for one offence, it became apparent that, although there was not sufficient evidence to support the conviction, there was evidence which might have led to the conviction of the appellants for an essentially different offence, with which they had not been charged, the Court declined to consider that evidence with a view to altering the conviction of the appellants. *Queen-Empress* v. *Parbati* (Weekly Notes, 1897, p. 130), referred to.

IN this case four persons were tried by the Sessions Judge of Allahabad, for an offence under s. 302 of the Indian Penal Code, convicted and sentenced, three to death, the fourth to transportation for life. They appealed to the High Court. At the hearing of this appeal the Court, on consideration of the evidence, came to the conclusion that the case under s. 302 was not **[108]** proved against the appellants, and accordingly acquitted them. In the argument, it was brought to the notice of the Court that there was evidence on the record which might support, as against some of the appellants, a conviction under s. 404 or s. 411 of the Code. The Court however declined to enter into that question.

Mr. *C. Dillon* and *Babu Satya Chandar Mukerji* for the appellants.

The Government Advocate (Mr. *E. Chamier*) for the Crown.

The Judgment of the Court (KNOX and BURKITT, JJ.) after discussing the evidence relating to the conviction under s. 302 of the Indian Penal Code, thus continued :—

JUDGMENT.

The Government Advocate pressed upon us the fact that there was evidence which in his opinion would bring home to Yusuf, Ghulam Husain and Musammat Paragia an offence falling within either s. 404 or s. 411 of the Indian Penal Code. A charge under either of these sections was never framed against any of the appellants, and they never pleaded to any such charge. Such a charge is of a nature so essentially different from and foreign to a charge of murder that we do not think it right to try any of the appellants on such a charge in this case. If the Magisterial authorities think there is sufficient evidence against them, this acquittal on the charge of murder will not prevent a trial upon a charge under either of the sections mentioned above. This was the course adopted by this Court in the case of *Queen-Empress* v. *Parbati* (1), a very instructive case in connection with the present, and one which we think, we should follow in the present case. For the above reasons, we allow the appeal, set aside the convictions and direct that all the four appellants be forthwith released.

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* Criminal Appeal No. 1059 of 1897.

(1) 7 A. W. N. (1887) 130.

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APPELLATE CIVIL.

20 A. 109 = 17 A.W.N. (1897) 213.

20 A. 109 = 17 A.W.N. (1897) 213.

[109] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

BRIJ LAL (*Applicant*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite Party*), *Respondent.**

[3rd November, 1897.]

Act No. V of 1881 (*Probate and Administration Act*), *s.* 50—*Revocation of grant of letters of administration no bar to a fresh application.*

Where a grant of letters of administration made by a District Judge had been revoked under the provisions of s. 50 of Act No. V of 1881, it was *held* that, the cause of revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object.

THIS was an appeal from an order of the District Judge of Benares, rejecting an application for grant of letters of administration. The facts of the case sufficiently appear from the order of the District Judge which, was as follows:—

"This is an application for grant of letters of administration purporting to come under s. 64 of Act No. V of 1881. The circumstances under which it is made are peculiar. Applicant obtained a grant of letters of administration from this Court on the 13th of June, 1896, but that grant was revoked under s. 50 of Act No. V of 1881, on the application of the opposite party on the 5th of September last, for 'just cause.' That order has not been appealed against and has, therefore, become final. Having regard to the wording of ss. 34 and 86 of Act No. V of 1881, I am of opinion that, so far as this Act goes, this Court is *functus officio* and that applicant's remedy now lies by a regular suit.

"This application for grant of letters of administration is therefore rejected."

The applicant accordingly appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *E. Chamier*, for the respondents.

JUDGMENT.

KNOX and BLAIR, JJ.—We are unable to take the view which the learned Judge has taken that he has no jurisdiction to entertain [110] the present application. The sections upon which the learned Judge purported to act contain no words depriving him of jurisdiction. We set aside the order of the Judge and return the application to be readmitted upon his file and dealt with according to law. The costs will be charged to the estate.

*First Appeal No. 17 of 1897 from an order of C. L. M. Eales, Esq., District Judge of Benares, dated the 23rd January, 1897.

20 A. 110 (F.B.) = 17 A.W.N. (1897) 216.

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NOV. 10.

FULL BENCH.

20 A. 110 (F.B.) = 17 A.W.N. (1897) 216.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

SRI GOPAL (*Plaintiff*) *v.* PIRTHI SINGH AND OTHERS (*Defendants*).* [10th November, 1897.]

Civil Procedure Code, s. 13. *Explanation* II—Res judicata—*Matter which might and ought to have been made ground of defence in a former suit—Mortgage—Prior and subsequent mortgagees.*

Held, that the holder of three prior mortgages over the same property, who, in answer to suits brought by the holders of other mortgages over that property of dates subsequent to his, had pleaded his rights under one only of the mortgages held by him, was barred by reason of Explanation II to s. 13 of the Code of Civil Procedure, from afterwards bringing a suit for sale upon one of the remaining mortgages, which he might and ought to have pleaded as an answer *pro tanto* to the suits of the other mortgagees. *Mahabir Prasad Singh* v. *Macnaghten* (1), *Kameswar Prashad* v. *Raj Kumari Ruttan Kuar* (2), *Kailash Mondul* v. *Baroda Sundari Dasi* (3), *Sheosagar Singh* v. *Sita Ram Singh* (4), and *Mata Din Kasodhan* v. *Kazim Husain* (5), referred to.

[**Affirmed**, 24 A. 429 (**P.C.**); **F.**, 31 C. 428; 11 Ind. Cas. 346 (347) = 14 O.C. 117 (121); **Cons.**, 1 C.L.J. 337 (350); **R.**, 30 B. 156 (162) = 7 Bom. L.R. 911; 35 C. 979 (984) = 8 C.L.J. 82 = 12 C.W.N. 862; 26 M. 760 (776); 35 M. 216 (229) = 21 M.L.J. 344 (357) = 10 Ind. Cas. 75 (81) = 10 M.L.T. 533 (541); 1 C.L.J. 248; 23 M.L.J. 543 (572) = 12 M.L.T. 500 (505) = 1913 M.W.N. 1 (23) = 17 Ind. Cas. 445 (447); 10 O.C. 145 (157); U.B.R. (1906) 3rd Qr., C.P.C. 46]

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Ram Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Messrs. *Abdul Majid* and *Abdul Raoof*, for the respondents.

The judgment of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by —

JUDGMENT.

EDGE, C. J.:—This is a suit for sale under section 88 of the Transfer of Property Act, 1882. The plaintiff is the representative of [111] one Ishur Das, deceased. Ishur Das obtained three mortgages over the property in question. The first was made on the 21st of July 1871, the second on the 7th of February, 1874, and the third on the 16th of July 1874. The present suit is brought on the mortgage of the 7th of February, 1874. The mortgagors had also executed the following mortgages of this property, *viz.*, a mortgage to Murli Singh and Sarnam Singh, made on the 30th of August 1872, and a mortgage to Bhagwan Das on the 18th of August, 1876. On the 11th of July 1883, Ishur Das brought a suit for sale on his mortgage of the 21st of July 1871, and on the 3rd of September 1883 he obtained a decree for sale. To that suit the other mortgagees were not parties. Under the decree in that suit $1\frac{1}{4}$ biswas were sold and were purchased by Ishur Das. Murli and Sarnam brought a suit for sale on the

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* Second Appeal No. 1028 of 1894, from a decree of L.G. Evans, Esqr., District Judge of Aligarh, dated the 12th June 1894, confirming a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 12th August 1893.

(1) 16 I.A. 107 = 16 C. 682. (2) 20 C. 79. (3) 24 C. 711.
(4) 24 C. 616. (5) 13 A. 432.

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15th of August 1883 on their mortgage of the 30th of August 1872, and got a decree on the 13th of December, 1883. The other mortgagees were not made parties to that suit. In execution of that decree 1¼ biswas were sold, and were purchased by Murli and Sarnam. On the 27th of July 1888, Ishur Das being dead, his representatives brought a suit for sale on Ishur Das' mortgage of the 16th of July 1874. They obtained a decree for sale on the 26th of September, 1888. The other mortgagees were not made parties to that suit. In execution of that decree 1 biswa 7½ biswansis were sold and were purchased by Bechai Lal, one of the defendants to this suit. On the 18th of August, 1888, Sri Ram, the then representative of Bhagwan Das. the holder of the fifth mortgage, brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876, and made the representatives of Ishur Das parties to that suit. The representatives of Ishur Das pleaded their rights under the mortgage in favour of Ishur Das of the 21st of July 1871, but made no mention of the mortgage of the 7th of February 1874, nor did they raise any question as to their rights under that mortgage. In that suit Sri Ram, on the 19th of December 1889, obtained a decree for sale, subject to his redeeming Ishur Das' mortgage of [112] the 21st of July 1871. Sri Ram is dead and Musammat Janki, his representative, is one of the defendants to this suit. Murli Singh and Sarnam Singh are also defendants. The other defendants not already mentioned are the representatives of the mortgagors. On the 24th of September 1888 Murli and Sarnam brought a suit for redemption under s. 92 of the Transfer of Property Act. 1882, against Ishur Das' representatives in respect of the 1¼ biswas which they had purchased in execution of the decree of the 13th of December 1883. On the 25th of July 1889 Murli and Sarnam got a decree for redemption on payment of the proportionate amount due to Ishur Das' representatives in respect of the sale of the 1¼ biswas under the mortgage of the 21st of July 1871. In that suit the representatives of Ishur Das did not plead their rights under the mortgage of the 7th of February 1874.

The first Court dismissed this suit. The plaintiff appealed, and the Court of first appeal dismissed the appeal, holding that the suit was barred by the operation of s. 43 of the Code of Civil Procedure and also by the operation of s. 13 of that Code. From that decree this appeal has been brought.

The contention as to the application of s. 43 of the Code of Civil Procedure is that Ishur Das when he brought his suit on the 11th of July 1883, on the mortgage of the 21st of July 1871, should have also claimed to sell the mortgaged property under the mortgages of the 7th of February 1874 and the 16th of July 1874. We do not think it necessary to express any opinion upon that question further than this, that we are not prepared to endorse the decision of the Court of first appeal so far as it applied s. 43 to this case.

The real point upon which, in our opinion, this case turns is whether or not s. 13 of the Code of Civil Procedure applies. It is quite certain that in order to make s. 13 applicable it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to [113] which explanation II applies. Indeed Explanation II to s. 13 of the Code would be meaningless if it were necessary in a case which was covered by it that the matter should have been heard and finally decided in the previous suit. Their Lordships of the Privy Council

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20 A. 110 (F.B.) = 17 A.W.N. (1897) 216.

in *Mahabir Parshad* v. *Macnaghten* (1) applied s. 13 of the Code of Civil Procedure where the matter raised in the second suit had not been directly or indirectly raised, heard or decided in the previous suit. In that case they held that the matter of the second suit was matter which ought to have been made ground of defence in the former suit between the same parties, and that the appellants before them, who were defendants in the former suit, were barred from insisting on it "*exceptione rei judicatæ.*" In *Kameswar Parshad* v. *Raj Kumari Ruttan Koer* (2) their Lordships took the same view of s. 13 and of the effect of Explanation II to that section. In referring to the matter to which it was sought to apply the doctrine of *res judicata*, their Lordships say (at page 85) :—"That it might have been made a ground of attack is clear. That it ought to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter ought to have been made a ground of attack in the former suit, and therefore that it should be deemed to be a matter directly and substantially in issue in the former suit and is *res judicata.*"

That decision also shows that it is not necessary for the application of s. 13, when Explanation II applies, that the matter in question should have been heard and finally decided in the previous suit. The decisions to which we have referred appear to us to be inconsistent with the decision in *Kailash Mondul* v. *Baroda Sundari Dasi*(3). We do not [114] consider that their Lordships intended to depart in *Sheosagar Singh* v. *Sitaram Singh* (4) from the interpretation of s. 13 of the Code of Civil Procedure which they had adopted in the two cases before their Lordships to which we have referred. In the last mentioned case in I.L.R., 24 Calc. 616, their Lordships had not to consider the effect of Explanation II.

As we have said, Sri Ram on the 18th of August brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876. That mortgage was the last mortgage of the series. All the other mortgages had priority; consequently the holders of the prior mortgages were entitled to plead their mortgages as a bar to a decree for sale without prior redemption of their mortgages. Now the representatives of Ishur Das pleaded one only of their mortgages, *viz.*, that of the 21st of July 1871. They might have pleaded the mortgage now in suit, *viz.*, that of the 7th of February 1874. If they have pleaded that mortgage, Sri Ram could only have obtained a decree for sale subject, before the decree became operative to effect a sale, to his redeeming not only the mortgage of the 21st of July 1871, but that of the 7th of February 1874. It was held by this Court in Full Bench in *Mata Din Kasodhan* v. *Kazim Husain* (5) that a decree for sale under the Transfer of Property Act is a decree for sale of the mortgaged property, and that a decree for sale under that Act cannot be made for sale of property "subject to a mortgage." Before the passing of the Transfer of Property Act decrees for sale were made of all sorts of interest in properties mortgaged. Properties were sold subject to one, two, three, four and six mortgages. Persons interested were not made parties to the suits, and endless litigation was the result. One reason for the passing of the Transfer of Property Act was to strike at the shameful abuses which had arisen

(1) 16 I.A. 107 = 16 C. 682.
(2) 20 C. 79.
(3) 24 C. 711.
(4) 24 C. 616.
(5) 13 A. 432.

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20 A. 110 (F.B.)= 17 A.W.N. (1897) 216.

by reason of the procedure allowed by some of the Courts in the enforcement of mortgages, procedure which often only benefited the legal profession—no doubt a very deserving body of men—and ended in the ruin [115] of the unfortunate mortgagor, if not of one or more of the mortgagees. In order to strike at that system s. 85 of the Transfer of Property Act was introduced to bring all persons interested before the Court in one suit, so that their rights might be dealt with and disposed of. The causes which led to the passing of that section and of other sections of the Transfer of Property Act are fully explained in *Mata Din Kasodhan* v. *Kazim Husain* (1), *Janki Prasad* v. *Kishen Dat* (2), and *Bhawani Prasad* v. *Kallu* (3). In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th of February 1874, but they ought to have done so, and if they had done so, no decree for sale could have been made without these rights being protected by the decree. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that s. 13 of the Code of Civil Procedure applies and that the present suit for sale is barred. A decree for sale as against Murli and Sarnam would be useless, for the property could not legally be sold so long as there was no right to sell as against Musammat Janki, the representative of Bhagwan Das.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

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20 A. 115=17 A.W.N. (1897) 214.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

POKHPAL SINGH (*Defendant*) *v.* BISHAN SINGH (*Plaintiff*).* [11th November, 1897.]

Act No. XV *of* 1877 (*Indian Limitation Act*), *sch. ii, arts.* 144, 148—*Limitation—Mortgage—Suit by a mortgagor for recovery of possession from a mortgagee holding over after expiry of the term of a usufructuary mortgage.*

When a mortgagee in possession under a usufructuary mortgage, holds over after the time limited in the mortgage deed for surrender of the property, his [116] possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession. *Juggurnath Sahoo* v. *Syud Shah Mahomed Hossein* (4) referred to.

[R., 34 A. 261 (263)=13 Ind. Cas. 963=9 A.L.J. 131.]

IN this case the plaintiff mortgaged to the defendant by a usufructuary mortgage certain zamindari property on the 4th of July 1873. The conditions of the mortgage were that the defendant should return the mortgaged property to the plaintiff on the expiration of four and a half years, the profits during that period being taken to discharge the mortgage debt and interest. The defendant, instead of returning the property, remained in possession. On the 27th of February 1895 the plaintiff brought his suit for possession and for mesne profits.

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* Second Appeal, No. 892 of 1896, from a decree of Lala Piari Lal, Officiating District Judge of Mainpuri, dated the 23rd July 1896, confirming a decree of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 13th June 1895.

(1) 13 A. 432. (2) 16 A. 478. (3) 17 A. 537 (559). (4) 14 B.L.R. 386.

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The Court of first instance (Subordinate Judge of Mainpuri) decreed the claim. On appeal by the defendant the lower appellate Court (Officiating District Judge of Mainpuri) dismissed the appeal, holding that the possession of the defendant was not adverse and that the suit was governed by the limitation prescribed by art. 148 of the second schedule to Act No. XV of 1877.

The defendant appealed to the High Court.

Mr. *R. Malcomson* (for whom Babu *Satya Chandra Mukerji*), for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

AIKMAN, J.—Bishan Singh, the plaintiff in the suit out of which this appeal arises, executed, in favour of the defendant Pokhpal Singh, a deed of usufructuary mortgage on the 4th of July 1873. The terms of the mortgage were that the mortgagee was to remain in possession of the property for four and a half years and surrender it at the expiry of that term, the usufruct for that period being held to discharge both the principal and the interest of the loan which was given. The period expired in 1878, but the mortgagee continued in possession of the property. On the 27th of February 1895, the mortgagor brought the present suit to recover possession of the mortgaged property. He got a decree from the Subordinate Judge, which was confirmed on appeal [117] by the District Judge. The defendant comes here in second appeal contending that plaintiff's suit is barred by limitation. It is argued that as soon as the term of four and a half years expired the possession of the defendant became adverse, and that the suit is barred by the limitation provided in art. 144 of the second schedule of the Limitation Act, 1877. That article can only apply if a suit like the present is nowhere specially provided for in the schedule. Reliance is placed on the decision of this Court in *Gobardhan* v. *Sujan* (1).

In my opinion the appeal must fail. The lower Courts were, I hold, right in thinking that this suit is one under art. 148 of the schedule, namely, a suit against a mortgagee to recover possession of immoveable property mortgaged, a suit for which a period of sixty years is allowed, reckoning from the time when the right to recover possession accrued. The circumstances of the case cited differ from those in the present case, inasmuch as there the suit was one between co-mortgagors and could not therefore fall under art. 148. In the case of *Jaggurnath Sahoo* v. *Syud Shah Mahomed Hossein* (2) their Lordships of the Privy Council observe, at page 391 of the report :—" The law, wisely or unwisely, has given to mortgagors the long period of sixty years within which to bring their suit, and no Court of Justice would be justified in diminishing that period on the ground of the *laches* of a party in the prosecution of his rights." The mere fact that the mortgagee held on in possession of the mortgaged property after he ought to have given it up, would not alter the character of the suit, which is clearly one between mortgagor and mortgagee and falling within the terms of art. 148. For the above reasons I am of opinion that this appeal must fail, and I dismiss it with costs.

Appeal dismissed.

(1) 14 A.W.N. (1894) 72.

(2) 14 B.L.R. 386.

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APPELLATE CIVIL.

20 A. 118=17 A.W.N. (1897) 220.

20 A. 118=17 A.W.N (1897) 220.

[118] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

SHUJA ALI KHAN (*Judgment-debtor*) *v.* RAM KUAR (*Decree-holder*).* [13th November, 1897.]

Civil Procedure Code, s. 596—Appeal to Her Majesty in Council—Substantial question of law—Succession certificate not produced at the proper time—Act No. VII of 1889 (Succession Certificate Act), s. 4.

The representative of a decree-holder applied for execution of the decree without producing before the Court a certificate of succession as required by Act No. VII of 1889, s. 4. The Court to which the application was made granted execution. The judgment-debtor appealed to the High Court, by which the order of the lower Court was sustained upon production before it (the High Court) of the necessary certificate of succession. *Held* that an objection that the said application for execution was improperly granted by reason of the non production of the succession certificate before the lower Court did not raise a "substantial question of law" within the meaning of s. 596 of the Code of Civil Procedure, so as to warrant the High Court in granting leave to appeal to Her Majesty in Council.

THIS was an application for leave to appeal to Her Majesty in Council from a decree of the High Court passed in an appeal under s. 10 of the Letters Patent from the judgment of a single Judge of the Court. The opposite party obtained a decree against the applicant on the 28th of June 1878 for Rs. 16,477. Application was made to the Subordinate Judge of Moradabad for execution of that decree on the 4th of August 1890, which application was allowed. Against the order allowing that application an appeal was presented to the High Court. The appeal was dismissed by a single Judge on the 6th of January 1896, and a further appeal under s. 10 of the Letters Patent was dismissed by a Division Bench of the Court on the 21st of January 1897.

The grounds of appeal as set forth in the application under s. 598 of the Code of Civil Procedure were as follows:—

(1) Because the respondent's application for execution of decree was not entertainable, inasmuch as it was not accompanied by a succession certificate as required by s. 4 of Act No. VII of 1889 (Succession Certificate Act).

[119] (2) Because all the proceedings relating to the execution of decree are manifestly opposed to the express provisions of s. 4, clause 6, of Act No. VII of 1889. They are null and void.

(3) Because such an application as filed by the respondent is of no effect and cannot be considered by the Court.

(4) Because the decree sought to be executed is therefore barred by limitation.

Babu *Jogindro Nath Chaudhri*, for the applicant.

JUDGMENT.

KNOX and BANERJI, JJ.—This is an application for leave to appeal to Her Majesty in Council. The subject-matter of the appeal is valued above ten thousand rupees, but, as the decree appealed from affirmed the decision of the Court immediately below, we have to see before granting the certificate that the appeal, if admitted, would involve

* Privy Council Appeal No. 12 of 1897.

some substantial question of law. The grounds set out in the application do undoubtedly involve questions of law, but in our opinion the questions raised are not substantial questions of law. The question briefly put is whether this Court was right in affirming a decision of the Court below which granted execution without the production of a succession certificate, upon its being shown to this Court that such succession certificate had been obtained by the decree-holder before the order appealed from had been passed, and upon the certificate being produced in this Court before the appeal was determined. The objection of non-production of the certificate, though raised in the Court below, was not pressed before that Court, and the reason to our mind is obvious: the judgment-debtor knew of the existence of the certificate and saw no advantage in sustaining an objection which would at once be removed and would only lead to unnecessary delay. In his appeal to this Court again the judgment-debtor, the present applicant, did not raise the objection, and no doubt for the same reason. Whatever irregularity there was in the Court below was not an irregularity affecting the merits or jurisdiction of the Court to entertain the application [120] for execution. It was cured by the production in the Court of the certificate which had already been obtained. No objection could have been taken if this Court in dealing with the appeal had set aside the order appealed from and directed the Court below to cause the production of the succession certificate and proceed to execution after the said production. Such a course would have been harassing, and needlessly harassing, both to the judgment-debtor and the judgment-creditor, and would have been a pure sacrifice to the observance of technicalities in proceedings. We hold that no substantial question of law is involved. We dismiss the application with costs.

Application dismissed.

1897 NOV. 13. — APPELLATE CIVIL. — 20 A. 118 = 17 A.W.N. (1897) 220.

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20 A. 120 = 17 A.W N. (1897) 214.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GOSWAMI RANCHOR LALJI (*Plaintiff*) *v.* SRI GIRDHARIJI (*Defendant*).*

[15th November, 1897.]

Act No. XV *of* 1877 (*Indian Limitation Act*), *sch.* II, *art.* 47—*Limitation—Criminal Procedure Code*, *s.* 146—*Suit for possession of property attached by a Magistrate under s.* 146.

Article 47 of the second schedule to Act No. XV of 1877 does not apply to a suit brought by one of the two claimants against the other to recover possession of property which has been attached by a Magistrate under the provisions of s. 146 of the Code of Criminal Procedure. *Chuj Mull* v. *Khyratee* (1), and *Akilandammal* v. *Periasami Pillai* (2) referred to.

To such a suit as above Government is not a necessary party.

[Rel. on, 16 C.W.N. 1073 (1074) = 16 Ind. Cas. 620 (621); Cons., 26 M. 410 (413).]

THE facts of this case sufficiently appear from judgment of the Court.

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* Second Appeal, No. 828 of 1895, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 22nd June 1895, reversing a decree of Babu Darjan Lal, Munsif of Muttra, dated the 25th February 1895.

(1) N.W.P.H.C.R. (1868) 65. (2) 1 M. 309.

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NOV. 15.

APPELLATE CIVIL.

20 A. 120=
17 A W N.
(1897) 214.

Mr. *D. N. Banerji*, Babu *Jogindro Nath Chaudri*, Pandit *Sundar Lal* and Babu *Satya Chandra Mukerji*, for the appellant.

Messrs. *T. Conlan* and *B. E. O'Conor*, for the respondent.

JUDGMENT.

BENERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the appellant to recover **[121]** possession of a piece of land and a house, together with the materials of the house and the trees standing on the land, by establishment of his right thereto. Disputes having arisen between the parties concerning the said property, proceedings were held by the Magistrate of Muttra under Chapter XII of the Code of Criminal Procedure, 1882. The Magistrate, being unable to satisfy himself as to which of the parties was in actual possession, made an order under s. 146 of that Code for the attachment of the property. This order was passed on the 13th of September 1887. The present suit was instituted on the 7th of September 1893. The Court of first instance decreed it, but the lower appellate Court dismissed it as barred by limitation. The only question which we have to determine in this appeal, therefore, is whether the suit was brought after the expiry of the period of limitation prescribed for it.

The learned Judge of the Court of first appeal was of opinion that, as the Government was not made a party to the suit, it could only be deemed to be one for a declaratory decree merely, and applying art. 120 of the second schedule of the Indian Limitation Act, 1877, held the claim to be time-barred.

It is conceded by Mr. *Conlan*, the learned counsel for the respondent, that this view of the Court below is erroneous. It has, in our opinion, been rightly contended that the applicability of the law of limitation depends upon the frame of the suit as brought, and not upon the form in which it should have been instituted. We are also of opinion that the Government was not a necessary party. By virtue of the order passed by the Magistrate under s. 146 of the Code of Criminal Procedure, the property was to remain under attachment until a competent Civil Court had determined the rights of the parties thereto or the persons entitled to possession thereof. The object of the order is to prevent a breach of the peace, and the effect of it is to hold the property for the rightful owner until he has established his title.

[122] Mr. *Conlan* contends that the suit is governed by art. 47 of sch. II of Act No. XV of 1877, and that as it was brought after the lapse of three years from the date of the order passed under s. 146 of the Code of Criminal Procedure, it is beyond time.

Article 47 provides a limitation of three years for a suit "by any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chap. XL * * * or by any one claiming under such person, to recover the property comprised in such order." Chapter XL of the Code of 1872, corresponds to Chap. XII of the present Code. An order under s. 146 is an order made under Chap. XII. It is also an order binding on the parties to the proceeding in which it was made. Is it "an order respecting the possession of property?" For, if it is so, art. 47 applies, and the present suit is barred by limitation. We are of opinion, that an order made under s. 146 for the attachment of the property in dispute is not an order respecting the possession of such property. An order for attachment may be passed either when the Magistrate decides that none of the parties is in possession or when he is unable to decide

which of them is in possession. The order contemplated by art. 47 is, in our opinion, an order whereby one of the parties is adjudged to be in possession and is maintained in possession until evicted in due course of law, that is to say, an order which is in favour of one of the parties and adverse to the other. It could not have been the intention of the Legislature that where the Magistrate, by reason of his inability to satisfy himself as to the possession of either of the parties, or by reason of his deciding that neither of them is in actual possession, attaches the property in dispute, in order to prevent a breach of the peace, neither party would be entitled to get back the property unless he instituted a suit within three years from the date of the order, and that in the event of neither of the parties bringing a suit within that period the property would be forfeited to Government. This would be the result were we to hold that an order under s. 146 is [123] governed by art. 47. Our view is supported by the ruling of this Court in *Chujmull* v. *Khyrattee* (1) and of the Madras High Court in *Akilandammal* v. *Periasami Pillai* (2). In the former case it was held that where the Magistrate found that neither of the parties at issue was in possession, and for that reason directed the attachment of the property, the order was not one respecting the possession of property to which the three years' rule of limitation applied. In the latter case, a similar conclusion was arrived at in respect of an order of attachment made by reason of the Magistrate's inability to satisfy himself as to which of the parties was in possession. Those cases were decided, respectively under Act No. XIV of 1859 and Act No. IX of 1871, the provisions of which in this respect were the same as those of art. 47 of sch. II of Act No. XV of 1877. Had the Legislature intended to lay down a different rule from that enunciated in the two rulings referred to above, art. 47 would have been worded in terms different from the corresponding provisions of the Acts of 1859 and 1871.

It may be that an order under s. 147 of the Code of Criminal Procedure is intended to be governed by art. 47 and that may be the reason why that article was not in express terms limited to orders under s. 145. We, however, do not decide the point. In our opinion art. 47 does not apply to an order under s. 146, and we hold that the claim is not barred by the provisions of that article. The article applicable is either 142 or 144.

We allow the appeal with costs, and, setting aside the decree below, remand the case to the lower appellate Court, under s. 562 of the Code of Civil Procedure, for trial on the merits.

Appeal decreed and cause remanded.

(1) N.W.P.H.C.R. (1868) 65.

(2) 1 M. 309.

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NOV. 16.

REVISIONAL CRIMINAL.

20 A. 124=17 A.W.N. (1897) 220.

20 A. 124=17 A.W.N. (1897) 220.

[124] REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GAURI SHANKAR *v.* MATA PRASAD.* [16th November, 1897.]

Act No XIII *of* 1859 (*Fraudulent Breaches of Contract by Workmen*), *s.* 1—*Criminal Procedure Code, s.* 83—*Warrant.*

Held, that s. 93 of the Code of Criminal Procedure, is applicable to warrants issued under Act No. XIII of 1859. *Queen-Empress* v. *Kattayan* (1) followed.

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the District Magistrate of Mirzapur. The complainant applied for warrants under s. 1 of Act No. XIII of 1859, for the arrest of men to whom he had advanced money for shellac operations, and who were at the time of which so applying resident in Ranchi in the Bengal Presidency. The Magistrate, being in doubt as to whether such warrants could be sent under s. 83 of the Code of Criminal Procedure for execution to a Magistrate outside his jurisdiction, made this reference. The following order was passed :—

ORDER.

EDGE, C. J., and BURKITT, J.—We hold the same opinion as that expressed by the High Court at Madras on a similar reference in *Queen-Empress* v. *Kattayan* (1). Section 83 of the Code of Criminal Procedure is, in our opinion, applicable to warrants issued under the provisions of Act No. XIII of 1859.

20 A. 124=17 A.W.N. (1897) 218.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

FAZAL HUSEN (*Decree-holder*) *v.* RAJ BAHADUR (*Objector*).†
[17th November, 1897.]

Act, No. XV *of* 1877 (*Indian Limitation Act*), *sch. II, art.* 179—*Execution of decree—Limitation—Starting point of limitation where appeal has abated.*

Held, that the order of an appellate Court abating an appeal, because no representative of the appellant was on the record, was not the "final order or [125] decree of the appellate Court" within the meaning of cl. 2, art. 179, of the second schedule to the Indian Limitation Act, 1877, but that limitation would run from the date of the original decree.

[R., 3 A.L.J. 8=A.W.N. (1906) 27=1 M.L.T. 59; 4 Ind. Cas. 629 (631)=81 P.L.R. 1909=87 P.W.R. 1909; D., 30 A. 385=5 A.L.J. 580=A.W.N. (1908) 161; 32 A. 136 (137)=5 Ind. Cas. 473=7 A.L.J. 58.]

THE facts of this case are as follows :—

Niaz Begam and Gul Begam brought a suit for redemption of mortgage and for mesne profits against Hazar Mir Khan, Bahadur Ali Khan and Har Dyal, in the Court of the Munsif of Farrukhabad. On the 24th

* Criminal Revision No. 597 of 1897.

† Second Appeal, No. 804 of 1895, from a decree of Babu Jai Lal, Officiating Subordinate Judge of Farrukhabad, dated the 5th April 1895, modifying a decree of Khan Zada Muhammad Musharaf Ali Khan, Munsif of Kayanganj, dated the 2nd June 1894.

(1) 20 M. 235.

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NOV. 17.
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APPELLATE CIVIL.
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20 A. 124 = 17 A.W.N. (1897) 218.

of December, 1889, the Munsif gave a decree for redemption of a certain area of muafi land as against Hazar Mir Khan and Bahadur Ali Khan and for redemption of a certain area of resumed land as against all three defendants. From this decree the plaintiffs appealed, and each of the defendants also appealed separately. The plaintiffs' appeal as against Har Dyal and Har Dyal's appeal abated, Har Dyal having died, and no representative having been brought on to the record in his place. On the 16th of February, 1894, that is more than three years from the date of the original decree, though less than that period from the date of the order abating the appeals by and against Har Dyal, Fazal Husain, the representative of the decree-holder, applied for execution of the decree as against one Raj Bahadur, the representative of Har Dyal. Raj Bahadur objected to the execution of the decree, on the ground that it was barred by limitation, the period of limitation running in this case from the date of the original decree of the Munsif.

The Munsif and the Subordinate Judge in appeal both dealt with the objection on grounds relating to the decrees in the appeals of the two other defendants whose appeals were decided on the 13th of April, 1891. The Subordinate Judge allowed the objection of Har Dyal's representative so far as it related to possession of the resumed land. The decree-holder appealed to the High Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondent.

JUDGMENT.

BLAIR and AIKMAN, JJ.—The appellant is a decree-holder seeking to execute his decree against the interest of one Har Dyal. [126] Har Dyal was one of three persons against whom a Munsif's judgment and decree were passed. Appeals by him and against him were instituted, and by reason of his death and the failure to put upon the record his representatives the appeals abated. The claim of the decree-holder is that he is in time in taking proceedings. The decree-holder claims to execute within three years from the date of that order of abatement. The decree of the Munsif is of a date beyond the three years' period. It appears to us that the appellant has no ground for that contention. According to art. 179, the starting point for limitation is from the date of the decree or order of the Civil Court. It is the decree of the Munsif which he now seeks to execute: he contends, however, that clause 2 of column 3 of art. 179 applies; the words are "where there has been an appeal, the date of the final order or decree of the appellate Court." It is manifest to us that an order by which an appeal abates is not the final decree or order contemplated by that clause; it cannot be executed, and the only extant decree after the making of such an order is the original decree of the Munsif. The application is admittedly presented more than three years after the date of the Munsif's decree. This appeal is dismissed with costs.

Appeal dismissed.

1897
NOV. 17.

APPELLATE CRIMINAL.

20 A. 126 = 17 A.W.N. (1897) 223.

20 A. 126 = 17 A.W.N. (1897), 223.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* BEER.* [17th November, 1897.]

Act No. VI of 1882 (*Indian Companies Act*), *ss.* 55, 56—*Company—Register of shareholders—Inspection—Refusal to allow inspection of register of shareholders.*

Where a person who is entitled under the provisions of s. 55 of the Indian Companies Act, 1882, to obtain inspection of the register of shareholders of a Company applies for inspection during business hours and not at a time when inspection is prohibited, either under s. 56 or by reason of any rules framed by the Company under s. 55, such inspection must be granted, and even a temporary refusal, based upon grounds of convenience to the Company's business, will render a director responsible for such refusal liable to the penalty provided for by s. 55.

[127] THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

Messrs. *D. N. Banerji* and *C. R. Alston*, for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—This is an appeal by the Local Government against an order of acquittal passed by the Joint Magistrate of Cawnpore. The respondent A. Beer was a director of the Muir Mills Company, Limited, Cawnpore. Mr. Beer was present at the registered office of the Company on the 18th of March last. He was presiding as chairman at a meeting of shareholders which was held that day. At the termination of the meeting of the shareholders, Mr. McRobert, who was a shareholder of the Muir Mills Company, Limited, asked Mr. Beer if he (Mr. McRobert) could see the register of shareholders. Mr. Beer replied that it was not convenient that he should see the register. After a little Mr. Beer told Mr. McRobert that he could see the register next day. The ground given by Mr. Beer for not allowing Mr. McRobert to see the register when he applied was that they were about to hold a directors' meeting. As Mr. McRobert was leaving the room he said:—"Then you refuse to let me see the register?" Mr. Beer replied:—"I do not refuse you; you can see the books to-morrow morning." Mr. McRobert went away. Later on in the afternoon Mr. McRobert received a letter from the Company informing him that the books would be open to his inspection at any hour up to 5 P.M. that day, or upon any day between the hours of 9 A.M. and 12 noon and 2 and 5 P.M. Mr. McRobert in his evidence said that Mr. Beer knew that he (McRobert) was leaving Cawnpore. We do not think that that affects the question in the slightest degree, for we do not think that Mr. Beer intended absolutely to exclude Mr. McRobert from a reasonable inspection of the books. The question is whethsr Mr. Beer has brought himself within s. 55 of the Indian Companies Act. Under s. 55 every shareholder, without payment, and every member of the public, on payment, is entitled to inspect the register of Members of the [128] Company during business hours, except when the register is closed under s. 56, and "subject to such reasonable restrictions as the Company

* Criminal Appeal No. 1117 of 1897.

in general meeting may impose." The law wisely provides, however, that, where the Company does impose restrictions, the books shall be open to inspection for at least two hours during the business hours of each business day. The section was introduced into the Act not only for the protection of the shareholders, but for the protection of the public. Subject to the restrictions mentioned, it gives every shareholder an absolute right to inspect the register during business hours. If it be inconvenient for the carrying on the Company's business that the register should be kept open for inspection for the whole day during business hours, it is very easy for the shareholders in general meeting to put reasonable restrictions on the right of inspection, and it appears to us that one such reasonable restriction would be that the register should not be open to inspection at any time when the directors of the Company should be in meeting assembled, always provided that on such days two hours within business hours should be appointed for inspection of the register. We can well understand that it might have been exceedingly inconvenient for the directors, whilst their meeting was going on, to have inspection of the registers going on in another room. However, the shareholders in general meeting have not placed any restriction on the right of inspection. If this was a matter of reasonableness or of convenience, we should have come to the conclusion that Mr. McRobert was unreasonable, and that it was not convenient at the moment to grant inspection. However, he was strictly within his rights and he was entitled to inspection there and then, and Mr. Beer as a director made himself liable to a penalty under s. 55 by reason of his authorising or permitting a refusal to Mr. McRobert to inspect the registers when he applied for inspection. Companies and directors must comply with the law. This seems to be the first case which has arisen in India on this point, and, although Mr. Beer acted illegally in refusing to give inspection to Mr. McRobert when **[129]** he asked for it, we do not think it is a case for imposing the full penalty. We find that Mr. Beer did authorize and permit a refusal of inspection of the register of members to Mr. McRobert during business hours on 18th March 1897, and that he was not justified in so doing, and we convict him and fine him the sum of eight annas. It must be remembered that if any case comes before us of a wilful and obstructive refusal when the demand was a reasonable one, we shall impose the full penalty.

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20 A. 129 = 17 A.W.N. (1897) 218.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

ABDA BEGAM (*Decree-holder*) *v.* MUZAFFAR HUSEN KHAN (*Judgment-debtor*).* [18th November, 1897.]

Civil Procedure Code, s. 223—Execution of decree—Certificate of execution—Jurisdiction of Court to which a decree is transferred for execution.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the

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* First Appeal No. 16 of 1897 from an order of Rai Kishan Lal, Subordinate Judge of Cawnpore, dated the 5th December 1896.

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decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution. *J. G. Bagram* v. *J. P. Wise* (1) followed.

[R., 13 C.P.L.R. 169 (170); 9 C.L.J. 443 = 13 C.W.N. 533 (540) = 1 Ind. Cas. 57 (61); 23 M.L.J. 236 (237) = 12 M.L.T. 119 (120) = 1912 M.W.N. 721 (722) = 15 Ind. Cas. 738 (739); 4 O.C. 333 (337)]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Baldeo Ram Dave*, for the appellant.

Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—The appellant before us obtain a decree for money in the Court of the Judicial Commissioner of Oudh. On the application of the decree-holder the decree was **[130]** sent to the District Judge of Cawnpore for execution under s. 223 of the Code of Civil Procedure. The District Judge transferred the case to the file of the Subordinate Judge of Cawnpore. The decree-holder applied to the Subordinate Judge for execution of the decree. The application was admitted and property was attached. Thereupon the judgment-debtor, who is respondent here, filed an objection to the execution of the decree on the ground that the application did not comply with ss. 235 and 237 of the Code of Civil Procedure. The application with the objection came on for hearing, and the Subordinate Judge on the 11th of April 1896, struck off the application on the ground that it did not comply with ss. 235 and 237. Subsequently the Subordinate Judge certified to the Court at Lucknow that "on the objection of the judgment-debtor the application for execution was struck off." Apparently on the very day when that certificate was sent the decree-holder applied again to the Subordinate Judge of Cawnpore to have the decree executed. Her application was dismissed on the ground that the Subordinate Judge of Cawnpore was no longer seized of the case and was *functus officio*. From that order of dismissal this appeal has been brought.

The dismissal of the first application on the 11th of April 1896, was not a dismissal on the merits and was not a dismissal which precluded the decree-holder from applying again to the same Court for execution of her decree. The application was dismissed merely upon the ground of informalities in the application itself. It has been contended before us on behalf of the judgment-debtor that the Subordinate Judge of Cawnpore ceased to have jurisdiction when he forwarded the certificate that the first application had been struck off. The grounds of that contention are that s. 223 of the Code provides, amongst other things, that the Court "to which a decree is sent under this section for execution shall certify to the Court which passed it, the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure," and it is contended that the certificate that the case had been struck off was a **[131]** certifying by the Subordinate Judge of Cawnpore, that his Court had failed to execute the decree within the meaning of s. 223. Reference was made to clause (*b*)

(1) 1 B.L.R. (F.B.) 91.

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of s. 224 for the purpose of showing that it was intended by the Legislature that the Court in which a decree was made should give information to the Court to which the decree was sent for execution as to the extent to which the decree had been executed, and as to the part of the decree which still remained unexecuted, and it is argued that similar information, when the decree had been sent to another Court, would be necessary for the Court which had sent the decree for its own guidance in case of further applications for execution of the decree. It has been now decided by their Lordships of the Privy Council that two or more contemporaneous executions of the same decree may be validly held. What might be the result if there were two or more contemporaneous sales of the judgment-debtor's property, say, one in Gorakhpur, another in Allahabad, and another in Meerut, each realizing the full amount due uuder the decree, is a matter with which we need not concern ourselves. What would become of the purchasers at these sales and what interest they would take, or how it could be arranged between the various Courts that the sales should not be held contemporaneously are further matters with which we need not concern ourselves.

For the appellant it is contended that the Subordinate Judge of Cawnpore must have jurisdiction to execute the decree until the decree had in fact been execute or until there had been an absolute failure to enforce execution of it. The following cases were cited in the argument: *Rangili* v. *Riayat Husain* (1), *Gajadhar* v. *Hanuman* (2), *Buboria Ahun Basee Kooer* v. *Joob Raj Singh* (3) and *J. G. Bagram* v. *J. P. Wise* (4).

In our opinion the Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or **[132]** has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which sent the decree. Now the Legislature, when it used the words "fails to execute" in s. 223 of the Code, could not have meant that a Court which merely strikes off an application on the ground of informality thereby fails to execute the decree. "Fails" must signify a failure after a serious and *bona fide* attempt by the Court to execute the decree. That paragraph in s. 223 suggests to our minds that it may have originated in an attempt to assimilate as far as possible the practice in such cases in England where a decree-holder who has obtained his decree for money sues out a writ of *fieri facias* directed to the sheriff to levy on the goods of the judgment-debtor within his bailiwick, and the sheriff's return (to be a good one) must be, either that he has levied to the extent of the goods of the judgment-debtor within his bailiwick, or that there are no goods of the judgment-debtor within his bailiwick. In our opinion the Court of the Subordinate Judge of Cawnpore did not fail to execute the decree within the meaning of s. 223; it merely struck off an application on the ground of informality. We further consider that the case was not a case in which the Subordinate Judge of Cawnpore was justified in sending any certificate to the Court at Lucknow. Neither of the events had arisen which would have justified the Subordinate Judge in sending any certificate under s. 223, for

(1) 3 A.W.N. (1883) 247.
(2) 6 A.W.N. (1886) 31.
(3) 23 W.R. C.R. 225.
(4) 1 B.L.R. (F.B.) 91.

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there was neither execution nor failure. The case of *J. G. Bagram* v. *J. P. Wise*, which was a Full Bench ruling of the Calcutta Court, is an authority to show that the Court to which a decree is sent has, even after striking off an application for execution, as here, still jurisdiction in the matter of the execution. It is true that the Full Bench case was decided on s. 284 of Act VIII of 1859, but in our opinion it is equally applicable to cases arising under the present Code of Civil Procedure. We have come to the conclusion that the Subordinate Judge wrongly declined jurisdiction when he had it. We set **[133]** aside the order dismissing the application out of which this appeal has arisen, and we remand the case under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge for the application to be restored to the file and to be disposed of according to law. The appellant will have her costs of this appeal.

Appeal decreed and cause remanded.

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20 A. 133 = 17 A.W.N. (1897) 224.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* MAIKU LAL AND ANOTHER.*

[19th November, 1897.]

Evidence—Confession—Value to be attached to confession subsequently withdrawn.

It does not necessarily follow, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, that therefore the confession is to be rejected. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief. *Queen-Empress* v. *Mahabir* (1) and *Queen-Empress* v. *Rangi* (2) referred to.

[F., 29 A. 434 (439) = 4 A.L.J. 310 = A W.N. (1907) 140 = 5 Cr.L.J. 360; **R.**, 23 B. 316 (318); 1 L.B.R. 238 (246); 153 P.L.R. 1903 = 16 P.R. 1903 (Cr).]

IN this case two men, Maiku Lal and Nathu, were tried for and convicted of the offence of dacoity under s. 395 of the Indian Penal Code. Maiku Lal made a long and detailed confession before the committing Magistrate and there was also other evidence connecting him with the dacoity. Nathu made a similar confession before the District Magistrate. In those confessions both men denied that any undue influence had been used to make them confess, and afterwards they admitted that none of the Police were in the room at the time when the confessions were recorded. Before the Sessions Judge both confessions were retracted, but both the Judge and the assessors believed the confessions to have been voluntarily made and to be substantially accurate. Each accused in his confession implicated the other accused, and, as has **[134]** been said, in the case of Maiku Lal there was other evidence against him. As against Nathu the only evidence was his own confession subsequently retracted, and the similarly retracted confession of Maiku Lal.

Kunwar *Parmanand*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

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* Criminal Appeal No. 1073 of 1897.

(1) 18 A. 78.

(2) 10 M. 295.

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JUDGMENT

EDGE, C. J. and BURKITT, J.—Maiku Lal and Nathu Lal have been sentenced to transportation for life under s. 395 of the Indian Penal Code. As against Maiku there was his own circumstantial confession and proof that some of the articles stolen in the dacoity were found in his house. He is also implicated by the confession made by Nathu. As to Nathu Lal the case against him depends upon a statement made by him before the District Magistrate, which was subsequently withdrawn, and further upon the fact that he is named as one of the dacoits in the confession made by Maiku. Kunwar *Parmanand*, for Nathu, has argued that inasmuch as Nathu's confession was subsequently withdrawn, and as there is no evidence in the case against him, we should not accept the confession as sufficient ground for his conviction. Kunwar *Parmanand* has relied upon *Queen-Empress* v. *Mahabir* (1) and *Queen-Empress* v. *Rangi* (2). It appears to us that every case of this kind must be decided upon its own circumstances, and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge in our opinion is bound to act, so far as that prisoner is concerned, on that confession, which he believes to be true. Courts frequently act, even in the most serious cases, on a simple plea of guilty, although in some cases it is possible that the person pleading guilty was not in fact connected with the crime. Where a confession is not supported by the evidence of witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that it is a natural **[135]** narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth. In the present case the confession is full of detail. It is very circumstantial, and bears on it, in our opinion, the impress of truth. There is nothing in the evidence to suggest that it was false in any particular, and it was made before a District Magistrate who would take care, so far as he could, that no advantage was taken of the prisoner. Our belief in the truth of Nathu's confession before the District Magistrate is not in the slightest affected by his subsequent retraction of it. In our opinion these men were guilty, and were rightly convicted. Although the dacoits had fire-arms with them, no personal injury seems to have been done to any of the villagers or to the people of the house, and we think that in this case we may alter the sentence to one of ten years' rigorous imprisonment, and we do so accordingly. In other respects the appeals are dismissed.

(1) 18 A. 78.

(2) 10 M. 295.

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20 A. 135 = 17 A.W.N. (1897) 220.

20 A. 135 = 17 A.W.N. (1897) 220.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

KANDHIA LAL (*Defendant*) *v.* MUNA BIBI (*Plaintiff*).*
[20th November, 1897.]

Guardian and minor—Loans to a minor—Inquiries necessary to be made by lender—Burden of proof.

A plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities, he can advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt. *Hanuman Pershad Pandey* v. *Babooee Munraj Kunwari* (1) referred to.

[136] THE facts of this case are fully stated in the judgment of the Court.

Munshi *Jwala Prasad* (for whom Babu *Durga Charan Banerji*), for the appellant.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondent.

JUDGMENT.

BLAIR and AIKMAN, JJ.—The plaintiff in this case is described by herself in the array of parties mentioned in the plaint as the widow of Babu Sohan, occupation money-lending. In this case she alleges that she from time to time lent money to one Lachmin Kunwar, as guardian of her infant son Kandhia Lal, against whose estate she is now proceeding. Various sums of money so advanced at last amounted to an aggregate of over Rs. 1,600, and for that sum upon the 5th of December 1889 the female defendant executed a bond, by which, in case of non-payment, the plaintiff was to be entitled to have recourse to the property of the defendant. From the contents of the bond it is manifest that the executing defendant represented that the advances so made had been required by the necessities of the estate of the minor defendant. On failure of payment, the present suit was brought upon the bond, the mother, guardian of the infant defendant, being herself impleaded as a co-defendant. The allegations in the plaint upon which the claim is founded are that money was required for the payment of Government revenue due from the minor's zamindari property and for money necessarily expended in suits for protection of the minor's estate. The defendant minor denies his liability. He denies that he received benefit from the loan or loans, and alleges that his property was sufficient to meet all charges upon it without borrowing. He denies that Government revenue was due at the time of the making of the bond, and alleges that none was paid out of the money secured by it, nor was there at that time need for money to carry on litigation. There was a further allegation, now immaterial, that

* Second Appeal No. 910 of 1895, from a decree of C. L. M. Eales, Esq., District Judge of Benares, dated the 16th April, 1895, modifying a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 13th December, 1894.

(1) 6 M.I.A. 393.

Lachmin Kunwar had been induced by fraud to sign the instrument. The [137] Judge of the Court of first instance framed certain issues, three of which only are now material. They are:—

(1) Was the minor benefited by the loan?

(2) Are the necessities mentioned in the bond correct?

(3) Is the loan binding upon the minor?

The Judge found all these issues in favour of the minor, holding that there were no necessities and no expenditure for the benefit of the minor and that the loan was therefore not binding upon him. A decree was passed against the female defendant, who did not file a statement of defence, and as against the minor defendant the suit was dismissed. In the lower appellate Court, the Judge rightly laid the burden of proof upon the plaintiff-appellant, but differed from the Subordinate Judge upon his finding that the plaintiff had produced no evidence of legal necessity. He himself treated as evidence certain decrees produced to him in cases in which the minor was a litigant, and in which on appeal in this Court, he had been successful. These cases were also, he says, test cases upon which depended half of the minor's zamindari estate. He also takes as evidence of liability to pay the Government revenue certain unsuccessful applications made to the District Judge by the female defendant for leave to borrow money on the security of the minor's estate. We do not acquiesce in the inference drawn by the Judge from these facts. But it is not upon that that our decision is grounded. There is manifestly no evidence before either Court that the plaintiff had made inquiry as to the necessities of the minor before advancing the money or moneys sought to be secured by the bond, nor was there really any evidence at all that such liabilities, had they existed, could not have been met out of the accumulations or current income of the minor's estate. In the judgment of the Privy Council in *Hanuman Pershad Pandey* v. *Babooee Munraj Kunwari* (1) the law upon this subject is considered and laid down in much detail. It is there ruled that a plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable [138] inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities, he can then advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not, in point of fact, used for his necessities or his benefit. On the other hand, a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt.

It is perhaps unfortunate, at all events it is curious, that the plaintiff money-lender should neither have alleged any reasonable inquiry made by herself before effecting the loan or loans, nor upon the hearing should have given any evidence of such inquiry. The lower appellate Court, which allowed the appeal of the plaintiff and decreed her suit against the minor defendant, did so without any finding that such inquiries had been made, and indeed the plaintiff had neglected to supply it with materials for doing so, nor does it appear even to have had before it, in explicit evidence upon the issues which it did try, direct proof that in fact the money borrowed was applied for the benefit of the minor and that there were necessities for borrowing it.

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(1) 6 M.I.A. 393.

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We are asked by the plaintiff-respondent to refer to the Court below an issue as to whether reasonable inquiries had been made by the plaintiff. We do not think we ought to grant her that grace; she certainly is not entitled to it as a matter of law. This is a suit substantially by a money-lender against a minor, and it is not the practice of this Court, or Courts elsewhere, to step out of their way for the purpose of visiting upon a minor liabilities contracted during the period of his minority. We are therefore of opinion that the decree of the lower appellate Court is a decree based upon evidence which does not establish a right of suit on the part of the plaintiff as against the minor. We, therefore, setting aside the decree of the lower appellate Court against the minor and restoring the decree of the Court of first instance, allow the appeal with costs.

Appeal decreed.

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[139] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

SADIQ HUSAIN (*Objector*) *v.* LALTA PRASAD AND ANOTHER (*Decree-holders*).* [22nd November, 1897.]

Execution of decree—Restitution of benefit obtained under a decree which is reversed on appeal—Restitution sought by means of execution of appellate decree against a person not a party to the appeal—Civil Procedure Code, s. 583.

Held that appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, could not, on succeeding in their appeal, obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council. *Bhagwati Prasad* v. *Jamna Prasad* (1) referred to.

[**F.**, 5 C.W.N. 426 (428); **R.**, 24 A. 288; **D.**, 28 A. 337 (339) = 3 A.L.J. 110 = A.W.N. (1906) 43.]

ON the 21st July 1888 Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz-ud-din Ahmad and Hafiz-ud-din Ahmad. The defendants appealed, and on the 16th of March 1891 the High Court set aside the decree and dismissed the plaintiffs' suit with costs. The defendants assigned their decree for costs to one Sadiq Husain. On the 16th July 1891, Sadiq Husain applied for execution of the decree assigned to him against the plaintiffs, and on the 23rd July 1891 obtained payment of the amount of costs decreed. On the 24th July 1891, the plaintiffs applied to the High Court for leave to appeal to Her Majesty in Council. Leave was granted, and ultimately, on the 5th of August 1895, the Privy Council decreed the appeal and restored the decree of the Court of first instance in favour of the plaintiffs. The plaintiffs did not make Sadiq Husain a party to their appeal to the Privy Council. The decree of the Privy Council was in due course transmitted for execution to the

* First Appeal, No. 15 of 1897, from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 12th December 1896.

(1) 19 A. 136.

Court of the Subordinate Judge of Bareilly, and thereupon, the plaintiffs filed in that Court an application for execution against the defendants and Sadiq Husain. In that application they prayed, as against the defendants, [140] for sale of the property charged in the decree, and, as against Sadiq Husain, for realization by attachment and sale of his property of the amount of costs realized by him in execution of the decree of the High Court of the 16th March 1891, together with certain interest. To this application Sadiq Husain filed objections, which were disallowed by the Subordinate Judge on the 12th of December 1896. From the order disallowing his objections Sadiq Husain appealed to the High Court.

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Mr. *A. E. Ryves* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This appeal arises out of an application to the Subordinate Judge of Bareilly made in execution of a decree of Her Majesty in Council. In the suit in which that decree was passed the plaintiffs obtained from the Subordinate Judge of Bareilly a decree for sale on a mortgage with costs. On appeal this Court set aside the decree of the Subordinate Judge and dismissed the suit with costs. That decree of this Court, which was in favour of the defendants, was assigned by the defendants to Sadiq Husain, we presume for consideration. On the 16 of July 1891, Sadiq Husain applied under s. 232 of the Code of Civil Procedure for execution of the decree which had been assigned to him for Rs. 4,820, the amount of the costs decreed by this Court in favour of the defendants. Of that application the plaintiffs had notice; they were parties to it. Sadiq Husain obtained an order, and, in execution of the decree assigned to him, he obtained, on the 23rd of July 1891, payment of Rs. 4,820. On the 24th of July 1891, the plaintiffs in the suit applied to this Court for leave to appeal to Her Majesty in Council. The appeal lay as a matter of right. Leave was granted; and finally the appeal came before Her Majesty in Council, with the result that the decree of this Court was set aside and the decree of the Subordinate Judge of Bareilly was restored with costs. That order of Her Majesty in Council was communicated to this Court, and on the application of the [141] plaintiffs this Court transmitted that order to the Subordinate Judge of Bareilly for the execution of the same. After the arrival of the order of Her Majesty in Council in the Court of the Subordinate Judge of Bareilly, the plaintiffs in the suit presented an application to the Subordinate Judge asking for an order of restitution against Sadiq Husain in respect of the Rs. 4,820-13-0 already mentioned and for Rs. 1,390-13-0, interest on that amount, making a total of Rs. 6,211-10-0. Sadiq Husain was no party to the appeal to Her Majesty in Council.

From what we have said it appears, as was the fact, that the plaintiffs had actually satisfied, by payment to Sadiq Husain, the decree for costs before they moved at all in the matter of appealing to Her Majesty in Council. They consequently had full knowledge that Sadiq Husain was the assignee of that decree and that he was a person interested to maintain that decree in its integrity so far as costs were concerned. Notwithstanding that the plaintiffs knew of Sadiq Husain's interest, they filed their appeal to Her Majesty in Council and proceeded with that appeal without making Sadiq Husain a party to it. When the appeal to Her Majesty in Council came on for hearing, the defendants, apparently through an oversight, were not represented. Sadiq Husain of course

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was not represented, being no party to the appeal, and the appeal to Her Majesty in Council was decreed in the absence, not only of the defendants but of the assignee of the decree. Sadiq Husain was not even made a party to the application to this Court to put the order of Her Majesty in Council into execution under s. 610 of the Code of Civil Procedure. The decree of Her Majesty in Council was against the respondents to the appeal. Sadiq Husain was not a respondent. It was not until the order of Her Majesty in Council arrived in the Court of the Subordinate Judge of Bareilly, that the plaintiffs in the suit sought for any remedy whatsoever against Sadiq Husain. What they seek is an order under which Sadiq Husain's goods and his lands may be seized and sold, and the proceeds up to Rs. 6,211-10-0 be paid over to the plaintiffs. It is contended that **[142]** because the order of Her Majesty in Council ordered this Court to govern itself according to that order, this Court and the Court of the Subordinate Judge of Bareilly are bound to make Sadiq Husain by the process of the Court, *i.e.*, by execution had against his goods or lands, pay to the plaintiffs the amount they claim. It is admitted that s. 583 of the Code of Civil Procedure does not apply to this case. It is obvious that that section does not apply. The decree under which the plaintiffs are seeking a benefit is an order of Her Majesty in Council, and not a decree passed under Chaper XLI of the Code of Civil Procedure. Further, s. 583 only applies to parties to the proceedings in the suit and in the appeal, and does not apply to assignees of interests of the parties to the suit when those assignees have not been made parties to the suit or the appeal. Mr. *Dwarka Nath Banerji* is unable to point out to us any section in the Code of Civil Procedure under which we could make an order which would justify the officer of the Court in seizing and selling in execution of the order of Her Majesty in Council, the goods or lands of a person who was no party to the appeal to Her Majesty in Council and who is not even either named or referred to in the order of Her Majesty in Council. Mr. *Dwarka Nath Banerji's* argument went as far as this, that this Court had not even discretion in the matter, that we were merely exercising ministerial functions, and that under the order of Her Majesty in Council we were bound to restore to the successful appellants the moneys they had paid to the assignee of the decree of this Court. According to that contention it would be immaterial whether Sadiq Husain could prove any matter of estoppel between him and these plaintiffs, as, for instance, that he had purchased the decree of this Court on the representation of the plaintiffs that they would not appeal. A somewhat similar case was before this Court last year, *viz.*, *Bhagwati Prasad* v. *Jamna Prasad* (1). We have been referred to *Rodger* v. *The Comptoir d' Escompte de Paris* (2) and to *Syud Bazayet Hossein* v. *Dooli Chand* (3). **[143]** In our opinion neither of these cases has any bearing on the one before us. If the plaintiffs had desired to obtain a remedy against Sadiq Husain through the medium of an order of Her Majesty in Council, they had ample notice of the assignment to him—they had actually paid him—and they could have made him a party to their appeal; but for reasons best known to themselves they did not do so. The plaintiffs are not asking to follow immoveable property decreed to them in the appeal by order of Her Majesty in Council. They are asking to turn this decree against the defendants into a decree against Sadiq Husain, who was no party to the proceedings, and to put it into execution against his goods and his lands as if it had

(1) 19 A. 136. (2) L.R. 3 P.C. 465. (3) 5 I.A. 211.

been a decree for money passed against him. In our opinion we have no jurisdiction to make any order for the execution of this order of Her Majesty in Council against Sadiq Husain. Equally in our opinion the Subordinate Judge had no jurisdiction to make the order which he made and which is now under appeal.

We allow this appeal and dismiss the application to the Subordinate Judge against Sadiq Husain with costs in both Courts.

Appeal decreed.

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20 A. 139=17 A.W.N. (1897) 222.

20 A. 143=17 A.W.N. (1897) 225.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* TULSHA.* [23rd November, 1897.]

Act No. XLV *of* 1860 (*Indian Penal Code*), *s.* 307—*Attempt to murder—Intention—Knowledge of probable consequence of act—Presumption.*

Where a woman of twenty years of age was found to have administered datura to three members of her family, it was *held* that she must be presumed to have known that the administration of datura was likely to cause death, although she might not have administered it with that intention.

[Not F., 30 A. 568=A.W.N. (1908) 243=8 Cr. L J. 383=4 M.L.T. 402.]

THE facts of this case sufficiently appear from the judgment of the Court.

[144] Mr. *R. K. Sorabji*, for the appellant.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—Musammat Tulsha has been convicted of the offence punishable under s. 307 of the Indian Penal Code, and has been sentenced to transportation for life. She was a young woman of twenty or twenty-one years of age and was a widow, her husband having died before the *gauna* ceremony was performed. She had a lover named Tika Ram, who was of the same caste as herself. She was anxious to live with him, but her father and family were opposed to her taking that course, as in their caste the marriage of widows was forbidden. Musammat Tulsha prepared the family meal, and of that meal her father her mother and her brother partook. They were afterwards seized with illness and exhibited symptoms of poisoning by datura. A native doctor was called in, who, recognizing what they were suffering from, refused to treat them and communicated with the police. The police arrived that night. The three members of the family who were suffering were removed to the dispensary and ultimately recovered. Musammat Tulsha was taken into custody, and she gave up a packet containing thirty-one datura seeds. She made a statement before the Magistrate in which she admitted that she had administered datura to her father, her mother and her brother in the food she had given. That statement was subsequently withdrawn, but, as it is entirely consistent with all the evidence in the case which we believe, we accept that statement as true notwithstanding its withdrawal. In the Court of Session her relations, in order to shield her, tried to make out a different case, namely, that what they were

* Criminal Appeal No. 1153 of 1897.

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20 A. 143 = 17 A.W.N. (1897) 225.

suffering from was the result of drinking bhang. We are quite satisfied that Musammat Tulsha administered datura to her father, her mother and her brother. Mr. *Sorabji*, who appeared for her, has contended that there is nothing to suggest that she intended to commit murder, and that there is no evidence that she knew that datura when administered might cause death. It is probable that Musammat Tulsha did not intend to kill her parents and her [145] brother. No doubt she intended to incapacitate them for the time that she might fly with her lover. There is no evidence that she knew that datura when administered to a human being might cause death. The same might have been said if she had administered arsenic or nux vomica. It appears to us that we must presume that people of her age have the ordinary knowledge of what the results may be of administering datura. It would be dangerous in the extreme to the public in this country if Judges were to hold that it could not be presumed that a woman of twenty years of age in an Indian village was not aware that death might be caused by the administration of datura. If we were to hold that such was the presumption, we fear that poisoning by datura would become more frequent than it is. In our opinion Musammat Tulsha was properly convicted. It was a case to which the sentence of transportation applied, and that was the proper sentence to pass. As the Sessions Judge truly observes, this woman's act might have resulted in the deaths of three persons.

We dismiss this appeal.

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20 A. 145 = 17 A.W.N. (1897) 227.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

SULTAN MUHAMMAD KHAN (*Defendant*) *v.* SHEO PRASAD AND ANOTHER (*Plaintiffs*).* [23rd November, 1897.]

Arbitration—Submission to arbitration—Revocation of submission.

A submission to arbitration once made cannot be revoked except for good cause. It cannot be revoked at the mere will of one of the parties to it. *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (1), referred to.

THIS was an application under s. 525 of the Code of Civil Procedure to have an award filed in Court and a decree passed in accordance therewith. The award was made ostensibly by one Chandar Sen, the clerk of a pleader, by name Raghubir [146] Saran, practising at Meerut, but with the advice and assistance of his master. The application was opposed on several grounds, amongst others, on the ground that the objector, having come to know that Raghubir Saran had originally been instructed by the other parties to the reference to file a suit against him in the matter dealt with by the award, had revoked his submission to arbitration. This objection was disallowed by the Court of first instance (Subordinate Judge of Meerut) which passed a decree in accordance with the award. The judgment-debtor appealed, urging the same objections as he had urged in the first Court. The lower appellate Court (District

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* Second Appeal, No. 453 of 1895, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 19th January 1895, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 16th May 1893.

(1) 12 M.I.A. 112.

Judge of Meerut) dismissed the appeal. The objector thereupon appealed to the High Court.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

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JUDGMENT.

BLAIR, J.—This is the appeal of an unsuccessful party to arbitration proceedings. The only point opened in second appeal is whether the award made was in point of law an award. It seems to me that the findings of fact by the learned Judge do amount to this, that the award is the expression of the mind and the will of the person who was nominated arbitrator. The award is of course signed by him. It might have been possible for objection to be taken to the arbitration proceedings upon the ground of the interference of the arbitrator's master, a pleader, had not such interference taken place with the full assent of the present appellant. In the face of such consent on his part it would not be open to him to revoke his consent to the arbitration proceedings. It would not lie in his mouth to urge as good cause for such revocation anything done by the arbitrator in the course of the proceedings, if the thing done was what he himself had assented to. I think the finding of the Judge that the award is the award of the arbitrator Chander Sen means, not only that he signed the award but that it was in the fullest legal sense his award, though the conclusions arrived at may have [147] been influenced by another person, who, by the consent of the parties, was an assisting party to the arbitration proceedings. I see no reason to disturb the findings of the Judge. I would dismiss the appeal with costs.

AIKMAN, J.—I am of the same opinion. The respondent applied under s. 525 of the Code of Civil Procedure to have an award filed in Court. The application was resisted by the appellant here, but the Court made an order against him under the provisions of s. 526 of the Code. On appeal the order was confirmed by the District Judge. In this second appeal it is urged that there was no valid award. That is the only ground upon which he could interfere. The reference to arbitration shows that the parties appointed one Chander sen, the clerk of a pleader named Babu Raghubir Saran, as arbitrator to decide the matters in dispute between them. The award on the face of it purports to have been made by the arbitrator chosen by the parties. It is, however, contended that the person who did really make the award was Chander Sen's master Raghubir Saran. It has been found by the lower appellate Court that Chander Sen was selected by the parties on his master Raghubir Saran promising to help him in every way. That Chander Sen took more than a nominal part in the proceedings is clear from the evidence of Raghubir Saran, a witness whom the Judge describes as absolutely above suspicion. Even if Chander Sen allowed himself to be unduly influenced by Raghubir Saran, that would not under the circumstances of this case amount to misconduct on his part and would not be a matter with which we could deal in appeal.

The learned counsel for the appellant further contended that the award was invalid, inasmuch as his client had revoked the submission to arbitration before the award was pronounced. The learned counsel went so far as to contend that a party who refers a question to arbitration can at his pleasure, and without any cause shown, withdraw from the submission at any time before the award has been given. On this point he referred [148] to Russell on the Power and Duty of an Arbitrator.

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This is a proposition to which I cannot assent. In the case of *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (1) it was held by their Lordships of the Privy Council that "where parties had agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to such agreement could revoke the submission unless for good cause, and that a mere arbitrary revocation of authority would not be permitted." The learned counsel has entirely failed to show that any good cause, existed which would have justified his client in withdrawing from the submission, if he withdrew at all, which is open to doubt. I think the lower appellate Court properly dismissed the appeal.

BY THE COURT.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

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20 A. 148=17 A.W.N. (1897) 226.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

MUHAMMAD YUSUF ALI KHAN (*Defendant*) *v.* DAL KUAR (*Plaintiff*).* [25th November, 1897.]

Pre-emption—Wajib-ul-arz—*Transfer to plaintiff-pre-emptor after sale—Hindu widow in possession for widow's estate.*

Held that the daughter of a Hindu widow to whom the widow had relinquished a share in a village, of which share she was in possession for a widow's life estate, was entitled to pre-emption in respect of a sale which had taken place in the village prior to the relinquishment made to her by her mother. *Sheo Narain* v. *Hira* (2) distinguished.

[F., 28 A. 424 (427)=3 A.L.J. 191=A.W.N. (1906) 73; 7 O.C. 158 (159); **R.**, 31 A. 623 =6 A.L.J. 887 (**F.B.**)=6 M.L.T. 352=3 Ind. Cas. 820; 15 Ind. Cas. 570 (571)= 8 N.L.R. 62 (64); **D.**, 125 P.L.R. 1901 at p. 497.**]**

THIS was a suit for pre-emption based on *wajib-ul-arz*. One Puran Mal, a co-sharer in the village in which the land sold was situate, died on the 6th of December 1893 leaving a widow Kesar Kuar and a daughter Dal Kuar. On the 22nd of January 1894, one Jagannath sold to the defendant Muhammad Yusuf Ali Khan, who was a stranger, a share in the village in which Puran Mal had been a co-sharer. Subsequently to this sale **[149]** Kesar Kuar relinquished in favour of her daughter Dal Kuar all her rights in the property which had been of Puran Mal in his lifetime, and mutation of names was effected in favour of Dal Kuar on the 2nd of May 1894. On the 21st of January 1895 Dal Kuar brought a suit for pre-emption in respect of the sale to Muhammad Yusuf Ali Khan of the 22nd of January 1894. The plaintiff's claim was decreed by the Court of first instance (Munsif of Etah). The defendant-vendee appealed, and his appeal was dismissed by the lower appellate Court (District Judge of Mainpuri). The defendant-vendee thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

The respondent was not represented.

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* Second Appeal, No. 928 of 1895, from a decree of T. C. Piggott, Esq., Additional Judge of Aligarh, dated the 6th August 1895, confirming a decree of Babu Achal Behari Lal, Munsif of Etah, dated the 19th March 1895.

(1) 12 M.I.A. 112. (2) 7 A. 535.

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20 A. 148=
17 A.W.N.
(1897) 226.

JUDGMENT.

BLAIR, J. (AIKMAN, J. concurring).—This is a pre-emption suit based upon the *wajib-ul-arzes* of two villages. The plaintiff is the daughter of one Puran Mal, and the title she alleges is that upon her father's death, the widowed mother, having become entitled to a life estate in the property, relinquished all her rights to the plaintiff, who thereupon entered into possession and was duly recorded as a co-sharer.

The sale which constituted the cause of action took place on the 22nd of January 1894. Puran Mal died on the 6th of December 1893. The appellant represented by Mr. *Mujtaba*, disputes the right of the plaintiff to pre-empt upon the ground that the voluntary relinquishment of the mother to the daughter, after the completion of the sale, could not confer upon her any right of pre-emption. In support of that contention Mr. *Ghulam Mujtaba* cited to us a Full Bench case, *Sheo Narain* v. *Hira* (1). That case is not on all fours with the case we have to decide. It was a sale to a person other than a co-sharer, and the plaintiff who claimed to pre-empt was himself a stranger who had purchased a share in the village. The inconveniences which formed the basis of that decision are set forth in detail in the judgment, and no doubt formed a very substantial part of the [150] *ratio decidendi*. Differing from the present case in that very material respect, that case affords no guidance to us in a case where the person claiming to pre-empt is not a stranger who has acquired a share in the village. There is another argument used in the judgment of Mr. Justice Mahmood to support the decision, the propriety of which I do not question, which appears to me to be based upon a misconception. It occurs in the following words:—"Now, if at the time of the sale the person who at that time owned the share purchased by the plaintiff had no objection to the sale, that sale gave rise to no cause of action, and nothing which happened afterwards could create one." That observation leaves out of sight that there was ample time still for the original owner of the property, had he lived, to take objection; the period for such objection had not expired, and it seems to me impossible to say that the abstinence from objection for some portion, and a portion only, of that time raised any inference of the abandonment of a claim to pre-empt. It is settled law that a widow holding a life estate, and not holding possession of land in lieu of maintenance, represents the estate in the fullest manner, and such plenary possession seems to me to carry with it the right to pre-empt. I find it difficult to conceive upon what principle applicable to pre-emptive rights, based not on Muhammadan Law but upon the *wajib-ul-arz*, which must be taken to be the basis of the rights of the co-sharers, it would be possible to justify the exclusion of a co-sharer from pre-emption, to whom the widow's life estate has been relinquished, and who herself would have had plenary proprietary rights on the determination of the life estate. There seems to be no doubt that the widow had power to make a good and legal relinquishment. As I have already said, I cannot infer from the fact that the widow took no objection for some brief time before the relinquishment, that there was on her part an abandonment of pre-emptive rights. It would seem upon general principles that the period within which the pre emptive rights can be exercised is not limited by a devolution of the estate from one co-sharer to another co-sharer. In the case of a [151] *wajib-ul-arz* I think the expression excluding such a right must be

(1) 7 A. 535.

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APPELLATE CIVIL.

20 A. 148 = 17 A.W.N. (1897) 226.

clear and imperative before I could find that so important an incident of proprietary possession could be lost by such devolution. It is to be regretted that the respondent was not represented in the argument upon this appeal, but I feel no doubt that Mr. *Mujtaba* has brought to bear upon the matter all cases which might help to guide the decision of the Bench. On the whole I am of opinion that the Courts below were right in their decision. I would dismiss the appeal.

BY THE COURT.—The appeal is dismissed, but without costs, as no one appeared for the respondent.

Appeal dismissed.

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20 A. 151 = 17 A.W.N. (1897) 227.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* MUHAMMAD ISMAIL KHAN.*

[25th November, 1897.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 177—*False information—Police Officer recording a false report.*

Held that a Police officer at a police station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the station diary, refused to enter a report made to him concerning the commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him, had thereby committed the offence punishable under s. 177 of the Indian Penal Code.

THE facts of this case are fully stated in the judgment of the Court.
The Government Advocate (Mr. *E. Chamier*), for the Crown.
Mr. *Dillon*, for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—This is an appeal brought by the Local Government against an order of the Sessions Judge of Farrukhabad acquitting Muhammad Ismail Khan of offences punishable under ss. 177 and 218 of the Indian Penal Code.

On the 23rd of January last, Muhammad Ismail Khan was a head constable stationed at Kaimganj police station. It was [152] his duty to enter all reports made at the station as to cogoizable or non-cognizable offences, and to enter them in the station diary. On the evening of that day, whilst Muhammad Ismail Khan was on duty, Banwari Lal and Bansidhar with two other men, Balla and Udho, came to the thana to make a report that Banwari Lal had been robbed on that evening of Rs. 454, which his servant Udho was carrying, and that the robbers who had made the attack had succeeded in carrying away the bag in which the money was and had escaped.

Banwari Lal and his companions made their statement to Muhammad Ismail Khan and asked him to enter the report. Muhammad Ismail Khan said that they wanted to get up a case and told them to wait. They waited until 1 o'clock in the morning, and then left. Muhammad Ismail Khan did enter a report in the general diary that night as made by Balla accompanied by Bansidhar. It was not a report of a

* Criminal Appeal No. 143 of 1897.

robbery ; it was a report that a milkman had beaten Balla. No such report had been made. It so happened that, at the time Banwari Lal and his companions were at the station, the police were busy with a murder case just reported. Now the Sessions Judge has found that no such report as that alleged by the witnesses for the prosecution was made at all. The assessors suggested that Banwari Lal and his companions wished to hush up the case of the robbery and consequently made a false report which was then entered in the general diary. The Sessions Judge observes that that was a simple explanation, and he accepted it. In one sense of the word "simple" it was simple enough ; so foolish that we should have expected the Sessions Judge to have rejected it. It might have struck him that these banias who had taken the trouble to go at that hour of the night more than a mile to the thana to report a robbery, which the Sessions Judge believed to have been committed (and which we have no doubt was committed), and remained there from 8 o'clock in the night until 1 o'clock next morning in order to have the matter reported, had not gone to the thana to make a false report of an assault that had not been committed, and [153] which, if it had been committed, did not concern either Bansidhar or Banwari Lal, the two chief men—a false report which might make them liable to punishment under s. 211 of the Indian Penal Code. We are satisfied that the banias did report that a robbery had been committed that night, and that they did not report any assault by a milkman on their porter.

It is easy to understand what happened. The Sub-Inspector at the time was absent investigating another case ; there comes in a report of a murder that had taken place ; then comes this report of a robbery. We have no doubt that at the police station they did not want to trouble about this case of robbery, in which none of the robbers had been identified, and in which what was carried away was rupees, which could not be traced, and in which there was little chance that an arrest would have been made or a conviction obtained. They thought they would keep the charge out of the books and not spoil their *naqshas* by showing an undetected offence of robbery committed in the street under their noses.

We are of opinion that s. 218 of the Indian Penal Code does not apply to this case. No doubt it is injurious to the public that such serious offences as robbery should be hushed up, but unfortunately the definition of "injury" contained in the Penal Code does not cover anything that took place that night at the thana. We can well understand that cases of falsification of reports may occur which come within the purview of s. 218. All we decide is that this case does not. There is nothing in this case to show that Muhammad Ismail Khan intended to cause loss or injury to the public or to any person, or that he intended to save, or knew he was likely to save, anyone from punishment or had any of the other intents mentioned in s. 218, when he suppressed the real report and entered the false one.

We are of opinion, and we find, that Muhammad Ismail Khan did commit an offence punishable under s. 177 of the Indian Penal Code. He was bound by law to enter in the general diary [154] all reports of cognizable and non-cognizable cases made to him at the thana. It is needless to say that this duty involved that he should truthfully enter those reports. One object of that diary is to inform the Magistrate of the District and the District Superintendent of Police of the offences which have been reported at the thana. In that sense the diary furnishes them with "information," and at this particular thana it was the duty

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of Muhammad Ismail Khan to furnish such information to the Magistrate of the District and the District Superintendent of Police by means of the truthful entry of reports made to him. What he did was——he furnished by means of a false entry information which he knew to be false. He suppressed the real report, and entered a report which had not been made. Indeed we would be prepared to hold that Muhammad Ismail Khan in not entering the report which was made to him, even if he had made no entry at all, would have brought himself under s. 177, as the result would have been that he would have thereby informed the Magistrate of the District and the District Superintendent of Police that no report of a cognizable offence had been made, which would have been false information. It is absolutely necessary in the interests of the public that Police officers charged with the duty of entering these reports should enter them truthfully. We regard this as a serious case. A grave offence had been committed, and the action of Muhammad Ismail Khan, possibly countenanced by some other Police officer, that night has resulted in no inquiry so far as we are aware, having been instituted in respect of this highway robbery. We are aware that this class of offence is committed in certain districts; that reports made have been minimised and minor offences entered when a graver offence was in fact reported. We cannot pass over this offence lightly. We set aside the order of acquittal, and we convict Muhammad Ismail Khan of the offence punishable under s. 177, and sentence him to be rigorously imprisoned for eighteen calendar months: the imprisonment will begin from the time when he is taken into custody to undergo this sentence.

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20 A. 155 = 17 A.W.N. (1897) 229.

APPELLATE CRIMINAL.

[155] *Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*

QUEEN-EMPRESS *v.* ZAWAR HUSEN AND OTHERS.*

[26th November, 1897.]

Evidence—Prosecution witness examined before the Magistrate but not called in the Court of Session—Witness called by defence—Cross examination by defending counsel disallowed.

Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness-box by counsel for the defence, it was *held* that counsel for the defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination, with the permission of the Court, if the witness proved himself a hostile witness.

THE facts of this case are fully stated in the judgment of the Court.
Mr. *C. Dillon*, for the appellants Miru and Phullu.
Mr. *G. P. Boys*, for the appellant Zawar Husen.
The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—Zawar Husen, Miru and Phullu have been found guilty of the offence punishable under s. 307 of the

* Criminal Appeal No. 1302 of 1897.

Indian Penal Code and have been respectively sentenced to transportation for life. They have appealed.

As to Zawar Husen, his contention is that he established an *alibi*. As to the other two men the contention is that they were not present, and that if Zawar Husen's *alibi* is believed, the case for the prosecution is entirely shaken and the evidence against Miru and Phullu cannot be trusted.

That a deliberate attempt was made to take the life of Imdad Husen some time between midnight and 2 A.M. is beyond doubt. Whoever the persons were who attacked him, they could have had but one intention, and that was to kill him. The question is were these three men, or any of them, members of the party that attacked Imdad Husen?

Zawar Husen's *alibi* is that he was in Allahabad up to 9-30 P.M. on the night in question, and could not have caught a train which would have taken him to Bharwari after that hour, and [156] that he could not have ridden from Allahabad to the neighbourhood of Bharwari, where the crime was committed, in time to be present at its commission.

To prove the *alibi* he called one Muhammad Mehdi, who gave the very vaguest evidence as to time. He said that Zawar Husen called on him at 8, 8-30, 8-45 or 9 o'clock that night, and remained with him until he, Muhammad Mehdi, retired to bed. He fixes that hour at 9-30 by the fact that that is his usual hour for retiring. Another witness (from Benares) is called to prove that Zawar Husen was at Muhammad Mehdi's until after 9-30 that night. We have very little doubt that Zawar Husen was doing, what many others in this country have done before, namely, arranging for an *alibi* in view of his taking part in the commission of a crime of a serious nature. Whether Mr. Muhammad Mehdi was particularly drowsy on the night in question, or whether the other witness' watch, if he had one, was rather fast or inaccurate we care not; nor do we care whether Zawar Husen went to Bharwari by train or on horse-back, for we are absolutely certain that he was present sometime between midnight and 2 o'clock on the following morning and was taking part in the attack on Imdad Husen.

Mr. *Boys* complains that the course adopted by the prosecution in the Court of Session prejudiced his client. Mr. *Boys* was anxious to show, apparently, in the Court of Session that Zawar Husen could not have travelled by train from Allahabad to Bharwari that night. Some one or more of the witnesses who had been called before the Magistrate were not called in the Court of Session. Mr. *Boys*, who was defending Zawar Husen in the Court of Session, called one of those witnesses, with the object, apparently, of getting the witness to say that in the Magistrate's Court he had sworn that he had seen Zawar Husen at or near Bharwari Railway Station that night. However, Mr. *Boys* called this witness, and thereby made him a witness for the defence. He proceeded to examine him, not by asking him what he knew about the case, but by asking him what he had said in the [157] Magistrate's Court. Neither counsel for an accused person nor his client is entitled to cross-examine a witness called for the accused person, unless it appears that that witness is suppressing the truth or is lying or is refusing to give information. Mr. *Boys* was not entitled at that stage to ask the witness what he had said in the Magistrate's Court. That, at that point, was immaterial. Mr. *Boys* was entitled to

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ask the witness as to what he could state of his own knowledge as to the events of that night, and if the witness in giving his evidence showed a hostile spirit in obviously suppressing information or in giving evidence at variance with what he had stated before, then Mr. *Boys* would have been entitled to ask the Court for permission to cross-examine his own witness. He was not entitled to begin his examination by a question which could only be put in cross-examination. He had laid no foundation for any right to cross-examine that particular witness. Further, Mr. *Boys* might have found himself in this difficulty, if the evidence had been admitted——we are glad to say the Judge rejected the question ——that, having called a witness who was not shown to be hostile or suppressing evidence or contradicting what he had already stated, Mr. *Boys'* client would have been bound by the man's answers and would not have been entitled to call evidence to contradict him. There might have been some difficulty in getting in the evidence of Muhammad Mehdi, if he was only tendered after the evidence to which we have been alluding had been given, if the question had been allowed.

But, indeed, the point was a small one. In our opinion it was immaterial whether the particular witness had or had not seen Zawar Husen at or near Bharwari Railway Station. The real question was—did Zawar Husen take part in the attack upon Imdad Husen? In this country it cannot be assumed that either a criminal or a civil case is false because a witness has lied or has exaggerated. We are satisfied on the evidence in this case beyond any doubt that Zawar Husen, Miru and Phullu did attack Imdad Husen, for the purpose and with the intention of killing him, sometime between midnight and 2 A.M. on the night in **[158]** question. We say 2 A.M. because the first report was made at the thana at 2-30 A.M. There was moon-light. These men were known perfectly well to the witnesses by sight; they lived in the same village. Zawar Husen's identity was also further established by witnesses hearing his voice. It is fortunate for these appellants that they did not succeed in their object that night. This was a planned and deliberate attempt at murder. The sentence of transportation for life passed on these men was the proper sentence. We dismiss these appeals.

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20 A. 158 = 17 A.W.N. (1897) 230.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* HIMAI.* [20th November, 1897.]

Act No. VIII of 1897 (Reformatory Schools Act), ss. 4, 8 and 16—Order for detention in a Reformatory School under s. 8—Revision—Powers of High Court.

Held, that the High Court has no power to interfere in appeal or revision with an order for detention in a Reformatory School passed in substitution for an order of transportation or imprisonment.

[Overruled, 21 A. 391 (F.B.); Diss., L.B.R. (1893—1900) 441.]

THIS was an application for revision made by the Government Advocate in respect of an order of the Joint Magistrate of Jaunpur. The Joint Magistrate convicted five persons, including Himai, of the offence

* Criminal Revision No. 578 of 1897.

punishable under s. 411 of the Indian Penal Code, and sentenced them therefor to various terms imprisonment. As to Himai the Magistrate recorded :—"Himai is a boy of fifteen years and shall be sent to the Reformatory for three years in place of going to prison for one year."

Revision of this order was applied for on the ground that Himai, being fifteen years of age, could not be the subject of an order under s. 8 of Act No. VIII of 1897.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—Himai was convicted of the offence punishable under s. 411 of the Indian Penal Code and was sentenced to one year's rigorous imprisonment therefor. **[159]** The Magistrate, purporting to act under s. 8 of Act No. VIII of 1897, substituted for that order of imprisonment an order for detention in a Reformatory School. The Magistrate found that Himai was fifteen years of age. Consequently Himai was not a "youthful offender" within the meaning of s. 4 of Act No. VIII of 1897 at the time of his conviction. The order substituting detention in a Reformatory School for imprisonment was therefore illegal.

But s. 16 of Act No. VIII of 1897*, precludes this Court from interfering in appeal or revision with an order for detention in a Reformatory School passed in substitution for an order of transportation or imprisonment. We can put no other construction upon s. 16. We accordingly dismiss this application for revision.

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20 A. 159=17 A.W.N. (1897) 230.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* GOBINDA.† [27th November, 1897.]

Act No. VIII of 1897 *(Reformatory Schools Act), ss.* 8 *and* 16*—Order for detention in a Reformatory School under s.* 8*—Revision—Powers of High Court.*

[Overruled, 21 A. 391 (F.B).]

THIS case is similar in principle to that of *Queen-Empress* v. *Himai* (*supra*). (1)

The facts of this case are sufficiently stated in the judgment of the Court which was as follows:—

JUDGMENT.

EDGE, C. J., and BURKITT, J.—Gobinda was convicted of the offence punishable under s. 379 of the Indian Penal Code and was sentenced therefor to one month's rigorous imprisonment. The Magistrate substituted an order of detention in a Reformatory School for four years for the order of **[160]** imprisonment. The Magistrate found that Gobinda was a

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* S. 16 of Act No. VIII of 1897 is as follows:—"Nothing contained in the Code "of Criminal Procedure, 1882, shall be construed to authorise any Court or Magistrate "to alter or reverse in appeal or revision any order passed with respect to the age of a "youthful offender or the substitution of an order for detention in a Reformatory "School for transportation or imprisonment."

† Criminal Revision No. 576 of 1897.

(1) 20 A. 158.

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Dalera and twelve years of age. Daleras are excluded from the purview of Act No. VIII of 1897 in these Provinces under rules made on the 18th of June 1897, by the Local Government. Consequently the order for substitution was illegal. It was further illegal in that it transgressed the rule which regulates the period for which a youthful offender of that age might be sent to a Reformatory School. Under s. 16 of Act No. VIII of 1897, this Court is precluded from altering or reversing that order, as the order was an order for detention in a Reformatory School in substitution for an order of imprisonment. Consequently, even if Gobinda had been a youthful offender who was not excluded from the operation of the Act by the rules made by the Local Government, we could not interfere with that portion of the order which directed him to be detained in a Reformatory School for four years. We dismiss this application.

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20 A. 160 = 17 A.W.N. (1897) 231.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* BILLAR.* [27th November, 1897.]

Act No. VIII of 1897 *(Reformatory Schools Act), ss.* 8 *and* 16—*Order for detention in a Reformatary School under s.* 8—*Revision—Powers of High Court.*

The prohibition contained in s. 16 of Act No VIII of 1897, does not apply to an order for detention in a Reformatory School passed when the person to whom it relates has not been convicted of any offence and has not been sentenced to any term of imprisonment or transportation for which detention in a reformatory could be substituted.

[R., 21 A. 391 (F.B.).]

THIS was an application for revision made by the Government Advocate in respect of an order of the District Magistrate of Gorakhpur.

On inquiring into a charge under s. 457 read with s. 75 of the Indian Penal Code, the Joint Magistrate of Gorakhpur had recorded the following order:—"I should have dealt with the case myself, but accused was convicted of an **[161]** offence under s. 454 of the Indian Penal Code in January this year. He is aged about 10. Sarju says his parents are badly off, and I do not think it would be any use binding him over to be of good behaviour. I consider he should be sent to a Reformatory. As I have not been empowered to pass such an order under s. 8 of Act No. VIII of 1897, I forward the case with this opinion to the District Magistrate under s. 9 of the said Act."

The District Magistrate, without noticing that the accused had not been convicted and sentenced by the Joint Magistrate, passed an order that the accused be confined in a Reformatory for six years.

Revision of this order was applied for on the grounds that the accused could not be sent to a Reformatory without first having been convicted of the offence with which he was charged, and, secondly, that the age of the accused had not been definitely ascertained.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—A Magistrate investigated a charge of theft in a dwelling house preferred against Billar. Without having

* Criminal Revision No. 577 of 1897.

convicted Billar of any offence, and of course without having sentenced him, the Magistrate sent the case to the Magistrate of the District. The Magistrate of the District, omitting to notice that Billar had not been convicted and had not been sentenced, and that he had no jurisdiction to make an order for detention in a Reformatory School in his case, ordered that Billar should be detained in a Reformatory School for six years. That order was entirely illegal. There was no jurisdiction to make it, It was not an order for detention in a Reformatory School passed in substitution for an order for transportation or imprisonment; consequently this Court is not precluded by s. 16 of Act No. VIII of 1897, from dealing with the order of the Magistrate of the District. We set aside the order of the Magistrate of the District, and direct that the Magistrate of the District, or some other competent Magistrate to whom the case may be assigned by him, shall proceed with the investigation of the charge according to law.

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20 A. 162 = 18 A.W.N. (1898) 9.

[162] APPELLATE CIVIL.

Before Mr. Justice Knox, and Mr. Justice Banerji.

SHAM KRISHNA AND OTHERS (*Plaintiffs*) *v.* RAM DAS AND OTHERS (*Defendants*).* [1st December, 1897.]

Civil Procedure Code, s. 440—Guardian and minor—Suit brought on behalf of a minor by a person other than the minor's certificated guardian.

Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was *held* that the suit was wrongly brought, having regard to s. 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1) referred to.

[R., 7 O.C. 234 (236); 11 O.C. 159 (164).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *T. Conlan*, Pandit *Moti Lal Nehru*, and Munshi *Madho Prasad*, for the appellants.

Mr. *D. N. Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMEMT.

KNOX and BANERJI, JJ.—The suit out of which this first appeal has risen is a suit instituted by one Rai Sham Krishna, a major, and two others, who at the time of the institution were minors: they professed to sue under the guardianship of Rai Sham Krishna, the first plaintiff. It is admitted that Rai Sham Krishna was not appointed by any Court guardian of the minor co-plaintiffs, and that there was a person, namely, their mother, who was appointed guardian by a competent Court. No objection was taken in the written statement to the frame of the suit,

* First Appeal, No. 229 of 1895, from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 16th November 1895.

(1) 13 C. 189.

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20 A. 162 = 18 A.W.N. (1898) 9.

and the suit proceeded to its first hearing on the 15th of September 1893, when issues were fixed in which no question was raised for decision as to the [163] parties who were arrayed as plaintiffs whether they were or were not properly represented as plaintiffs in the suit. In the face of these facts it is somewhat difficult to understand the opening sentence in the judgment of the Court below, which sets out that the defendants had taken a preliminary objection to the effect that Rai Sham Krishna could not be the next friend of the plaintiffs, numbers two and three, as there was a certificated guardian of the minors, and that the suit failed for non-joinder of parties. This objection could only have been taken orally, and there is no trace of its having been taken till the 15th of November 1895, in other words, till nearly three years had elapsed from the time when the suit was instituted and after the case had been fixed for some score of hearings. The Court below proceeded, however, to treat the objection as a very serious one. It held, under the authority of s. 440 of the Code of Civil Procedure, that Rai Sham Krishna could not institute the suit on behalf of the minor co-plaintiffs; that the only person who could institute a suit on their behalf was the guardian appointed by the Court, and that, as the minors were necessary plaintiffs in the case, the suit as instituted was *ab initio* void, failed and must be dismissed. For this view, it further relied upon the case of *Har Bilas* v. *Lachman Das* (1). As regards the case of *Har Bilas* v. *Lachman Das*, we are of opinion that we need not consider it any further, as the case was decided before the passing of Act No. VIII of 1890, and that Act has made the law, in our opinion, sufficiently clear for us to follow without any regard to the cases decided before it was passed. Section 440 of the Code of Civil Procedure, as amended by Act No. VIII of 1890, provides, first, that every suit by a minor shall be instituted in his name by an adult person, and, secondly, that if a minor has a guardian appointed or declared by an authority competent in this behalf, such suit shall not be instituted on behalf of the minor by any person other than such guardian, except with the leave of the Court obtained in the way provided [164] by that section. In this suit, as it stands at present, we have the fact that the guardian appointed by an authority competent in that behalf has not instituted the suit on behalf of the two minor plaintiffs, and that no application has up to now been made to bring her as guardian upon the record. We have the further fact that Rai Sham Krishna, who posed as guardian, has never obtained the leave of the Court to sue on behalf of his minor brothers. The learned counsel for the appellants attempted to meet this difficulty that was raised in his way by first contending that the mother of the minor co-plaintiffs had not been declared guardian by a competent authority. This contention was based upon the argument that we had before us the case of a joint Hindu family living jointly, the *karta* of which family was the plaintiff Rai Sham Krishna, that as such *karta* he was competent to manage and to institute suits respecting the joint family property, and that no need existed for the appointment of any guardian to the minors. In fact, his contention went so far as to maintain that Act No. VIII of 1890 did not apply to the case of a joint Hindu family living jointly. It is not necessary to decide that question in the present case. We have the fact that a Court having jurisdiction to appoint a guardian for the minors has appointed as guardian the mother of the minors. In such a case we hold that s. 440 of the Code of Civil Procedure precludes any other person than the

(1) 11 A.W.N. (1891) 42.

guardian so appointed from instituting a suit on behalf of the minors, except in the case pointed out in s. 440, *i.e.*, when, after due notice has been given to such guardian and after hearing and objection which such guardian may desire to make with respect to the institution of the suit, the leave of the Court has been granted to another person to institute the suit on behalf of such minors. This being so, we so far agree with the Court below that the suit was not properly instituted on behalf of the minor plaintiffs. This did not, however, entail the dismissal of the suit as brought. There was from the beginning before the Court one plaintiff who was *sui juris*, and further no [165] objection was taken to the effect that the remaining plaintiffs were not properly represented. If the respondent wished to raise the objection that the minors were necessary parties to the suit, and that, inasmuch as they were not properly represented, they could not be considered to have been joined as parties, that objection as to non-joinder had by law to be taken at the earliest opportunity, and in any case before the first hearing. Section 34 expressly provides that any such objection not so taken shall be deemed to have been waived by the defendant. In this case, as we have already pointed out, the objection as to non-joinder of the plaintiffs was not taken until two years had elapsed from the date of the first hearing. The Court below was therefore not justified in dismissing the suit on the ground of non-joinder. While the case was slowly proceeding, one of the minor co-plaintiffs came of age and asked the lower Court to be permitted to proceed with the case, but permission was refused, and wrongly refused. The Court should have done what we now direct to be done in this case, and that is that the title of the suit be corrected and read henceforth, so far as that plaintiff is concerned, as "Rai Butte Krishna, late a minor but now of full age." This correction, which should have been made, would have cured the defect of non-joinder so far as Rai Butte Krishna was concerned. In the view we have taken it is immaterial whether the third plaintiff was properly represented or not. The case must, however, go back, and the Court will now have an opportunity of doing that which it should have done at a much earlier stage of the proceedings, namely, of allowing the third plaintiff to be properly represented, and this it can do by following the procedure laid down in s. 440 of the Code of Civil Procedure. The view we have just taken is, we find, similar to that adopted by the Calcutta High Court in the case of *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1).

We decree this appeal, and, as the Court below has gone wrong on a preliminary point, we set aside the decree of that Court and remand the case to the Court below with directions to re-admit it [166] under its original number on its file of pending cases and to proceed with it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) 13 C. 189.

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DEC. 2.

REVISIONAL CRIMINAL.

20 A. 166 = 18 A.W.N. (1898) 7.

20 A. 166 = 18 A.W.N. (1898) 7.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* DAL SINGH.* [2nd December, 1897.]

Act No. XLV *of* 1860 (*Indian Penal Code*), *s.* 498—*Enticing away a married woman—Evidence of marriage—Mere statement of the complainant and the woman insufficient.*

Where a charge is made under s. 498 of the Indian Penal Code of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.

[F., 13 Cr. L.J. 541 (542) = 15 Ind. Cas. 813 = 5 S.L.R. 270 (272); R., 31 B. 218 = 9 Bom. L.R. 148 (151) = 5 Cr. L.J. 164; 18 A.W.N. 186; 10 Cr. L J. 235 = 2 S.L. R. 22 (23) Cr.]

THIS was a case referred by the Sessions Judge of Mainpuri to the High Court on an application for revision made by Dal Singh. Dal Singh had been convicted by a Deputy Magistrate of the offence punishable under s. 498 of the Indian Penal Code, and sentenced to a fine of Rs. 25, or in default to four months' rigorous imprisonment. In his application in revision he contended that there was no sufficient evidence to prove the marriage between the woman he had been convicted of abducting and her alleged husband, the complainant. That evidence consisted of the statement of the woman, who was called as a witness before the Deputy Magistrate, and the statement of the complainant. In support of the application the case of *Queen-Empress* v. *Kallu* (1) was relied on.

The following order was passed by the High Court.

ORDER.

EDGE, C.J., and BURKITT, J.—In any view of this case the sentence was entirely inadequate. In one view, the case was merely one under s. 498 of the Indian Penal Code; but the woman, if she was the complainant's wife, was, if the evidence is true, enticed away by the accused, who had [167] connection with her and kept her for sometime. If her story is true, the accused man must in addition have committed the offence punishable under s. 376 of the Indian Penal Code. The case has not been properly tried. In cases of this kind, where a false charge may easily be made of enticing away a woman, said to be a married woman, but possibly only a mistress, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. We set aside the conviction and sentence, and we direct that a further inquiry be held before some competent Magistrate of the district, other than Syed Mazhar Ali, who can either deal with the case himself, or, if he should be of opinion that a case under s. 376 is made out, will act accordingly.

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* Criminal Revision No. 457 of 1907.

(1) 5 A. 233.

20 A. 167 = 18 A.W.N. (1898) 7.

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DEC. 9.

APPELLATE CIVIL.

APPELLATE CIVIL.

20 A. 167 = 18 A.W.N. (1898) 7.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PANCHAITI AKHARA KALAN UDASI SRI SAT GURU NANAK NIR WAN PANCH PARMESHWAR, IN KYDGANJ, CITY ALLAHABAD, THROUGH MAHANT MOTI RAM, MOKAMI HARI DAS, MAHANT NARAIN DAS, MAHANT SOTI PRAKAS, MAHANT GOKUL DAS, MAHANTS GANGA RAM AND ISWAR DAS, LOCAL AGENTS AND MANAGERS OF THE SAID AKHARA (*Plaintiffs*) *v.* GAURI KUAR AND ANOTHER (*Defendants*).*

[9th December, 1897.]

Civil Procedure Code, s. 435—Company—Corporation—Unincorporated society—Form of suit.

The corporation contemplated by the Code of Civil Procedure is a corporation as known in English Law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed.

In a suit by an unregistered and unincorporated society the names of the members of the company must be disclosed. If this is not done, and if the society is neither a corporation nor a company authorized to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of the Code of Civil Procedure, s. 435, applicable, the plaint is a bad plaint. *Koylash* [168] *Chandra Roy* v *Ellis* (1), *The Muhammadan Association of Meerut* v. *Bakhshi Ram* (2) and *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church of New York* (3) referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Ram Prasad*, for the appellants.

The respondents were not represented.

JUDGMENT.

BANERJI and AIKMAN, J.J.—This was a suit for sale brought upon a mortgage, dated the 18th of July 1889, by the plaintiffs-appellants who described themselves in the plaint as follows :—"Panchaiti Akhara Kalan Udasi Sri Sat Guru Nanak Nirwan Panch Parmeshwar, in Kydganj, city Allahabad, through Mahant Moti Ram, Mokami Hari Das, Mahant Narain Das, Mahant Soti Prakas, Mahant Gokul Das, Mahants Ganga Ram and Iswar Das, Local Agents and Managers of the said Akhara." It was stated in the plaint that the loan had been taken from, and the mortgage granted to, "The Panchaiti Akhara Kalan Udasi in muhalla Kydganj in the city of Allahabad, under the management of the plaintiffs." The defendants did not appear at the hearing. The Court of first instance, however, relying upon the ruling of this Court in *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church of New York* (3) dismissed the suit. It was of opinion that the "Akhara Panchaiti" was not a corporation, and had no "legal status" to sue. This decree was affirmed by the Court of first appeal.

It was contended in this second appeal that the Akhara Panchaiti was a corporation by prescription and entitled to sue in its corporate name. Having regard to the importance of the question raised, and to the fact that the decision of it will affect a large number of religious associations similar to that of the plaintiffs, which, we understand, have

* Second Appeal, No. 236 of 1895, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 24th January 1895, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 8th November 1894.

(1) 8 W.R. 45. (2) 6 A. 284. (3) 16 A. 420.

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DEC. 9.

APPELLATE CIVIL.

20 A. 167 = 18 A.W.N. (1898) 7.

hitherto sued and been sued in the manner in which the plaintiffs have brought this suit, we took time to consider our judgment. After giving the question our best consideration, we have come to the conclusion that the [169] plaintiffs are not a corporation within the meaning of the Code of Civil Procedure.

The Akhara Panchaiti is, according to the finding of the Lower Appellate Court, an association "formed by the followers of Guru Nanak, who flourished in the 15th century. Certain of his followers are stationary. They carry on money dealings and acquire immoveable property and distribute food and clothing to other followers of Guru Nanak who wander over the country, or they otherwise dispose of their income in charity." Such an association might be a corporation under the Civil Law, but is not a corporation under the English Law.

"Corporations, by the Civil Law seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them." (Stephen's Commentaries on the Laws of England, Vol. III, p. 8, 8th Edition.) In England, however, "the Sovereign's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given (*ib.* p. 8)." Such consent is presumed in the case of corporations by prescription, that is, corporations "which have existed as corporations from a time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes there once was one, and that by the variety of accidents which a length of time may produce the charter is lost or destroyed (*ib.* p. 8)." In our opinion the corporation contemplated by the Code of Civil Procedure is a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign or of such antiquity that the consent of the Sovereign may be presumed. It is not alleged that the Akhara Panchaiti was founded with the sanction of the ruling authority, and the learned advocate for the appellants has frankly admitted that he is unable to trace the [170] origin of the plaintiffs' association to royal sanction Further, the antiquity of the association is not in our opinion such as to make it a corporation by prescription. As the plaintiff's society is neither a corporation, nor has it got itself registered so as to make it "a company authorized to sue and be sued in the name of an officer or of a trustee," we are constrained to hold that the suit has been rightly dismissed.

The decision of Peacock, C. J., in *Koylash Chandra Roy* v. *Ellis* (1) is an authority for holding that in a suit by an unregistered or unincorporated company, the names of the members of the company must be disclosed. If this is not done, and if the society is neither "a corporation, nor a company authorized to sue or be sued in the name of an officer or of a trustee," so as to make the provisions of s. 435 of the Code of Civil Procedure applicable, the plaint is a bad one. As remarked in Stephen's Commentaries (Vol. III, p. 17, 8th Edition), the rights and privileges of a corporation "do not attach to any bodies of persons unincorporated, however connected they may be in point of social position, or however united by express compact; though a voluntary society

(1) 3 W.R. 45.

of individuals should unite together by mutual agreement for common purposes; should provide a common stock by subscription, and should subject themselves to laws of their own creation for the Government of their society, yet all this will not entitle them to the privilege of suing or being sued in their social capacity."

As observed in the case relied on by the lower Court—*Yusuf Beg* v. *The Board of Foreign Missions, &c.* (1), bodies of this nature wishing to claim the privileges and protection which the law assigns to corporations "should take care to have themselves incorporated and registered in such a way that those who deal with them or are brought in contact with them can know whom they are suing and by whom they are sued."

We would also refer to the case, *The Muhammadan Association of Meerut* v. *Bakshi Ram* (2).

[171] As was held in that case, so it must be held here, that the plaintiff society has *per se* no status in law to warrant its instituting a suit in its own name by some of its members. As the suit was brought in the name of the society itself, and does not purport to be a suit brought by some out of numerous persons having the same interest, s. 30 of the Code of Civil Procedure has no application. We may add that in this case permission to sue was not applied for under that section.

For the above reasons we hold that the appeal fails, and we dismiss it, but without costs, as the respondents are not represented.

Appeal dismissed.

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20 A. 171 (P.C.)=2 C.W.N. 129=25 I.A. 9=7 Sar. P.C.J. 273.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces.*]

BINDESRI NAIK (*Defendant*) *Appellant v.* GANGA SARAN SAHU AND OTHERS, (*Plaintiffs*), *Respondent.*

(10th November and 8th December, 1897.)

Construction of a contract in a mortgage deed as to interest. Also the absence of requirement to register, under s. 17 of Act, No. III of 1877, petitions filed in judicial proceedings.

A deed of mortgage stipulated in general terms that interest was to run upon the principal sums advanced, without any limitation as to the period of its currency; and also stipulated that, in default of punctual payment at the end of each year, the mortgagees were to be at liberty to treat unpaid interest as principal, and to recover it from the mortgaged property. According to the tenor of the deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment.

Mathura Das v. *Raja Narindar Bahadur Pal* (3) referred to and followed. Section 17 of the Registration Act III of 1877 does not apply to proper judicial proceedings whether consisting of pleadings filed by the parties, or orders made by the Court.

[R., 28 A. 78=2 A.L.J. 564=A.W.N. (1905) 195; 35 C. 837 (841)=7 C.L.J. 492=12 C.W.N. 849; 36 C. 193=5 C.L.J. 611; 31 M. 330 (333)=18 M.L.J. 1 (N)=3 M.L.T. 377; 6 M.L.T. 313 (317)=3 Ind. Cas. 701; 1 N.L.R. 9 (12); 4 O.C. 78; 14 C.P.L.R. 49; D., 1 C.L.J. 388 (406).]

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(1) 16 A. 420.

(2) 6 A. 284.

(3) 23 I. A. 138=19 A. 39.

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CROSS appeals from two decrees (9th March 1893) of the High Court, varying a decree (30th June 1888) of the Subordinate Judge of Gorakhpur.

[172] These appeals were consolidated by an order in Council of the 9th March 1893. The plaintiffs were mahajans in Gorakhpur. The defendants were Bharan Naik, deceased during the proceedings in the suit, and his son Bindesri Naik. The claim was brought upon two deeds mortgaging a village, and shares in pattidari villages; the first deed dated the 21st August 1875, securing a loan of Rs. 8,977 to be re-paid in two years, with interest at Rs. 1-8-0 a month, and the second, dated the 3rd May 1876 securing Rs. 2,977 to be re-paid on the date when the first loan would become due, at the same rate of interest. Both mortgages were by conditional sale, and the provisions in the first deed were made applicable to the mortgage in the second. All the particulars are set forth in their Lordships' judgment.

The principal question determined on this appeal related to the construction of the contract for the payment of interest, and to whether it was payable at the contract rate after the day, fixed for payment originally, had passed. Another question (the answer to which had been the ground of decision in the High Courts) was whether petitions for further time filed by the mortgagors during proceedings commenced for foreclosure should have been registered in order to be admissible in evidence in this suit, according to s. 17 of the Registration Act, 1877.

On the 18th January 1879 the mortgagees applied, under s. 8 of Regulation XVII of 1806, for foreclosure, stating in this petition that the unpaid debt was Rs. 21,646. The prescribed procedure, however, was not followed up. Afterwards the mortgagees petitioned for a deduction of Rs. 7,452 from their claim.

On the following dates, *viz.*, 3rd September 1879, 4th December 1879, 5th April 1881, 23rd May 1882, 15th April 1884 and 15th May 1886, petitions were presented to the same Court containing agreements between the parties, by which, in consideration of the amounts for which foreclosure might be obtained, the amounts being agreed upon in each petition, the period of the loan was, from time to time, extended. Interest due, but unpaid, **[173]** was at those intervals added to the principal, the whole carrying interest at the rate stipulated by the deeds. The last petition stated it to be agreed that Rs. 33,444 were then due for principal and interest together and that the mortgagor should be liable for that sum with interest thereon at the rate of Rs. 1-8-0 a month upon having time granted to him by the mortgagees; that time was three months more; at the end whereof upon default in payment of principal and interest, the mortgagors, by taking proper steps, should become the proprietors of the land mortgaged.

Default made was followed by this suit claiming Rs. 43,450, commenced on the 12th December 1887.

The following were the principal issues:—Whether the mortgage had or had not been foreclosed; whether the whole of the mortgage debt had been satisfied; whether the interest had been properly calculated.

Both the Courts below found that the foreclosure proceedings had had no result, and that principal and interest were still unliquidated. But the Court of first instance treated the admissions made in the petitions for further time as the result of advantage taken of the helpless state of the debtors, and decreed only Rs. 24,900 to be due.

On appeals by both parties a division Bench of the High Court

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referred to the petitions for time, taking the sum stated in the last as agreed upon. They gave the following reasons:—

"The plaintiffs' contention here is that that sum of Rs. 33,444-7-6 "should be taken as the principal due. Under the bond of the 21st of "August 1875 it was agreed that when interest was in default the "mortgagees should be entitled to add such interest to the principal "and treat it as principal. The conditions of the first bond were "by the second bond made applicable to the latter. Now, although "the bonds do not appear to contemplate the payment of *post diem* "interest, and although the greater part of that sum of Rs. 33,444-7-6 "must have been composed of *post diem* interest, it was in our "opinion competent to the parties to agree on the one side that [174] "the period when foreclosure should be finally applied for should be "extended, and on the other, in consideration of such extension of "time, that the original principal amounts should be increased by adding "to them interest at the rate stipulated in the bond, treating such "interest as principal secured by the bond, and by agreeing that interest on "such amount should be paid at such time as they might arrange. On the "part of the defendants it was contended here that as the petitions, "including that of the 15th May 1886, to which we have referred, were "not registered, they could not be considered, or given effect to, in this "suit. We do not agree with that contention. The proceedings instituted "on the 18th January 1879, were before the Court in which those pro-"ceedings were instituted, and it was quite competent to the parties to "those proceedings from time to time to present petitions, stating accounts "upon the basis of which the Court might act without there being any "necessity for those petitions being registered. The Indian Registration Act "never could have been intended to make it obligatory upon parties to a "proceeding pending in a Civil Court to register statements of accounts "agreed upon for the Court's guidance, although those statements of "accounts related to charges upon immoveable property. In our opinion "those petitions may be looked at and effect given them. If the mort-"gagees had not on the basis of the agreements contained in those "petitions granted time, they would have been entitled to recover by "foreclosure or other proceedings the principal and interest stipulated in "the mortgage contract and damages in the nature of interest for the "non-payment of the principal amount on the due date. Here the "mortgagors having from time to time obtained extension of time by "agreeing to statements as to the amount due, seek to deprive the mort-"gagees of the consideration upon which the time was so extended, and "to confine them to such rights as, having regard to limitation, they "would be entitled to on the two mortgage contracts standing by them-"selves. That was not the intention of the parties at the time. The "Subordinate [175] Judge did not take the Rs. 33,444-7-6 as the basis "upon which to calculate the amount of the decree. He was of opinion "that the mortgagors were helpless, and that the mortgagees took undue "advantage of their helplessness, and that as a Court of equity he ought "to interfere. No evidence has been brought to our attention to suggest "that any undue advantage was taken.

"On the one side the mortgagees were, in 1879, taking proceedings "authorized by Regulation XVII of 1806, to obtain foreclosure; and on "the other side the mortgagors were desirous of obtaining time. What "was done was that time was given on the basis of interest continuing to be payable at the rate mentioned in the bonds, and that such interest

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"should be added to the principal. In our opinion the Subordinate Judge "was not justified in concluding that there had been any undue advantage "taken by the mortgagees. In our opinion we shall be giving effect to the "arrangement between the parties by making a decree under s. 86 of "the Transfer of Property Act, and fixing the amount at Rs. 33,444-7-6 "with interest thereon at the rate of Rs. 1-8-0 per mensem for three "months, from the 15th May 1886, and including in the amount on pay- "ment of which redemption will be obtained, the plaintiffs' proportionate "costs on the amount decreed by us. The defendants will have time to "pay the decretal amount within six months from the date of declaring "the amount of the account to be taken in this office. The decree will be "prepared under s. 86 of the Transfer of Property Act. In preparing "the account the proportionate costs in this Court and the Court below "of the defendants in respect of that portion of the claim disallowed by us "will be deducted from the amount payable by the defendants. The above "principle will be applied to the appeal. To the above extent the plaint- "iffs' appeal is allowed with proportionate costs, and the defendants' is "dismissed with costs."

On this appeal.

[176] Mr. *G. E. A. Ross*, for the appellants argued that the petitions filed in the foreclosure proceedings, representing transactions between the parties affecting immoveable property, were within s. 17 of the Registration Act III of 1877. The agreement stated in the petitions being treated as apart from the evidence, the ground of decision in the High Court's judgment was insufficient.

Mr. *J. D. Mayne*, for the respondents. The petitions in judicial proceedings required no registration. Any argument on the construction of the contract to pay interest, that it ceased on the day fixed for repayment of the loan to be claimable at the rate fixed, was precluded by the decision in *Mathura Dass* v. *Raja Narindar Bahadur Pal* (1), which disaffirmed the judgment on this point in *Narindar Bahadur Pal Khadim Husain* (2).

JUDGMENT.

Afterwards, on the 8th December 1897, their Lordships' judgment was delivered by

LORD WATSON :—The late Bhairon Naik, and his son and heir Bindesri Naik, who is the present appellant, on the 21st August 1875, executed a mortgage, in the form of a conditional sale, in favour of the deceased Debi Prasad, who is now represented by the respondents Ganga Saran Sahu and Ram Saran Sahu, and of the other respondent Goshain Moti Gir. By the terms of that deed, the mortgagors acknowledged "that the sum borrowed is Rs. 8,997 in cash of the current coin; that interest shall be paid "on this sum at Rs. 1-8-0 per cent. per mensem": and that they had, in lieu thereof, given a conditional mortgage of the entire village of Ramnagra, and of certain other shares of lands (which need not be enumerated) "for a term of two years from this day, engaging to redeem the mort- "gaged shares by paying the entire amount in a single sum within or at the "time stipulated." The deed provided that, if they should fail to pay the principal money at the time stipulated, the mortgage of the shares should **[177]** in lieu of that money only be foreclosed; and they should every year pay the interest; and that on defualt of payment of interest at the end of the year, "the creditors shall be at liberty to treat it as principal,

(1) 23 I. A. 138 = 19 A. 39.
(2) 17 A. 581.

"and to recover it with interest thereon from our person and our other "property, and also from the property mortgaged."

By a second deed of mortgage by conditional sale, dated the 3rd May "1876, which recites the previous deed of the 21st August 1875, the appel- "lant and his father borrowed from the same lenders "another sum of "Rs. 2,997 of the current coin, engaging to pay interest thereon at Rs.1-8-0 "per cent. per mensem; that we tack this money on to the conditions of "the former deed of mortgage by conditional sale, engaging to pay it with "the amount of the said former deed; that on default of payment of the "amount of the former deed or of this one, according to the terms of the "former deed, the mortgage of the said shares shall, in lieu of the amount "of both deeds, be foreclosed, and the sale shall become absolute."

The time of payment stipulated in the first deed, which was made applicable to both, arrived on the 21st August 1877. No payment having been made, the creditors, on the 18th January 1879, presented an application in the Court of the Subordinate Judge of Gorakhpur, praying that at first the usual process of allowing one year's time should be issued to the mortgagors, and that, if they failed to deposit Rs. 21,066-11-3, the amount of principal and interest then claimed as due, together with future interest and costs of foreclosure, an order might be passed declaring the mortgage to be foreclosed. The record bears, under the signature of the Judge, that the application was admitted by the present appellant and his father.

On the 3rd September 1879, the creditors filed an application stating that they had received two sums, together amounting to Rs. 7,452, from two persons, one of whom had purchased the entire village Ramnagra, and the other the 8-anna share of Mauza Tina from the mortgagors. They accordingly prayed [178] that Rs. 7,452 should be deducted from the sum claimed in their original application; that the village Ramnagra and the 8-anna share of Mauza Tina should be exempted from foreclosure; and that the remaining property of the mortgagors should be held liable to foreclosure for the balance of the amount originally claimed by them. The assent of the mortgagors to the application is attested by the signature of the Judge.

After the expiry of the year of grace allowed them for consignation or payment, the mortgagors, between the 4th December 1879 and the 15th May 1886, from time to time presented no less than five incidental petitions to the Court praying for further time. These petitions were, with consent of the creditors applying for foreclosure, confirmed by the Court, and directed to be filed with the foreclosure record. In each of these applications the mortgagors stated the total amount of principal and interest which, at its date, was owing by them under the two mortgage deeds, after deducting the sums paid to account by their vendees. The sum thus stated by them in their last application, on the 15th May 1886, was Rs. 33,444-7-6. Upon that occasion, by consent of the creditors, they obtained an extension of time for three months; but they failed, as usual, either to consign or pay within the time allowed them.

On the 12th December 1887, the creditors filed their plaint in this suit, praying either to have possession on the footing that the prior proceedings had effected a complete foreclosure, or to have the usual foreclosure decree. They claimed that the sum due to them was Rs. 43,450-11-6. In answer, the mortgagors filed a written statement in which they for the first time maintained that the mortgage deeds did not cover interest, at all events beyond the stipulated term of payment, being the 21st August 1877. They

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did not dispute that, in their repeated applications which have been already referred to, they had constantly admitted and asserted that, under the deeds in question, they were not entitled to redeem, except upon payment of the principal sums, with interest thereon at Rs. 18 per cent. per annum until [179] paid ; and that in respect of such admission and assertion they had got an extension of time with the consent of their creditors. But they contended that none of these proceedings in the Subordinate Court of Gorakhpur could be referred to or founded upon, because they had not been registered in terms of s. 17 of Act III of 1877.

It does not clearly appear whether the Subordinate Judge was of opinion that interest was due under the mortgage deeds, and must be paid in order to avoid foreclosure. Had he been of that opinion, it would have been unnecessary for him to consider the effect of the statements and admissions previously made by the mortgagors in order to obtain delay. He held that registration of such proceedings was not compulsory, and that these admissions must receive effect ; but, being of opinion that the creditors had taken an undue advantage of the mortgagors' helplessness, he, upon grounds which he describes as equitable, found that the creditors were only entitled to simple interest, and allowed the mortgagors to redeem on payment of Rs. 24,990-15-0, within six months.

Both parties appealed against that judgment to the High Court at Allahabad. In disposing of the cross appeals, the Court, consisting of Sir John Edge, C. J., and Aikman, J., expressed an opinion that the mortgage bonds did not appear to contemplate the payment of interest *post diem*, that is, after the day upon which it was stipulated that the principal of the loans was to be repaid. But they held that the mortgagors, having, from time to time, obtained extensions of the term of payment, by admissions that interest was included in the amount due, could not confine their creditors to such rights as they would have had under the two mortgage contracts standing by themselves. They held that judicial proceedings did not require to be registered under Act III of 1877, s. 17 ; and also that the Subordinate Judge was not justified in finding that an undue advantage had been taken of the mortgagors. They accordingly increased the amount payable for redemption to Rs. 36,492-12-3, taking, as [180] the basis of their calculation, the sum of Rs. 33,444-7-6, which the mortgagors had admitted to be due on the 15th May 1886.

The only plea urged for the mortgagors in support of this appeal was that founded upon Act III of 1877, which had been rejected by both Courts below. Their Lordships do not think that, according to the tenor of the mortgage deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment. The learned Judges in the Courts below appear to have fallen into the error, which was corrected by this Board in *Mathura Das* v. *Raja Narindar Bahadur Pal* (1), of confining their attention to a single passage, instead of taking into consideration the whole provisions of the deeds with respect to interest. In the present case, by the deed of the 21st August 1875, the whole conditions and provisions of which are made applicable to both loans, it is stipulated, in general terms, that interest at Rs. 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that, in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal, and to

(1) 23 I. A. 138.

recover it from the mortgaged property. It was therefore, in their Lordships' opinion, unnecessary for the creditors, respondents in this appeal, to rely upon the admissions made by the mortgagors in the course of the foreclosure proceedings.

Although, in the view which their Lordships take the question whether those proceedings can be founded on, without their having been registered in terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of s. 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

[181] Their Lordshisps will, for those reasons, humbly advise Her Maiesty to affirm the decrees appealed from, and to dismiss the consolidated appeals with costs.

Appeals dismissed.

Solicitors for the appellant: *Messrs. Barrow and Rogers.*
Solicitors for the respondents: *Messrs. Pyke* and *Parrott.*

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20 A. 181 = 18 A W.N. (1898) 11.

REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Jutsice Burkitt.

QUEEN-EMPRESS *v.* FATEH BAHADUR.* [11th December, 1897.]

Criminal Procedure Code, s. 555—Jurisdiction—Appellate Court not disqualified by interest from granting permission to a subordinate Court to try a case.

The interest which might disqualify a Court from trying or committing for trial a case, having regard to s. 555 of the Code of Criminal Procedure, will not prevent an appellate Court from giving the permission contemplated by that section.

IN this case a complaint was lodged against one Fateh Bahadur, a clerk in the employment of the North-Western Provinces Club of the commission by him of an offence punishable under s. 409 of the Indian Penal Code in respect of moneys the property of the members of the Club. The complainant was the Honorary Secretary of the Club. The case came before the Cantonment Magistrate of Allahabad, who, being himself a member of the Club, referred it to the Sessions Judge under s. 555 of the Code of Criminal Procedure to obtain his permission to try it. The Sessions Judge was also a member of the Club, and held on this application that the prohibition contained in s. 555 inferentially applied to him also and disabled him from giving the permission asked for. He accordingly declined to grant permission to the Cantonment Magistrate to try the case. Against this order of the Sessions Judge the complainant applied in revision to the High Court.

[182] Mr. *G.P. Boys*, for the applicant.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—A charge under the Indian Penal Code came on for investigation before the Cantonment Magistrate of Allahabad. The person charged had been a servant of the North-Western Provinces

* Criminal Revision No. 603 of 1897.

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Club. He was charged with having committed the offence punishable under s. 409 of the Indian Penal Code in respect of moneys belonging to the Club. The Cantonment Magistrate was a member of the Club, and he referred the matter to the Court of Sessions Judge of Allahabad for permission to proceed with the case. The Sessions Judge was also a member of the Club, and held that as he was interested as a member of the Club he had no jurisdiction. In that he was wrong. There is nothing in s. 555 of the Code of Criminal Procedure to suggest that, under these circumstances, the Sessions Judge of Allahabad had not jurisdiction to grant permission to the Cantonment Magistrate to try the case or commit it for trial.

We set aside the order of the Sessions Judge of Allahabad and direct the present Sessions Judge of Allahabad to consider the reference from the Cantonment Magistrate, as he has jurisdiction to decide whether permission should or should not be given to try, or commit for trial, the accused.

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20 A. 182 = 18 A.W.N. (1898) 19.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

INAYAT HUSEN AND OTHERS (*Plaintiffs*) *v.* ALI HUSEN AND OTHERS (*Defendants*).* [16th December, 1897.]

Limitation—Adverse possession—Possession of usufructuary mortgagees—Act No. XV of 1877 (Indian Limitation Act) sch. ii, art. 144—Burden of proof.

The possession of a usufructuary mortgagee being the possession of all the persons who have the right of redemption, that is, of all the persons entitled to the estate, it is only when after redemption possession is taken by some of the persons so entitle that their possession can become adverse as against the others.

[183] In a suit for possession of immoveable property it is for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the defendant can be called upon to substantiate a plea of adverse possession. *Parmanand Misr* v. *Sahib Ali* (1) and *Jafar Husain* v. *Mashuq Ali* (2) referred to.

In dealing with the question of possession as between brothers and sisters in native families regard must be had to the conditions of life under which such families live, and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession. *Fazal Karim* v. *Umda Bibi* (3), referred to.

[Rel., 17 Ind. Cas. 518 (519); R., 9 O.C. 91 (95); 105 P.R. 1901; U.B.R. (1897—1901) 461.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Pandit *Moti Lal*, for the respondent.

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* First Appeal No. 238 of 1894, from a decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Meerut, dated the 17th August 1894.

(1) 11 A. 438. (2) 14 A. 193. (3) 4 A.W.N. (1884) 171.

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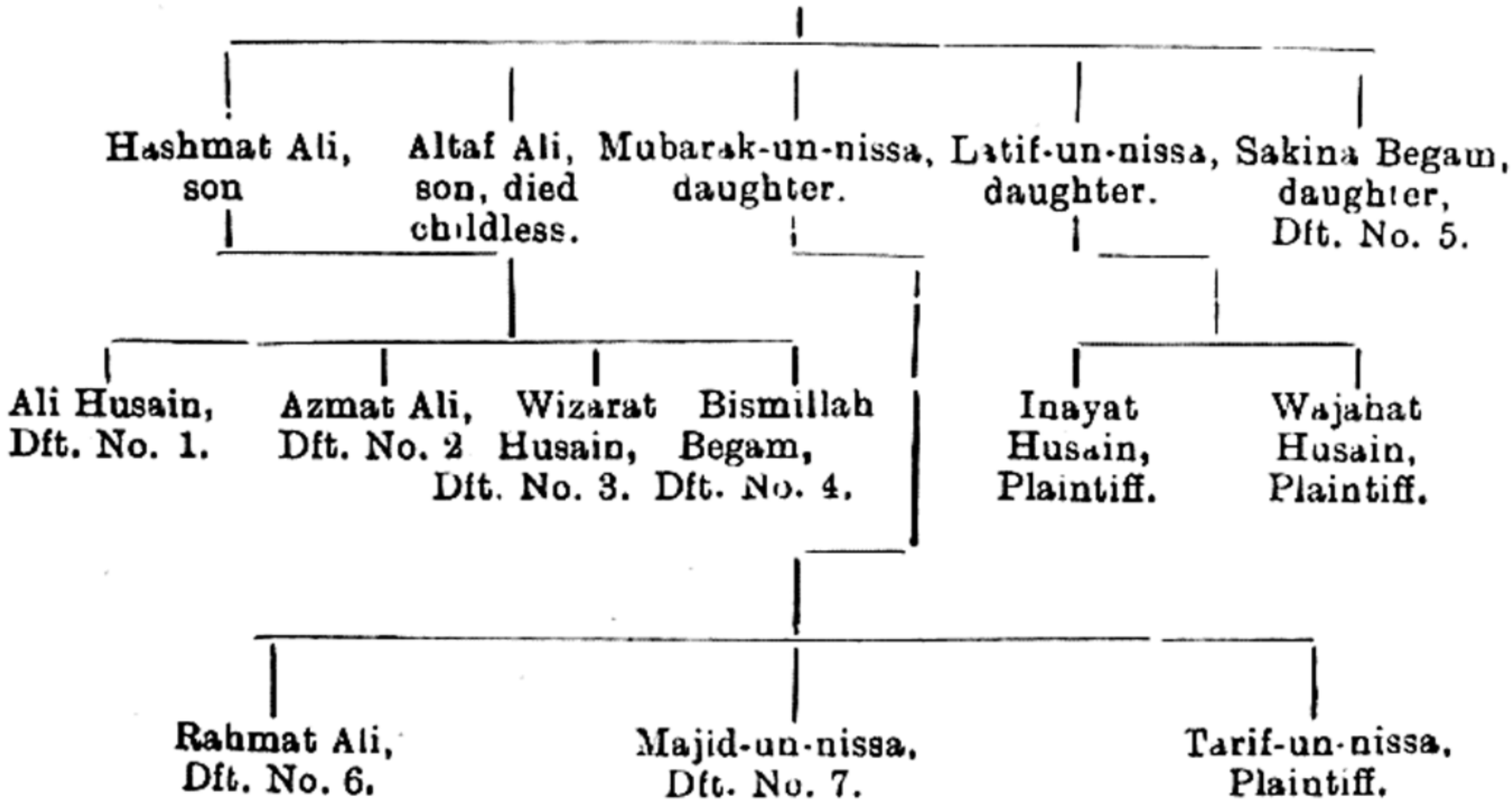
JUDGMENT.

BANERJI and AIKMAN, JJ. :—The following pedigree shows the relationship between the principal parties to the suit out of which this appeal has arisen :—



[184] The property in suit originally belonged to Karamat Ali, who died about fifty years ago, leaving him surviving his two sons and three daughters, who were heirs to his estate. The names of his sons alone, however, were entered in the revenue papers, and on the death of Altaf Ali the name of Hashmat Ali alone was recorded, although the right to his share devolved on his surviving brother and sisters. Upon Hashmat Ali's death the names of his sons and daughter, who are the first four defendants to the suit, were entered in respect of the whole property.

The first and second plaintiffs are the sons of Latif-un-nissa, and the third plaintiff is a daughter of Mubarak-un-nissa. The fourth plaintiff is the purchaser from the other plaintiffs of a portion of what is alleged to be their share of the estate of Karamat Ali and she is evidently financing the suit. The extent of the legal share of the first three plaintiffs is 35 sihams out of 140, *i.e.*, one-fourth.

The plaintiffs allege that they have all along been in possession of their share jointly with the other heirs of Karamat Ali, but the first four defendants now dispute their title. The plaintiffs therefore brought this suit for establishment of their right to a fourth share, for possession of that share and for partition of certain houses.

The main defence to the suit was that of limitation. The lower Court has allowed it and has dismissed the claim.

As regards a portion of the property claimed, namely, the resumed *muafi* lands in kasba Khurja, the plea of limitation cannot prevail. Those lands were mortgaged by the ancestor and were in the possession of the mortgagee. The mortgage having been discharged out of the usufruct, it was redeemed by the defendants Nos. 1 to 4 in 1888, when they took possession. The possession of the mortgagee was the possession of all the persons who had the right of redemption, that is, of the

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persons entitled to the estate. It was only when, after redemption, possession was taken by the first four defendants that their possession became adverse to the plaintiffs. As the suit was brought within twelve [185] years from the date of the defendant's possession, it was, as regards this part of the claim, within time. The Court below has evidently erred in dismissing this portion of the claim as barred by limitation. There is no question as to the title of the plaintiffs and the extent of their share. So far as the *muafi* lands are concerned their title has not become extinct by lapse of time, and they are entitled to a decree.

With regard to the remainder of the property, it is contended that the suit is governed by art. 144 of the second schedule to Act No. XV of 1877, and that the burden of proof was on the defendants to establish the adverse possession alleged by them. In our opinion in every suit for possession, the plaintiff must prove not only a legal title to possession, but a subsisting title not barred by the law of limitation. The effect of that law is not only to bar the remedy on the expiry of the prescribed period of limitation, but to extinguish the right (*vide* s. 28 of Act No. XV of 1877). It is therefore for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the defendant can be called upon to substantiate his plea of adverse possession. This was held by this Court in *Parmanand Misr* v. *Sahib Ali* (1) and *Jafar Husain* v. *Mashuq Ali* (2).

The *quantum* of evidence which it will be necessary for the plaintiff to adduce will depend on the circumstances of each case. In some instances very slight evidence may be sufficient to shift the burden of proof on the defendant. We agree with the observation of the learned Judges in *Fazal Karim v. Umda Bibi* (3), that in dealing with question of possession as between brothers and sisters in native families regard must be had "to the conditions of life under which such families live" and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. [186] In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession. In the suit before us the evidence adduced by the plaintiff hardly amounts to such proof.

[The rest of the judgment in this case deals mainly with the evidence in the case and therefore is not reported—ED.]

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20 A. 186=18 A.W.N. (1898) 20.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

QUEEN-EMPRESS *v.* LALTA PRASAD.* [18th December, 1897.]

Act No. XI *of* 1890 (*Prevention of Cruelty to Animals Act*), *s.* 6 (1)—*Meaning of the word "permit."*

Held, that the word "permits," as used in s. 6, clause (1), of Act No. XI of 1890, implies knowledge of that which is permitted.

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* Criminal Revision No. 552 of 1897.

(1) 11 A. 438. (2) 14 A. 193. (3) 4 A.W.N. (1884) 171.

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20 A. 186 = 18 A.W.N. (1898) 20.

THIS was a reference under section 438 of the Code of Criminal Procedure made to the High Court by the Officiating District Judge of Saharanpur on an application for revision of an order passed by the Joint Magistrate.

The facts of the case are thus stated in the referring order :—"The "applicant is a resident of the district of Farrukhabad, and is the sole "proprietor of a Company carrying goods and passengers between Saha- "ranpur and Rajpur. He carries on business under the style of Lalta "Prasad & Co. The local manager of the business is Lalta Prasad's "nephew Janki Das. It is admitted that he has complete control of the "management, and that he has various other local managers, clerks and "drivers under him. Applicant was prosecuted under s. 6 (1), of Act XI "of 1890 (The Prevention of Cruelty to Animals Act), and fined Rs. 100, "for permitting to be driven in a tonga a horse which was suffering from "severe harness galls and excessive weakness. The only point taken by "Mr. *Vansittart* for petitioner is that Lalta Prasad cannot be said to "have 'permitted' the unlawful use of the animal. It is admitted "that Lalta Prasad is a respectable man, that he usually resides at "**[187]** Farrukhabad and rarely comes here, and that he was at Farrukha- "bad when the alleged cruelty was committed."

Under these circumstances the Sessions Judge was of opinion that the applicant could not be said to have "permitted" the alleged cruelty within the meaning of the Act.

Mr. *A.E. Ryves*, in support of the reference.

The Government-Advocate (Mr. *E. Chamier*), for the Crown.

JUDGMENT.

BLAIR, J.—This is a case which has been submitted to this Court under s. 438 of the Code of Criminal Procedure, with the recommendation that the order of conviction should be quashed. The person convicted is unquestionably a resident of Farrukhabad. He made it his business to let out horses and ponies on hire, and a certain pony, his property, was being used, and cruelly used, on the high road between Saharanpur and Rajpur. The driver who committed the ill-usage was his servant; the nature of the ill-usage was this, that the pony was driven when it was, through collar galls, quite unfit to be so driven. The question is whether the owner "permitted" such illegal employment of the animal. The word "permit" has a well known meaning, and, unless under very exceptional circumstances, implies knowledge of that which is permitted. Such knowledge, it is not suggested, was in the possession of the owner of the pony. Mr. *Chamier* has been instructed to call my attention to two cases in the English Reports, in which a larger meaning has been given to the word "permit" than that which it bears in common parlance. One case is reported in 13 Law Journal, C. P., page 319; the other is reported in Law Reports 12 Q. B., page 639. In one case the person convicted was the owner of a licensed Music Hall. The other was a case of a Railway Company. I do not think the special circumstances existing in those cases have any parallel in this, and I am not aware of any case arising in an Indian Court in which the word "permit" has been interpreted, in a quasi-criminal case, in any meaning more extensive than that which it obtains in common parlance. No doubt the decision of this case adversely to the conviction will **[188]** materially limit the usefulness of the Act.

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That is a conclusion which I cannot obviate if the plain wording of the Act seems to me to make for the more limited construction. I therefore reluctantly set aside this conviction and order the fine, if paid, to be at once returned.

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20 A. 188 = 18 A.W.N. (1898) 12.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

TIKAM SINGH AND OTHERS (*Defendants*) *v.* THAKUR KISHORE RAMANJI MAHARAJ, THROUGH SHEO GOPAL AND OTHERS (*Plaintiffs*).* [22nd December, 1897.]

Civil Procedure Code, ss. 32 and 108—Powers conferred by s. 32 exerciseable even after an order has been passed under s. 108.

Held that the powers conferred by s. 32 of the Code of Civil Procedure in respect of the addition of parties were exerciseable even after a suit had been reinstated on an application under s. 108 of the Code made by one of the defendants who had not been served with notice of the suit.

IN this case a suit for sale under the Transfer of Property Act was brought by the trustees of a certain temple against Magan Behari Lal, Tikam Singh his son, and other defendants. In that suit a decree for sale was made. Subsequently Tikam Singh, who had not been served with notice of the suit, applied under s. 108 of the Code of Civil Procedure to have the decree set aside as against him, and it was accordingly set aside. After the suit as against Tikam Singh had been reinstated on the file of pending suits, the plaintiffs made an application under s. 32 of the Code of Civil Procedure praying that a minor brother of Tikam Singh, and Tikam Singh's two minor sons should be brought upon the record as defendants, they being all members of the same joint Hindu family and parties interested within the meaning of s. 85 of the Transfer of Property Act. This application was granted and the names of the minors were put on the record of the suit. Against this order Tikam Singh appealed to the High Court.

[189] Munshi *Ram Prasad*, for the appellants.

Mr. *D. N. Banerji*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—A suit for sale under the Transfer of Property Act was brought against Tikam Singh and others. A decree for sale was made. Subsequently Tikam, who had not been served with notice of the suit, presented an application under s. 108 of the Code of Civil Procedure to have the decree set aside as against him, and it was accordingly set aside. Thereupon the plaintiffs applied to have Tikam's minor brother and his two minor sons brought on under s. 32 of the Code of Civil Procedure as defendants, they being all members of a joint Hindu family and parties interested within the meaning of s. 85 of the Transfer of Property Act. The Court made an order bringing the minors on the record. From that order this appeal has been brought. It appears to us, that, as the suit was still at hearing before the Court of first instance, so

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* First Appeal, from Order No. 112 of 1896, from an order of Maulvi Syed Muhammad Seraj-ud-din, Subordinate Judge of Agra, dated the 18th November 1896.

far as the plaintiffs and Tikam Singh were concerned, the Court could exercise its discretion under s. 32 of the Code and add these defendants. We cannot say that the Court exercised its discretion wrongly. Such a case as this can but seldom occur, but in similar cases a Court should be cautious in making an order under s. 32 of the Code of Civil Procedure. Here the parties brought on were all in the same interest. Other cases might occur in which the interests might be conflicting. We dismiss this appeal with costs.

Appeal dismissed.

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20 A. 189 = 18 A.W.N. (1898) 14.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

PRAN NATH GHOSE (*Petitioner*) *v.* JADO NATH BHATTACHARJI (*Opposite Party*).* [23rd December, 1897.]

Act No. V of 1881 (*Probate and Administration Act*), *s.* 9—*Application for probate by an executor.*

Although under s. 85 of the Probate and Administration Act, 1881, it is within the discretion of the Court to refuse to grant an application for **[190]** letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. *Heera Coomar Sircar* v. *Doorgamani Dasi* (1) referred to.

[R., 42 P.L.R. 1913 = 110 P.W.R. 1913 = 18 Ind. Cas. 16.]

THIS was an appeal arising out of an application for probate of a will under s. 9 of Act No. V of 1881. The applicant, Babu Pran Nath Ghose, and the opposite party, Babu Jado Nath Bhattacharji, were the two executors of the will of Musammat Sonamani Dasi. Jado Nath took out probate of the will in the Court of the District Judge of Benares on the 9th May 1896. Pran Nath seems to have declined to take any part in carrying out his duties as executor, and in fact seems to have been sued by Jado Nath in the Court of Small Causes for the recovery of moneys in his possession belonging to the estate of the testatrix. Subsequently, on the 17th of March 1897, Pran Nath applied to the Court of the District Judge for probate to be granted to him of the will of Musammat Sonamani. This application was opposed by Jadu Nath and was dismissed by the Judge, chiefly, it would appear, on the ground that the applicant had been sued by the opposite party in his capacity as executor and a decree had been passed against him in the Benares Small Cause Court. From this order the applicant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.
Babu *Satish Chandra Banerji*, for the respondent.

JUDGMENT.

AIKMAN, J.—This appeal arises out of an application made under the Probate and Administration Act of 1881 for probate of a will. On the 20th of December 1895, Mussammat Sonamani, a Hindu lady, executed a will, in which she named the appellant Pran Nath Ghose and the

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* First Appeal, from Order No. 79 of 1897, from an order of C.L.M. Eales, Esq., District Judge of Benares, dated the 10th July 1897.

(1) 21 C. 195.

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respondent Jadu Nath Bhattacharji, executors of the will. On the 9th of May 1896, the latter applied for and obtained probate of the will from the District Court of Benares. On the 17th of March 1897, the appellant also applied for probate of the will. This application was refused by the learned District Judge, and the applicant appeals to this Court. The appeal must succeed. S. 9 of the Act provides [191] that when several executors are appointed probate may be granted to all simultaneously or at different times. If the applicant is an executor named by the will and is under no legal incapacity to act, the Court has no option but to grant him probate. S. 85 of the Act enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. The case of *Heera Coomar Sircar* v. *Doorga Moni Dasi* (1) is in point. I decree the appeal, with costs here and in the Court below, and direct the District Judge to grant the application.

Appeal decreed.

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20 A. 191=18 A.W.N. (1898) 13.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

RAGHUNATH KUARI AND ANOTHER (*Defendants*) *v.* MUNNAN MISR (*Plaintiff*).* [23rd December, 1897.]

Hindu law—Mitakshara—Succession—Sister's son.

Held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. *Thakoorain Sahiba* v. *Mohun Lall* (2); *Rao Kurun Singh* v. *Nawab Mahomed Fyz Ali Khan* (3); *Amrita Kumari Debi* v. *Lakhe Narain Chakrabutty* (4); *Girdhari Lall Roy* v. *The Bengal Government* (5); *Naraini Kuar* v. *Chandi Din* (6); and *Umaid Bahadur* v. *Uday Chand* (7), referred to.

THIS was a suit to set aside a deed of gift. The plaintiff was the nephew—sister's son—of one Nand Gopal Pande. Nand Gopal died some twenty years before suit and his widow Raghunath Kuari succeeded to the property left by him. On the 29th of April 1894 the widow executed a deed of gift of the property left by Nand Gopal in favour of one Hub Lal, a stranger to the family. The plaintiff thereupon sued to have the deed of gift [192] executed by the widow set aside on the grounds that the property with which it dealt was ancestral and that he (this plaintiff) was the reversioner to the estate of Nand Gopal. The Court of first instance (Subordinate Judge of Mirzapur) gave the plaintiff a decree so far as the immoveable property dealt with by the deed of gift was concerned, but dismissed the suit in respect of the moveable property entered in the deed. The defendants appealed. The Lower Appellate Court (Officiating District Judge of Mirzapur) dismissed the appeal.

The defendants thereupon appealed to the High Court.

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* Second Appeal, No. 863 of 1895, from a decree of Kuar Juala Prasad, District Judge of Mirzapur, dated the 2nd May 1895, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mirzapur, dated the 20th September 1894.

(1) 21 C. 195. (2) 11 M.I.A. 386. (3) 14 M. I.A. 187.
(4) 10 W.R. (F.B.) 76. (5) 12 M. I.A. 448. (6) 9 A. 467.
(7) 6 C. 119.

Mr. *W. Wallach*, for the appellants.
Munshi *Ram Prasad* and Babu *Bishnu Chandar*, for the respondent.

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JUDGMENT.

BLAIR and AIKMAN, JJ.—The apellant Musammat Raghunath Kuari is the widow of one Nand Gopal, who died upwards of twenty years ago leaving certain immoveable property. Nand Gopal died without any issue. On the 29th of April 1892, Musammat Raghunath Kuari executed a deed, in which, after a recital that she is in sole and exclusive possession of the abovementioned immoveable property, she declares that after her death one Hub Lal, a minor, who is unconnected with the family, shall be full owner of this property and of certain moveable property. This deed was registered on the 6th of May 1892. The plaintiff, who is respondent in this appeal, is the son of Nand Gopal's sister. He came into Court on the allegation that the above deed was invalid, inasmuch as Musammat Raghunath Kuari, a childless widow, had no power to make a transfer of the property. He prayed for the cancellation of the deed. He obtained a decree from the Subordinate Judge declaring that the deed, so far as it related to the immoveable property, should be of no effect after the death of Musammat Raghunath Kuari. The deed, so far as it related to the moveable property, was upheld. On appeal this decree was affirmed by the learned District Judge. This second appeal has been brought by Musammat Raghunath Kuari and the minor Hub Lal, who was made a defendant to the suit.

[193] The learned counsel who argued the case on behalf of the appellants put forward two contentions. The first of these was that the execution of the deed in question gave the plaintiff no right of action. We are of opinion that this contention cannot be sustained. We consider that it is immaterial whether the deed be regarded as a deed of gift or as a will. In this deed Musammat Raghunath Kuari undoubtedly asserts a full ownership to the property to which the plaintiff claims he is entitled to succeed on her death. The deed was registered by her in a public office. We consider that there is no doubt that the action of Musammat Raghunath Kuari threw a cloud upon the plaintiff's title, and that it is open to the Court under the provisions of s. 42 of the Specific Relief Act, 1877, to make the decree which it did make as against Musammat Raghunath Kuari. But we are so far with the learned counsel in that we hold that the plaintiff had no cause of action against the minor Hub Lal, inasmuch as the latter had done nothing to assert any title or claim under the deed in his favour. We think that the decree of the lower Court must be modified by dismissing the minor from the suit.

The next contention upon which the learned counsel for the appellant relied in assailing the decree of the Courts below was that a sister's son is no heir according to the Mitakshara law, by which the parties are governed. It is found by the lower Courts that the deceased Nand Gopal left no nearer heirs than the plaintiff. The learned counsel for the appellant contends on the authority of two rulings of the Privy Council, namely, *Thakoorain Sahiba* v. *Mohun Lall* (1) and *Rao Kurun Singh* v. *Nawab Mahomed Fyz Ali Khan* (2), that a sister's son is no heir according to the Hindu law. The former of these rulings was considered by a Full Bench of the Calcutta High Court in the case of *Amrita Kumari Debi* v. *Lakee Narain Chakrabutty* (3) and it was held that

(1) 11 M. I.A. 386. (2) 14 M. I.A. 187. (3) 10 W.R. (F.B.) 76.

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it could not be looked on as an authoritative [194] decision against the rights of the sister's son. We entirely concur in the view which was taken by the Calcutta High Court as to the effect of the decision of their Lordships of the Privy Council. In the second case relied on by the learned counsel, it is true that their Lordships observed, at page 196 of the judgment :—"It is clear that the sister and her descendants find no place in the tables of succession according to the law of the Mitakshara." But it is clear from the judgment that it was not necessary for the Privy Council in this caae to decide as to the rights of a sister's son, inasmuch as the point had not been taken in the lower Court. This cannot, in our opinion, be looked on as an authoritative decision binding upon us adverse to the rights of the sister's son. It is true that the sister's son is not mentioned in the Mitakshara amongst other relatives capable of taking by inheritance the property of a deceased Hindu in preference to the king. But, as was held by their Lordships of the Privy Council, in the case *Gridhari Lal Roy* v. *The Bengal Government* (1), the text of the Mitakshara "does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, nor was it cited as such, or for that purpose by the author of the Mitakshara; it is used simply as proof or illustration of his proposition, that there are three kinds of classes of Bandhus." In the case just referred to it was held that a maternal uncle is an heir. Their Lordships observed that such an inference, *i. e.*, that a maternal uncle was incapable of taking the property of a deceased Hindu "in the teeth of the passages which say that the king can take only if there be no relatives to the deceased, seems to be violent and unsound." We are of opinion that this observation applies with equal force to the case of the sister's son. In the judgment just quoted their Lordships referred, if not with approval, at all events without disapproval, to the Full Bench decision of the Calcutta High Court which has been mentioned above. In the case *Naraini Kuar* v. *Chandi Din* (2) this Court, referring to the Full Bench case of the Calcutta [195] High Court, and to another case—*Umaid Bahadur* v. *Udoi Chand* (3) —observed :—"All that these authorities, as it appears to us, establish is that, according to the Mitakshara, which is the law prevailing in these Provinces as to inheritance among Hindus, a sister's son may be heir to his mother's brother, a proposition which appears at one time to have been doubted."

On a review of all the authorities we have no hesitation in coming to the conclusion that, in the absence of nearer relatives, a man may be heir to his mother's brother as regards property which is governed by the Mitaksbara law of inheritance. This disposes of the second contention of the learned counsel for the appellant. The result is that we modify the decree of the Lower Appellate Court by dismissing tbe suit as against the minor Hub Lal. As the appeal has substantially failed, the respondent will have his costs in this Court.

Decree modified.

(1) 12 M.I.A. 448 (465). (2) 9 A. 467. (3) 6 C. 119.

20 A. 195=18 A.W.N. (1898) 17.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

SHANKAR DAT DUBE (*Applicant*) *v.* RADHA KRISHNA (*Decree-holder.*)* [23rd December, 1897.]

Civil Procedure Code, s. 108—*Decree* ex parte—*Appearance—Pleader retained in suit but not instructed.*

A party defendant retained a pleader to defend the suit against him, and the pleader filed a vakalathnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held that this decree was a decree *ex parte* within the meaning of s 108 of the Code of Civil Procedure. *Bhagwan Dai* v. *Hira* (1) and *Jonardan Dobey* v. *Ramdhone Singh* (2) referred to. *Sahibzada Zeinulabdin Khan* v. *Ahmad Raza Khan* (3) distinguished.

[**Affirmed**, 23 A. 220 (P.C.); **Appr.**, 23 B. 414 (424); **R.**, 22 A. 66 (**F.B**); 34 C. 403 (**F.B.**)=5 C.L.J. 247=2 M.L.T. 123; 31 M. 505=4 M L.T 216=19 M L.J. 222 =4 Ind. Cas. 1167; 1 S.L.R. 115; **D.**, 20 A. 294; 17 C.P.L.R. 1 (4).]

THE facts of this case are fully stated in the judgment of the Court.

[196] Pandit *Sundar Lal* and Munshi *Kalindi Prasad*, for the appellant.

Messrs. *T. Conlan* and *D. N. Banerji*, for the respondent.

JUDGMENT.

EDGE, C. J., and BLAIR, J.:—Rai Radha Krishna brought a suit against Shankar Dat Dube, then Raja of Jaunpur, on a bond alleged to have been given by the Raja's deceased elder brother. The Raja entered an appearance, filed a written statement and appointed pleaders to act for him. One of those pleaders was one Satish Chandar, a pleader practising at Benares. The suit in question was filed in the Court of the Subordinate Judge of Benares, and the vakalatnamah which was given by the Raja authorised Satish Chandar and the other pleaders therein named to conduct the suit on behalf of the Raja, and to answer any questions, &c. Satish Chandar obtained more than one adjournment, and on the 31st of January, 1896, he obtained an adjournment until the 19th of March in that year. On the 19th of March when the suit was called on for hearing and disposal, Satish Chandar stated that no one had come near him on the part of the Raja, and that he had no instructions. Thereupon the Subordinate Judge proceeded to dispose of the suit upon the evidence on the record, and, arriving at a finding in favour of the plaintiff, made a decree for the plaintiff. Raja Shankar Dat Dube subsequently applied to the Subordinate Judge under s. 108 of Act No. XIV of 1882 for an order to set aside the decree. The Subordinate Judge, without considering whether Raja Shanker Dat Dube was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March, 1896, dismissed the application on the ground that

* First Appeal, No. 2 of 1897, from an order of Munshi Mata Prasad, Subordinate Judge of Benares, dated the 8th October 1896.

(1) 19 A. 355. (2) 23 C. 738. (3) 5 I. A. 233.

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the decree in question which he had passed against Raja Shankar Dat Dube was not a decree passed *ex parte*. He appears to have arrived at that conclusion because he considered that on the 19th of March 1896, the Raja was represented by Satish Chandar having instructions. This is an appeal from that order.

Although Satish Chandar was still the vakil of the Raja, and under his vakalatnamah had full authority to act in the suit[197] within the limits of that vakalatnamah for the Raja he stated that he had no instructions. We understand from that, that he had practically retired from the case. It is difficult to understand how a pleader, even in the Court of the Subordinate Judge of Benares, can conduct a case for the defendant without instructions. It appears to us that the decisions of the Court in *Bhagwan Dai* v. *Hira* (1) and of the High Court at Calcutta in *Jonardan Dobey* v. *Ramdhone Singh* (2) are authorities in favour of the contention of the appellant that an application lay in this case under s. 108 of Act No. XIV of 1882. On the other hand we have been pressed by the learned counsel for the plaintiff decree-holder with the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmad Raza Khan* (3). The procedure which the Subordinate Judge must, in our opinion, have adopted was that under s. 157 of Act No. XIV of 1882. That section makes applicable, so far as may be, to cases coming within the section the procedure of Chapter VII of the Code. S. 157 apparently relates to a later period in the litigation than the sections which are to be found in Chapter VII, but there is no difficulty in ascertaining the rule to be followed in cases under s. 157 by reference to Chapter VII. It has been contended for the plaintiff decree-holder that the effect of the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmad Raza Khan* (3) is that there can be no decree which can be called a decree *ex parte* against a defendant who has at any time and on any occasion before the decree is made put in an appearance in the suit, although at the hearing he may have been absent and unrepresented, or may have had present merely a pleader who had no instructions. In our opinion the decision of their Lordships of the Privy Council merely referred to the opening paragraph of s. 119 of Act No. VIII of 1859. That section itself shows quite clearly that [198]there can be *ex parte* decrees against defendants whether or not they have put in appearances in the suit. The prohibition of an appeal in the earlier part of s. 119 is limited, to apply the decision of their Lordships of the Privy Council, to a case in which the defendant had not put in any appearance at all. In our opinion the decision of their Lordships of the Privy Council has no bearing on the case before us here.

We hold that this was a decree passed *ex parte* against a defendant within the meaning of s. 108 of Act No. XIV of 1882 for, although the defendant's pleader was physically present in Court, he was not there representing the defendant in the suit. We set aside the order under appeal, and we remand this case under s. 562 of Act No. XIV of 1882 to the Court of the Subordinate Judge to be disposed of on the merits. We make this order with costs to the representative of Raja Shankar Dat Dube.

Appeal decreed and cause remanded.

(1) 19 A. 355. (2) 23 C. 738. (3) 5 I. A. 233 = 2 A. 67.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

UDIT NARAIN SINGH AND OTHERS (*Defendants*) *v.* SHIB RAI (*Plaintiff*).* [4th January, 1898.]

Cause of action—Suit for damages for removal of crop—Defendant entitled to possession under decree of competent Court of Revenue—Plaintiff in actual possession under an illegal decree of a Civil Court—Trespass.

A held a decree of a competent Court of Revenue for possession of certain land as against B, and obtained under that decree formal possession of the land. B, however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B, removed his crop, and thereafter sued in a Civil Court for a declaration that he was A's tenant of the land in question holding occupancy rights. A did not defend the suit, and the Civil Court passed a declaratory decree in favour of the plaintiff, and further proceeded to execute that declaratory decree by putting B. in possession. Subsequently B sued A for damages in respect of the alleged removal by A of a second crop, which he asserted that he (B.) had sown upon the said land.

***Held* that B had no cause of action, and that even if in fact he had sown the crop in respect of which damages were claimed, he did so at his own peril and as a trespasser.**

[199] THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *A. E. Ryves*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

JUDGMENT.

EDGE, C. J , and BURKITT, J.—This was a suit for damages based upon an allegation that the defendants wrongfully cut and appropriated the plaintiff's crop. The facts of the case, so far as they are material, are as follows:—The principal defendant, namely, Raja Udit Narain Singh, obtained an order or decree from a competent Court of Revenue establishing his title to possession of the land and establishing the fact that the plaintiff had got no title, and, the plaintiff being in possession, the Court of Revenue decreed possession to the Raja and gave him formal possession. At that time a crop of the plaintiff's was growing on the land, and the amin, apparently overlooking the fact that s. 42 of the Rent Act (Act No. XII of 1881) did not apply to the case, allowed the plaintiff to continue in such necessary possession as would be requisite for gathering and removing the crop; possession of the land was given to the Raja. The plaintiff gathered and removed the crop, and thereafter brought a suit in a Civil Court for a declaration that he was a tenant of the Raja of the land in question holding occupancy rights. That suit did not lie in the Civil Court, which had no jurisdiction to entertain it. The suit was one which came under s. 95 of Act No. XII of 1881. It was liable to be defeated also on another ground, namely, that, if the plaintiff was entitled, he was not in possession and could have sought consequential relief. For some reason the suit was undefended, probably through an oversight, or through indifference as to what the Civil Court might do in a suit which was not within its jurisdiction. This plaintiff got a decree declaring that he was entitled as an occupancy tenant. The Civil Court, having

* First Appeal No. 50 of 1897, from an order of J.W. Muir, Esq., District Judge of Farrukhabad, dated the 12th May, 1897.

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granted him a declaration of title in a suit in which it had no jurisdiction to interfere, next proceeded to execute its declaratory decree by giving this plaintiff possession, overlooking the fact that the only execution [200] of a declaratory decree is for such costs as may be decreed and may not have been paid. This plaintiff alleges that he sowed the crop in respect of which this action is brought. If he sowed the crop, he sowed it as a trespasser. He had got neither title nor lawful possession. The first Court dismissed this suit. The Court of first appeal set aside the decree of the first Court, and made an order under s. 562 of the Code of Civil Procedure. From that order this appeal has been brought. The plaintiff had no cause of action. If in fact the plaintiff did sow the crop in question, which is disputed, he did so at his own risk and as a trespasser. We allow this appeal, and, setting aside the order of the Court of first appeal, we dismiss the appeal to that Court and restore the order of the first Court. The appellant here will have his costs of this appeal and of the appeal to the Court of first appeal.

Appeal decreed.

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20 A. 200 = 18 A.W.N. (1898) 25.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

THE MUNICIPAL BOARD OF CAWNPORE (*Defendants*) *v.* LALLU AND ANOTHER (*Plaintiffs*).* [12th January, 1898.]

Customary right—Prescription—Ghat dedicated to the public—Right to occupy specific portion of ghat not susceptible of acquisition by prescription—Gangaputras.

Held that no exclusive right of occupation could be acquired by prescription in any specific portion of a bathing ghat the use of which was dedicated to the public. *Husain Ali* v. *Matukman* (1) followed. *Tyron* v. *Smith* (2) and *Turner* v. *Ringwood Highway Board* (3) referred to.

[F., 2 O.C. 1; R., 20 M.L.J. 699 (704) = 8 M.L.T. 399 = 2 Ind. Cas. 427; D., 7 P.R. 1899.]

THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. *E. Chamier*) and subsequently the Officiating Government Advocate (Mr. *A. E. Ryves*), for the appellants.

Pandit *Moti Lal*, for the respondents.

JUDGMENT.

[201] BLAIR, J.—This suit is brought by Lallu and Murli Dhar, two brothers, for the relief that, by a declaration of the rights of the plaintiffs and removal of the illegal interference offered by the defendants and the invalidation of the orders of the Municipal Board of Cawnpore, a decree may be passed in favour of the plaintiffs allowing them to sit whenever they please at their old seats mentioned below at the Sarsaiya ghat on the bank of the Ganges in the city of Cawnpore to attend to their jajmans at the time of bathing and other religious performances, and to

* Second Appeal No. 891 of 1895 from a decree of Babu Madho Das, Additional Subordinate Judge of Cawnpore, dated the 2nd May 1895, reversing a decree of Babu Banke Bihari Lal, Munsif of Cawnpore, dated the 27th September 1894.

(1) 6 A. 39. (2) 9 A. and E. 406. (3) L R. 9 Eq. 418.

receive their dues and presents, &c., as usual from them with their consent.

The plaintiffs are Gangaputras, and have no doubt themselves, as have, it is alleged, their ancestors, exercised their functions upon the Sarsaiya ghat. Others of the same class have done the same. What they claim is a right as Gangaputras to occupy to the exclusion of all other persons certain particular defined and measured spots upon the ghat, Their claim is based exclusively upon prescription. The defendants are the Municipal Board of Cawnpore, and, in the absence of proof to the contrary, must be presumed to have been acting within their jurisdiction in relation to the matters complained of, unless their right of control and interference is limited by some right acquired by the plaintiffs. No argument has been addressed to us questioning their general jurisdiction. The history of the ghat is not absolutely clear, but this much we can gather from the pleadings and the admissions of the parties, that there has been at some time, probably remote, a dedication of the ghat to the use of pilgrims desiring to perform their spiritual ablutions in the sacred river. Beyond doubt for the proper performance of those ablutions and accompanying ceremonies the services of Gangaputras would be required. We have nothing before us to show that the plaintiffs claim any interest in the soil upon which the ghat stands. Their allegation amounts simply to this :— "We and our ancestors as Gangaputras, and for the performance of our functions of Gangaputras, have continuously and for an indefinite time occupied, [202] to the exclusion of all other Gangaputras and of all other persons whatsoever, the particular spots which we claim. We are, therefore, they say, entitled as of right now and in the future to use these spots as we have done heretofore." It was upon that ground that the Subordinate Judge in appeal decreed their suit, which had been dismissed upon the ground of limitation in the Court of first instance.

The judgment, the appeal against which we are now hearing, is one of the most inadequate and perfunctory performances that has ever come before us. It deals with and discusses none of the questions of law, serious and important as they are, raised in this case. It assumes that the user alleged by the plaintiffs would, if proved, be a sufficient basis of title in the present and for the future. The defendants in their written statement alleged, and it is nowhere denied, that the land of the ghat belongs to Government, and that the management and protection of such lands as are situate within the limits of the Municipality are under their control. The interference of which the plaintiffs complain was, the defendants allege, an arrangement by them of the seats to be occupied by the Gangaputras at such places as the defendants thought proper, and they contend that the plaintiffs have no right to object to such arrangement.

The defendants also, in answer to the claim by virtue of prescription, allege that the plaintiffs have not had uninterrupted user or user, as of right, upon the ghat, but that such user has periodically been prohibited by them one day per year from 1870 up to the present date.

That is one of the important pleas which appeared unworthy of the notice of the Subordinate Judge, and yet, if that were established, coupled with the absence of proof that such interruption had ever been contested by any person interested, the strongest presumption would have been raised that the occupation by the plaintiffs of the part of the ghat occupied by them was permissive only and was not an occupation as of right. Indeed, it would have been possible upon that single plea to have dismissed the suit of the plaintiffs. [203] There are, however, questions

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raised in this case of larger scope, which may well be decided in this appeal, inasmuch as they may affect other similar claims in which particular incidents to be found in this case are absent. It is only fair to say that Mr. *Moti Lal*, for the respondents, frankly admitted that the claim of the plaintiffs could not in point of law be described as an easement. It is enough therefore to say that, inasmuch as the claim of the plaintiffs was not based upon any allegation of right either in the soil of the ghat or in any other soil to which their user of the ghat was appurtenant, and inasmuch as neither the English nor the Indian law recognizes such a right as an easement in gross, the plaintiffs have to establish their claim upon some other basis.

Mr. *Moti Lal* contended then that the right of the plaintiffs was of the nature of a customary right and fell within the scope and meaning of s. 18 of the Easements Act of 1882. We fail to see the applicability of that section to the facts of the case. The illustrations given both imply some right of ownership, occupation or habitation of some particular place. A number of cases have been brought to our attention, of which perhaps the most important one is that of *Tyron* v. *Smith* (1). That was a suit in which the lord of the manor sued in trespass a person who had erected or begun to erect a booth upon some part of his estate. The defendant's statement was, put shortly, that by ancient custom a public fair was held upon that manor, and that for the convenience of persons frequenting it all victuallers were allowed from time immemorial to erect booths for the supply of refreshments. It was held that the custom had been proved and that it was a reasonable custom. That case in no way helps the contention of the respondent. The right pleaded was really the right of the public to have stalls erected for their refreshments and not an exclusive right claimed by one of the victuallers to occupy any particular spot. And it may be taken generally that the English law recognizes no right of the nature of easements, and not being easements, other than public as distinct from private rights, though such rights may be **[204]** limited to the inhabitants of a manor or township, but within that limit they are *publici* and not *privati juris*. In the present case it appears manifest, indeed it is not denied, that the dedication of the ghat must have been a dedication to the use of the public desiring, according to their religion, to use the water of the river, and such right conveyed by such dedication does not seem to carry with it any restriction upon the number of Gangaputras who might wish to perform their functions upon their disciples, nor does it imply a right o any particular Gangaputras to occupy to the exclusion of other Gangaputras any particular spot. A case has been decided in this Court by two Judges which seems to us a sufficient authority for the contention of the appellants in this appeal. It is the case of *Husain Ali* v. *Mahakman* (2). The plaintiff's suit in that case was dismissed on the ground that no right of any sort to the soil of the ghat or any portion thereof was asserted by the plaintiff or shown. The *dictum*, broadly laid down, is in our opinion equally applicable to the facts of the present case, which do not substantially differ from those of the reported case. Now in this case also no right to the soil of the ghat or any portion thereof is asserted by the plaintiffs or shown, and under such circumstances, following the decision above cited, we hold that the plaintiffs cannot maintain a claim to the exclusive use of the ghat for the purpose of collecting alms or fees to the exclusion of other

(1) 9 A. and E. 406.

(2) 6 A. 39.

persons. The *ratio decidendi* in *Husain Ali* v. *Matukman* appears to us open to no exception. It matters not in our opinion that the claim in this case refers only to a part of the ghat, and that opinion is amply supported by authority. I see no reason to find that there is any difference in principle betwen the dedication of a ghat to the public use and the dedication of a high road. It has been held, and the principle appears indisputable, that where a dedication has been established of a high road and where a portion only out of the land so dedicated has been used for that purpose, no person could by occupation or other user of any part of the road establish a right as against the public over any part of the **[205]** land, even had it never been used for the purpose for which it was dedicated. I refer to *Turner* v. *Ringwood Highway Board* (1). That is a decision of one of the most eminent Judges of the century, and the judgment itself is founded upon reasoning which has been, as far as I know, universally applied in all cases of this kind. Now here the dedication to the public could not be limited by invasion of any of the members of the public, nor could they by such invasion, however prolonged, gain for themselves a title to the land or to the exclusive user of the land which was the subject of the invasion. And the reason is manifest, that such user by them was a licensed user; they had a right to be there, but their right of user could carry with it no right to exclude other persons—Gangaputras, pilgrims or others, for whose use the ghat had been originally dedicated.

The result is that I would allow this appeal, and, reversing the decision of the lower appellate Court, dismiss the suit of the plaintiffs with costs.

AIKMAN, J.—I concur in thinking that this appeal must be allowed. The learned advocate who appears on behalf of the respondents admitted that the right claimed by the plaintiffs, his clients, was not an easement; he said that, if put to a definition, he would describe it as an assertion of a customary right. But the relief which the plaintiffs asked for and the decree which they have obtained amount to much more than this. The decree gives them possession of certain spots on a public ghat to the exclusion of all other members of the public. No instance of such a relief having been granted has been cited to us. There are, it is true, cases in which plaintiffs have successfully asserted a title to enjoy customary rights, but the decrees in those cases did not interfere with the enjoyment of the other members of the public or section of the public entitled to the customary right. In my opinion this case is not distinguishable from the case of *Husain Ali* v. *Matukman* (2), which, as my brother Blair has shown, is in accord with the law as laid down in England. I concur in the decree proposed.

[206] BY THE COURT.—The decree of the Court is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance restored. The appellants will have their costs here and in the lower appellate Court.

Appeal decreed.

(1) L.R. 9 Eq. 418.

(2) 6 A. 39.

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REVISIONAL CRIMINAL.

20 A. 206 = 18 A.W.N. (1898) 21.

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REVISIONAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* RAHIM BAKHSH.* [12th January, 1898.]

Criminal Procedure Code s. 110 et seqq—*Security for good behaviour—Object of demanding security—Discretion of Magistrate in accepting or refusing sureties tendered.*

The object of requiring security to be of good behaviour is, not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. *Narain Soobooddhee* (1) not followed.

[**Diss.**, 35 C. 400 = 7 Cr. L.J. 439; **F.**, 36 C. 562 = 9 C.L.J. 296 (297) = 13 C.W.N. 555 = 10 Cr. L.J. 89 (90) = 2 Ind. Cas. 592; 8 Cr. L.J. 166 (168) = 1 S.L.R. 46 (47) Cr.; **R.**, 24 A. 471 (472); 1 Bom. L.R. 520 (521); 8 Cr. L.J. 344 = 11 O.C. 267 (268).]

RAHIM BAKHSH was found by the Joint Magistrate of Saharanpur, acting under s. 110 of the Code of Criminal Procedure, to be an habitual burglar and receiver of stolen property, and was called upon to enter into a bond for Rs. 500, with two sureties each in Rs. 250, to be of good behaviour for one year. From this order he appealed to the Magistrate of the district, who, after adverting to the evidence upon which the Joint Magistrate's order was based and signifying his approval of that order, went on to say:—"The security offered was that of persons living at a distance from Saharanpur where appellant lives. If the security is to be of any value for the purpose for which it is demanded, it must be offered by a person living near appellant's home where he can exercise efficient supervision over him. If such is offered it will be accepted." Against this order Rahim Bakhsh applied in revision to the High Court.

[207] Mr. *N. L. Paliologus*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

EDGE, C.J.—This is an application in revision. An order was made that a certain person proceeded against by a Magistrate under s. 110 and the following sections of the Code of Criminal Procedure should give security himself and should obtain two sureties for his good behaviour for one year. It is obvious that the man Rahim Bakhsh was a man against whom such an order should have been made. His own witness, who is a respectable man, gave him an exceedingly bad character. It was proved to the satisfaction of the Magistrate that he was an associate of professional burglars and a receiver of stolen property. He lived and carried on an ostensible business of a milk seller (which in itself is an innocent occupation for a gentleman of his character), in the city of Saharanpur. The sureties whom he tendered lived in the Roorkee tahsil. One had been rejected when first offered. On his own examination he showed that he knew practically nothing of the man for whom he was coming from Roorkee to act as surety. The Magistrate considered that sureties at Roorkee would probably have but little influence over a gentleman like Rahim Bakhsh residing

* Criminal Revision No. 679 of 1897.

(1) 22 W.R. Cr. R. 37.

at Saharanpur. In my opinion the Magistrate came to a proper conclusion. The object of requiring security to be of behaviour is, not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It seems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. Of course Magistrates must not act arbitrarily in these cases: they must be guided in each case by the facts of the case. I am certainly not prepared to follow the decision of the Calcutta Court in the case of *Narain Sooboddhee*. (1) I dismiss this application.

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20 A. 208 = 18 A.W.N. (1898). 28.

[208] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

SHARF-UD-DIN KHAN (*Judgment-debtor*) *v.* FATEHYAB KHAN (*Decree-holder*).* [17th January, 1897.]

Mesne profits—Execution of decree—Objection to assessment of mesne profits—Trespasser not allowed expenses of obtaining decrees for rent during the term of his possession.

Held that a trespasser, who, after having been for some time in possession of immoveable property, was ejected in execution of a decree obtained by the rightful owner, could not have allowed to him in reduction of mesne profits expenses incurred by him in obtaining decrees for rent against tenants on the property in suit.

[Expl., 23 A. 252 (256).]

THE respondent to this appeal obtained against the appellant a decree for possession of immoveable property and for mesne profits, the mesne profits to be ascertained in execution of the decree. The decree-holder applied to the executing Court for ascertainment for the mesne profits, claiming Rs. 1,248-5-0. The judgment-debtor filed objections to this application urging that the mesne profits were wrongly calculated by the decree-holder, and that certain expenses of collection and expenses incurred in bringing suits against tenants during his occupation of the land ought to be deducted from the amount of mesne profits awarded. The Court (Subordinate Judge of Moradabad) disallowed the judgment-debtor's objections and assessed the mesne profits at the amount claimed by the decree-holder. From this order the judgment-debtor appealed to the High Court.

Munshi *Ram Prasad* and Maulvi *Ghulam Mujtaba*, for the appellant. The respondent was not represented.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This appeal arises out of an assessment of mesne profits. The appellant complains, firstly, that he was deprived of the benefit of evidence in the suit which was on the record in the High Court at the time when the mesne profits were being assessed. In order to support that ground, it [209] would

* First Appeal, No. 21 of 1897, from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 10th November 1896.

(1) 22 W.R. Cr. R. 37.

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be necessary to show that the evidence he desired to have was material. He has not taken the trouble to procure the production of that record here, and he has failed to prove that one word of that evidence was material. He also complains that in taking the account for mesne profits he was allowed an insufficient sum for expenses. His claim for expenses was made up of, amongst other things, a claim for the salary of two karindas. That portion of the claim alone would have brought the expenses on the amount collected to something near 12 per cent., an allowance which we could never sanction in favour of a wrong-doer. It would be excessive in any case. However, his main complaint as to expenses relates to the fact that he was disallowed the expenses he was put to in suing tenants on the estates, who were not his tenants, who owed him no rent, but against whom he obtained decrees for rent. The result shows that the appellant was never entitled to those decrees. He was a wrong-doer. He was not entitled to the possession of the land, nor was he entitled to the receipt of rents and profits. It may well be, and certainly the contrary has not been shown, that, if the decree-holder, the rightful owner, had not been disturbed in possession by the appellant and had been in possession, all his tenants would have paid their rents and there would have been no necessity for a single suit against any of them. Expenses of decrees for rent obtained under such circumstances by a wrong-doer who is not entitled to them certainly cannot be allowed to him in the assessment of mesne profits. We dismiss this appeal.

Appeal dismissed.

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20 A. 209 (P.C.)=2 C.W.N. 209=25 I.A. 46=7 Sar. P.C.J. 257.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Pavey and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces.*

NARAIN DAS (*Plaintiff*) *Appellant v.* RAMANUJ DAYAL (*Defendant*) *Respondent.* [16th November and 15th December, 1897.]

Intention as to future action, expressed between parties, not amounting to a contract.

A mutual expression of intention between parties caused expectation on either side that the intention would be carried out, but no contract was made.

[210] A childless person, since deceased, expressed to the father of the minor son of his sister his intention to make the boy his heir, and that if he, the intending donor, should have children of his own, he would give the boy a share of his property.

The father assented, and made over charge of the boy.

The widows, and mother, of the deceased, taking his estate for their lives, admitted the boy to joint possession with them; and on being sued by the reversioners of the family estate expectant upon their deaths, defended, as co-defendants with the boy, on the ground that they had, in obedience to the known wishes of the deceased, recognized the boy as heir to him.

Held, that the reversioners could only be deprived of the inheritance after the death of the widows, who could not transfer any estate to last beyond their own lives, by the act of the deceased in contracting with the father of the boy to make the boy the heir, if such contract had been made. And that the substantial question was whether the representations made between the two had amounted to a contract to that effect.

On evidence, wholly oral, it was found that no such contract had been made.

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Only enough had been said between the two to give rise to expectation on either side that the boy would, the then intended course being followed, get the inheritance.

[R., 30 A. 197 = 5 A.L.J. 200 (235) = A.W.N. (1908) 79 ; 8 C.L.J. 458 (464) = 13 C.W.N. 201 = 4 Ind. Cas. 513 (516).]

APPEAL from a decree (9th Febuary 1893) of a Divisional Bench of the High Court reversing a decree (29th September 1892) of the Subordinate Judge of Meerut.

This suit was brought on the 31st July 1888 by six plaintiffs, among whom was the present appellant, for a decree declaring their title as reversionary heirs after the deaths of the two widows of their deceased kinsman Durga Prasad, a zamindar, and village shareholder, in the Meerut district, who was killed in an affray on the 1st August 1882, at the age of twenty-nine years. He had no children, and had made no will. The plaintiffs claimed a declaration that their rights were not affected by the acts of the widows in setting up Ramanuj Dayal, a minor son of the sister of the late Durga Prasad as the heir to the property of the deceased, and in putting him into possession of it jointly with themselves.

The widows, and the mother of the deceased, were made co-defendants with Ramanuj, now the only respondent on this appeal. The only appellant was Lala Narain Das, the fifth plaintiff, who represented Kishen Sahai, the first of them, the **[211]** latter having been found by the High Court to stand in lieu the more remote agnates of the deceased.

The substantial question raised by this appeal was whether the late Durga Prasad had contracted with the respondent's father, acting on the respondent's behalf, when a minor, to make the latter his heir, if he, Durga Prasad, should die childless, and if not, but having had children, to give a portion of his property to the boy. And whether such a disposal of the inheritance was binding upon the appellant.

The prayer of the plaint was for a declaration that Ramanuj was not the heir of Durga Prasad, or entitled to the possession of his estate, and for an order that the widows should invest the surplus income of the property for their benefit.

It was admitted by the plaint, that the deceased proprietor was absolute owner of all his estates, and that therefore he might have disposed of them as he chose, by deed or by will,

The defendants put in written statements, all substantially to the same effect. Their case was, that Durga Prasad had brought up Ramanuj Dayal from childhood in his own house, and had promised his father to make him his heir; that he had died suddenly before he could carry out his intentions, and that the widows, in obedience to his known wishes, had put the boy in possession of the property, and recognized him as heir.

The Subordinate Judge, Rai Piari Lal, fixed an issue as to the fact of the making, and a to the legal validity of a contract between Durga Prasad and Ganga Saran, the boy's father, to the above effect. He considered the evidence, and the law of contract, citing several of the cases afterwards referred to in the argument of this appeal, and concluded that no such contract had been made. In his opinion the elements of a binding contract were wanting. He found so far as the boy was concerned no duty or obligation was cast upon him to remain with Durga Prasad. His status was never altered, wherein this case was distinguishable from

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Bhola Nahana v. *Parbhu Hari* (1), nor did the relation of father [212] and son ever cease between Ganga Saran and the boy. Durga Prasad could not have prevented the father from taking the boy away. Also, he found that the widows, though they had caused to be entered in the proprietary register the name of Ramanuj Dayal together with their own names, had not conveyed their life interests to him by any formal act.

He therefore made a declaratory decree that the reversioners of Durga Prasad, on the death of his widows, would be entitled to succeed to his property, and that the rest of the claim should be dismissed. Ramanuj Dayal appealed to the High Court against the conclusion of the Subordinate Judge as a matter of law, that no contract had been made which was legally binding so as to affect the inheritance. But no appeal was made against the finding of facts as stated in his judgment.

The observations of the Divisional Bench (TYRRELL and BLAIR, JJ.) so far as they are material to this report, appear in the judgment of their Lordships. The judgment of the Subordinate Judge was reversed.

On this appeal—

Mr. *A. Cohen*, Q. C., and Mr. *C. W. Arathoon*, for the appellant, argued that the whole case for the respondent had been based upon an alleged promise which had never reached the stage of contract, and, in fact, had gone no further than the representation of the then present intention on the part of Durga Prasad. There had been no evidence that the latter had bound himself to accept the boy as his heir under all circumstances, or to deal with his estate, or any part of it, so that it should pass, on his death, to Ramanuj.

Nor had Ganga Saran, the father of the boy, been shown to have effectually parted with his son, or to have relinquished all right to parental control over him. The result had been only to signify the intention existing at the time on either side. The Subordinate Judge had rightly decided that the appellant, amongst the other plaintiffs, was entitled to a decree declaring his right to succeed to the family estate on the death of the widows of [213] Durga Prasad. No sufficient reason had been assigned in the judgment of the High Court for reversing that decree in favour of the present appellant. Section 42 of the Specific Relief Act, I of 1877, was referred to, within which came the appellant as a person entitled to a right, and therefore by that section empowered to institute a suit against a person denying it. It was true that the Court had a discretion to refuse a declatatory decree; but here there were no grounds for such refusal.

Reference was made to *Jorden* v. *Money* (2); *Alderson* v. *Maddison* (3); *Citizens' Bank of Louisiana* v. *The First National Bank of New Orleans* (4), where the rule in *Jorden* v. *Money* was approved, as to the distinction in effect between representation of intention, and respresentation of fact; *Coverdale* v. *Eastwood* (5), where it was decided that expression of intention did not amount to contract to settle and to *Rani Anand Koer* v. *The Court of Wards* (6), where the appeal was presented by the nearest reversioner's heir.

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(1) 2 B. 67.
(2) (1854) 5 H. L. Ca. 185.
(3) (1880) 5 Exch. D. 293; and on appeal, (1881) 7 Q.B.D. 174; and on appeal (1881) 8 Ap. Ca. (H.L.) 467.
(4) (1873) L.R. 6 Ap. Ca. (H.L.) 352 (360).
(5) (1872) L.R. 15 Eq. 12.
(6) 8 I A. 14 = 6 C. 764.

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Mr. *M. Crackanthorpe*, Q. C., and Mr. *J. D. Mayne*, for the respondent, argued that, from the evidence, the promise by Durga Prasad to make the boy his heir had been based on a consideration proceeding from Ganga Saran, the father, completed when the boy was made over to Durga Prasad. That this promise had been made had been found by both the Courts below, although the first Court had held that it created no legal obligation. It was submitted that the consideration supported the promise, and that the latter was legally binding, so that it had become the duty of the widows, who for this purpose represented the estate, to carry this promise into effect. Gange Saran had not only agreed to allow, but had allowed the boy for years to remain free from his control, and the boy had been maintained and educated, at first by Durga Prasad, and then by the widows. There was no such abandonment by Ganga Saran [214] of his parental authority and responsibility as to make the consideration supplied by Ganga Saran illegal. Reference was made to *Lyons* v. *Blenkin* (1), one of the cases where the custody of children was refused to the father, and to *Bhala Nahana* v. *Parbhu Hari* (2), where the gift of a boy was made by his parents on the express promise to settle property on him, and that he had by their permission altered his status, and foregone his claim to inherit from them, did not render it altogether inapplicable here. Also was cited—*The Queen* v. *Smith*, *in re Boreham* (3).

Mr. A. Cohen, Q. C., replied.

Afterwards on the 15th December 1897, their Lordships' judgment was delivered by SIR *R.* COUCH.

JUDGMENT.

Durga Prasad who died childless on the 1st of August 1882, leaving two widows Ram Dei and Hira Dei was the grandson of Bakhtawar Singh, the son of Jawahir who had also three other sons Dilawar Singh, Kishan Sahai and Har Sahai. Dilawar died leaving an adopted son Chanda Lal, Har Sahai died leaving four sons, Anand Sarup, Jugal Kishore, Narain Das and Ram Saran Das. The suit was brought by Kishan Sahai, Chanda Lal and the four sons of Har Sahai against the respondent and the widows and the mother of Durga Prasad. The plaint stated that in order to defeat the rights of the reversioners the widows had caused the name of the respondent to be entered in respect of most of the properties left by Durga Prasad along with theirs, and his name alone in respect of some, on the false allegations that Durga Prasad left them and Ramanuj Dayal the minor son of his sister as his heirs; that he owing to his having no issue kept Ramanuj Dayal with him as his adopted son and heir promising that in case of his having no male issue he and his descendants should succeed as owners to the entire property left by him, but that they should have no right to waste the property; and that in case of his having a son of his own [215] Ramanuj Dayal should get an equal share with him; that he had brought him up, educated him and celebrated his marriage as if he was his own son; that the widows in their own right and as guardians of the minor were heirs in possession of his estate. And the plaintiffs prayed that it might be declared that these allegations being false the transfers of the estate of Durga Prasad made on them in favour of Ramanuj Dayal were void as against the plaintiffs or the persons who at the death of the

(1) (1821) Jacob 245. (2) 2 B. 67. (3) (1853) 22 L.J. Q. B. 116.

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widows would be reversioners, and that the statement that Ramanuj Dayal or his descendants were entitled to the estate of Durga Prasad by virtue of any declaration falsely attributed to him was of no effect and false. The widows in their written statement said that as their husband was killed suddenly he could not execute any document in favour of Ramanuj Dayal, and they therefore in accordance with his promise and order made over the entire property to him. The mother in her written statement said the same. Ramanuj Dayal in his written statement said that Durga Prasad had a great affection for him from his childhood and constantly kept him with him and eventually entered into a contract with him through his father, his guardian, to make him proprietor of and heir to all his property; from that time he lived with Durga Prasad as his son and the widows in pursuance of the stipulations and directions of their husband continued to maintain and bring him up during his minority and gave him possession of all the estate left by Durga Prasad. Upon these pleadings the following issue was settled by the Subordinate Judge:—

"Did Lala Durga Prasad covenant with defendant's father on his "behalf to make the defendant his heir and owner of the property, and in "the event of his having issue to give a portion of the property to the "defendant? Is such a covenant, if proved, good and binding upon the "plaintiff?"

This was the substantial question in the suit. Durga Prasad having died childless the widows were entitled to his property during their lives and could dispose of their interest in favour [216] of Ramanuj Dayal, but they could not go beyond that. If the reversioners were to be bound, it must be by the act of Durga Prasad. There was no issue whether the allegations of the widows were false. It was not necessary, as if they were true they would not justify the action of the widows if there was no contract by Durga Prasad as was alleged by Ramanuj Dayal. The evidence of the widows as to what was said by Durga Prasad and Ganga Saran when the alleged covenant or agreement was made is only hearsay and, to use the language of the Indian Evidence Act, is not relevant. It was admitted by the Subordinate Judge and is in the record, but it ought now to be disregarded. The evidence of Jwala Prasad another witness is too vague and uncertain to have any weight. The principal witness is Ganga Saran, the father of the respondent, who is corroborated in some respects by Diwan Singh, but without that his evidence may be considered trustworthy. Their Lordships have considered the whole of his evidence which is material to the question of a contract, but it is sufficient to state the part which is directly applicable to it. At page 255 of the Record he says that Durga Prasad said to him:—"'My property is "'for this boy, I have no dearer relation in this world than this boy. I "'will give my property to this boy. He goes to members of the "'brotherhood on my behalf and does my household business. If you "'will take him with you how shall I manage these affairs.' At last "Durga Prasad uttered these words:—'I would make him my heir "'and he would get sufficient education at Meerut for my business.' I "said to him:—'Two years have elapsed since your marriage. It "'is hoped that you may get an issue and your own son may soon be "'competent to manage your affairs.' Thereupon he said:—'Even if a "'son be born, mind that I would give a share to Ramanuj Dayal. It "'is by no means my intention that I may in any way deprive him, "'but give up this hope that I would ever part with him and allow

" 'him to go with you.' Lal Jwala Prasad made me understand that my " object was the welfare of the boy, [217] that he could not remain with " me, for if I got him admitted into the college or sent him to England he " could become separated from me, and that I should do what Durga " Prasad liked. I, thinking that he will be recompensed here for education " in England and that it was impossible to take the boy without complete " displeasure of Durga Prasad and that I did not like to displease him, " told Durga Prasad that the boy was his if he wished to keep him, and " that I would not interfere in this affair. Up to that time there was no " other son of mine. I finally left the boy saying that I waived all claim " to the boy and the thought of taking him did not remain in my mind." The reference to the college and England is explained by Ganga Saran having said in the previous part of his evidence that he told Durga Prasad that he wanted to take the boy to Agra (where there is a college) and there educate him, and that he wished he should be educated in England " either for service or for the Bar." At this time the respondent was nine years old; and, being the son of a sister, Durga Prasad could not according to Hindu law have adopted him. The only way by which the respondent could be made his heir was by a deed of gift or by a will. Diwan Singh in his evidence said that Durga Prasad about two months before his death asked him to write out a deed of gift in favour of Ramanuj Dayal and, upon his saying it was not proper to do so and asking him whether he should write out a will, told him to do so, that the matter was put off from time to time and the will was not written.

Upon the evidence in the case their Lordships are of opinion that there was no contract or agreement, there was only an expectation on each side, on the part of Durga Prasad that if the respondent continued to live with him and was brought up and educated under his care and control the respondent would be induced by the prospect of becoming his heir to continue to live with him, and on the part of Ganga Saran that if he gave up the boy Durga Prasad would have him educated and make him his heir. Ganga Saran could according to any view only bind the [218] respondent during his minority, and it is very difficult to believe that it was their intention that Durga Prasad should be bound in all events to make the boy his heir when upon the respondent attaining majority Durga Prasad would have no control over him and he might determine to leave him. Gratitude would be a very weak obligation upon the respondent if he knew that the estate must become his. The Subordinate Judge found that Durga Prasad made a promise to Ganga Saran that he would make the respondent his heir if he had no male issue or would give him a share in his property if he had such, but that it did not amount to a contract and was not binding on the reversioners. He made a decree declaring that the reversioners of Durga Prasad deceased should after the death of the widows and the mother of the deceased be entitled to get the estate of the deceased by right of inheritance, and that the rest of the plaintiffs' claim should be dismissed. Ramanuj Dayal appealed to the High Court at Allahabad, and that Court ordered the decree of the Subordinate Judge to be set aside and the suit to be dismissed. Their Lordships are quite unable to agree in the reasons of the two learned Judges of the High Court for making this decree. They appear to their Lordships to have entirely disregarded the question in the suit (whether what passed between Durga Prasad and Ganga Saran amounted to a contract) and indeed in the former part of their reasons to have misconceived the real question in the case, and in

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the latter part to have conceded that there was a contract, and only considered whether it was illegal or opposed to public policy. Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court and to order the appeal to it to be dismissed with costs and to affirm the decree of the Subordinate Judge. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson* and *Co.*
Solicitors for the respondent: Messrs. *Barrow* and *Rogers.*

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[219] FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

KASHI PRASAD *(Defendant)* *v.* KEDAR NATH SAHU AND OTHERS *(Plaintiffs).** [17th December, 1897.]

Act No. IX of 1872 *(Indian Contract Act)*, s. 23—*Void contract—Agreement to relinquish ex-proprietary rights—Partition—Act No. XII of* 1881 *(N.-W P. Rent Act)*, *ss. 7 and 9—Act No. XIX of* 1873 *(N.-W. P. Land Revenue Act)*, *s.* 125.

By a mutual agreement entered into between the parties to a private partition of certain villages held by them jointly the parties agreed that, if either party at the time of the partition was holding *sir* land in a village which upon partition fell into the share of the other party, he would relinquish his rights in such *sir* land in favour of the party into whose share the said village had fallen.

Held that under such private partition, the holder of the *sir* land became, on partition being effected, an ex-proprietary tenant in respect of the land previously held by him as *sir*, and that consequently the agreement to relinquish his rights in such land was not enforceable in law.

Held also that s. 125 of Act No. XIX of 1873 does not apply to a partition by private agreement. *Gaya Singh* v *Udit Singh* (1) referred to. *Ram Prasad* v. *Dina Kuar* (2) dissented from by Knox and Banerji, JJ.

[R., 33 A. 695 (700)=8 A.L.J. 826=11 Ind. Cas. 17 (18); 9 A.L.J. 701=16 Ind. Cas. 81 (82).]

THE facts of this case are briefly as follows:—

The parties were co-sharers in a number of villages. By an instrument, dated the 20th of May 1891, they partitioned their shares, and some entire villages were allotted to the share of the plaintiffs and other villages to that of the defendant. It was agreed that each party should surrender to the other the *sir* lands held by him in the villages assigned to the share of the other. The plaintiffs performed their part of the agreement, and surrendered to the defendant the *sir* land held by them in the village Sehri, which fell to the defendant's share, but the defendant, whilst retaining in his possession the *sir* lands of the plaintiffs, refused to deliver up to the plaintiffs the *sir* lands held by him in the village Barghat which was assigned on partition to the plaintiffs. The **[220]** plaintiffs brought the present suit to recover from the defendant the *sir* lands in the village Barghat. The defendant asserted that he had acquired the rights of an ex-proprietary tenant in respect of those lands and that the agreement to relinquish was void as it was forbidden by law. The court of first instance

* First Appeal, No. 111 of 1895, from a decree of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 25th March 1895.

(1) 13 A. 396. (2) 4 A. 515.

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(Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim. The defendant thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant. By the deed of partition the defendant lost his proprietary rights in the village in question within the meaning of s. 7 of Act No. XII of 1881. He therefore became in respect of the land held by him as in that village an ex-proprietary tenant. Being an ex-proprietary tenant any agreement by him to transfer his ex-proprietary rights was prohibited by s. 9 of the said Act. These sections (*viz.*, 7 and 9) apply to a loss of proprietary rights resulting from a partition amongst co-sharers. Section 125 of Act No. XIX of 1873 applies only to partitions effected by the Revenue authorities for Revenue purposes and will not apply to a case such as the present where the partition was by private agreement. Besides the case of *Ram Prasad* v. *Dina Kuar* (1) cited in the judgment of Banerji, J., the advocate for the appellant referred to *Indar* v. *Khushi* (2), *Hanuman Rai* v. *Kariman* (3) and *Gulab Rai* v. *Indar Singh* (4).

Mr. *W. Wallech*, for the respondents. The agreement to partition was *per se* a valid agreement enforceable in law. The proviso for the mutual exchange of *sir* land was added as an afterthought after all the substantive provisions of the agreement had been completed, and as a matter of convenience, so that each party should hold the whole of the villages that had fallen to their share on partition. The whole agreement was purely voluntary, no money consideration passing. Each party before the agreement possessed 50 per cent. of the property, and by the agreement the parties exchanged certain of their interests, so that in the result they still possessed 50 per cent. of the whole, and under s. 9 [221] of the Rent Act, 1881, a voluntary transfer is lawful between persons "in favour of whom as co-sharers such right originally arose." Under s. 125 of Act No. XIX of 1873 *sir* land belonging to one co-sharer can be assigned on partition to another co-sharer if the co-sharer cultivating it consents. In this case the co-sharer consented by the agreement. There is nothing in the Act to show that the proviso contained in s. 125 is not meant to apply to private partitions. Counsel for the respondents relied on *Abhai Pandey* v. *Bhagwan Pandey* (5), *Indar Sen* v. *Naubat Singh* (6) and *Gaya Singh* v. *Udit Singh* (7).

Pandit *Sundar Lal* replied.

The following judgments were delivered.

JUDGMENTS.

BANERJI, J. (KNOX, J., concurring).—I agree with my learned colleagues in holding that the defendant acquired the rights of an ex-proprietary tenant in the land held by him as *sir* in the villages which have been assigned by partition to the share of the plaintiffs. The parties were co-sharers in a number of villages. By an instrument, dated the 20th of May 1891, they partitioned their shares, and some entire villages were allotted to the share of the plaintiffs and other villages to that of the defendant. It was agreed that each should surrender to the other the *sir* lands held by him in the villages assigned to the share of the other. The plaintiffs performed their part of the agreement, and surrendered to the defendant the *sir* land held by them in the village Sheri, which has fallen into the defendant's share, but the latter, whilst retaining in his possession the *sir* lands of the plaintiffs, has refused to deliver up

(1) 4 A. 515.
(2) 6 A.W.N. (1886) 88.
(3) 8 A.W.N. (1888) 185.
(4) 6 A. 54.
(5) 3 A. 818.
(6) 7 A. 847.
(7) 13 A. 396.

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to the plaintiffs the *sir* lands held by him in the village Barghat, which has been assigned by partition to the share of the plaintiffs. He asserts that he has acquired the rights of an ex-proprietary tenant in respect of those lands and that the agreement to relinquish them is void, as it is forbidden by law. Upon this contention two questions arise :—first, whether the defendant has acquired the rights [222] of an ex-proprietary tenant in regard to his *sir* land, and, secondly, whether, if he has acquired such rights, the agreement made by him to surrender them is legally enforceable.

In my opinion both these questions must be decided in favour of the defendant. Under the partition of the 20th of May 1891, the share which the defendant had in the mahal in which he held *sir* lands, has been assigned to the plaintiffs, and he has obtained in exchange for that share villages in other mahals. He has therefore "lost or parted with his proprietary rights" in the mahal in which he held the sir lands. By s. 7 of Act No. XII of 1881, "every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting" at a favourable rate of rent, and he shall be called an ex-proprietary tenant. The defendant therefore has under this section acquired the rights of an ex-proprietary tenant in the land held by him as *sir* in the villages which have under partition passed into the share of the plaintiffs. The language of s. 7 is wide enough to apply to transfers of every description by which a proprietor may lose or part with his proprietary rights, and there is nothing in it to exclude from its operation the case of a partition effected by the co-charers by mutual agreement. It has been contended that the Legislature never intended s. 7 to apply to an exchange of shares by partition, and reference has been made in support of this contention to the provisions of s. 125 of the North-Western Provinces Land Revenue Act, 1873. The intention of the Legislature must be gathered from the language employed by it, and I find nothing in the provision of s. 7 to warrant the supposition that it was not intended to apply to a private partition. The words used in that section are only consistent with the policy which dictated it, namely, that no proprietor whose rights as such have passed away from him should be wholly denuded of everything he had in the mahal in which he held those rights, and that he should be secured in the occupation of the *sir* lands held by him in that mahal. That policy in my opinion [223] applies as much to the transfer of proprietary rights under a private partition as to any other description of transfer of such rights, and therefore there is no reason in my judgment for holding that the Legislature did not intend the provisions of s. 7 to be applicable to private partitions. Section 125 of Act No. XIX of 1873, it is true, provides in its second paragraph that if under the partition of a mahal the *sir* land of one co-sharer be assigned to another co-sharer, the former will have the rights of an occupancy tenant in respect of such land if he continue to cultivate it. There cannot be any doubt that under the North-Western Provinces Rent Act the rights of a mere occupancy tenant are different in their incidents from those of an ex-proprietary tenant, and it seems that the Legislature in that Act regarded an ex-proprietary tenancy as of a higher status than the tenancy of a mere occupancy tenant. I am therefore unable to agree with the learned Judges who held in *Ram Prasad* v. *Dina Kuar* (1) that a co-sharer whose share

(1) 4 A. 515.

has been assigned to another co-sharer acquires under s. 125 the rights of an ex-proprietary tenant in respect of his *sir* lands. Section 125 is, in my judgment, an exception to the general rule laid down in s. 7 of the North-Western Provinces Rent Act, 1881. That section has taken the place of a similar section in Act No. XVIII of 1873, which was passed on the same day as Act No. XIX of 1873. Reading the two Acts together, and having regard to the fact that both of them were under the consideration of the Legislature at one and the same time, it seems to me that the intention of the Legislature was to enact a general rule in s. 7 of Act No. XVIII of 1873 and provide an exception to that rule in Act No. XIX of 1873 in the case to which s. 125 of that Act applies. What the policy of the Legislature may have been in conferring on an ex-proprietor in respect of his *sir* land the rights of a mere occupancy tenant in the case of a partition held under Act No. XIX of 1873, and the rights of an ex-proprietary tenant in the case of a private partition by mutual agreement, it is not easy to conceive. But I am **[224]** unable to hold that the Legislature did not intend s. 7 of Act No. XII of 1881 to include within the scope of its operation a partition effected by the co-sharers by private arrangement. I am therefore of opinion that the defendant acquired the rights of an ex-proprietary tenant in the *sir* lands held by him in the villages which have been allotted to the plaintiff's share.

By the terms of the deed of partition the defendant agreed to surrender his *sir* lands to the plaintiffs upon the latter's doing the same in regard to their own *sir*. The terms are these:—"According to this partition the *sir* lands and the houses of a party situated in a village shall go to the other party's share along with the village in which they are situated; consequently, the party who will get possession of the village shall be considered by reason of its falling to his lot to be the proprietor of the *sir* lands, and the houses situate in such village. Should any party fail to give up possession of the houses and the *sir* lands the proprietor of the village shall have the said person's possession removed from the houses and the *sir* lands." In pursuance of this agreement the plaintiffs have delivered possession of their *sir* lands to the defendant, and it is certainly an act of bad faith on the part of the defendant to retain in his own possession the *sir* lands of the plaintiffs and to refuse to give them in exchange his own *sir* lands. But what we have to consider is whether the defendant can be compelled in law to surrender his *sir*. The agreement referred to above is nothing more than an agreement to relinquish the ex-proprietary rights which would accrue under the provisions of s. 7 of Act No. XII of 1881. Such an agreement would, in my opinion, defeat the object of that section, which is to prevent a proprietor from divesting himself by his own improvidence of every interest owned by him in his zamindari, and to afford him some protection against the effect of a complete transfer of his rights therein. No doubt an ex-proprietary tenant, like any other occupancy tenant, is competent to relinquish his ex-proprietary rights after he has acquired them; but an agreement to relinquish in the future the **[225]** ex-proprietary rights which would be acquired after the transfer of his proprietary rights is virtually an agreement to transfer the ex-proprietary rights. Such an agreement is within the prohibition of s. 9 of Act No. XII of 1881. The agreement in question, therefore, is one forbidden by law, and is also of such a nature that, if permitted, it would defeat the provisions of law. The object of the agreement is consequently unlawful under s. 23 of the Indian Contract Act, and the agreement is void. This case may be distinguished from that of *Gaya Singh* v. *Udit*

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Singh (1), as it appears from the judgment of one of the learned Judges that in that case a relinquishment had already taken place, and it was on that ground that it seems the relinquishment was upheld. If, however, it was intended to hold in that case that every agreement to relinquish an ex-proprietary holding in the future is a valid agreement, I must say with due deference that I am unable to agree with that view. Such an agreement, if sustained, would certainly defeat the object of s. 7, and would be resorted to as a device for evading the operation of that section. It has been said that in this case the object of s. 7 would not be defeated, as the defendant was to get, and has already obtained, the *sir* lands of the plaintiffs. But it must be borne in mind that it is extremely doubtful whether the land which was once the *sir* of the plaintiffs would be *sir* land in the hands of the defendant, within the meaning of *sir* land as defined in Act No. XII of 1881. I am accordingly of opinion that the agreement relied upon by the plaintiffs is void under s. 23 of the Indian Contract Act and cannot be enforced, and on these grounds the claim for possession of the lands which were once the *sir* of the defendant must fail. I may observe that the plaintiffs have failed to make out any case in respect of their claim for the lands in the village Ahraula which has fallen to the share of the defendant under the partition.

As for the claim to which relief (3) of the plaint relates, the appeal must, for the reasons given by my brother Aikman, be sustained.

[226] I agree in the decree proposed by my brother Aikman.

BLAIR, J.—The plaintiffs were the owners of a one-half share in certain zemindari villages, and the defendant was the owner of the other half share. A deed of partition was executed by the parties and registered, the effect of which was that, instead of their half shares in the zamindari villages, each party should become sole proprietor of certain of the villages and abandon in consideration all right to those allotted to the other. In two villages, one of which was allotted in the deed of partition to the plaintiffs and one to the defendant, there was certain land theretofore held by the parties respectively as *sir*, with houses thereon. One of the terms of the agreement was that "the *sir* lands and the houses of a party situated in a village shall go to the other party's share along with the village in which they are situated; consequently the party who will get possession of the village shall be considered, by reason of its falling to his lot, to be the proprietor of the *sir* lands and the houses also situate in such village. Should any party fail to give up possession of the houses and the *sir* lands, the proprietor of the village shall have the said person's possession removed from the houses and the *sir* lands." The defendant entered on the possession of the village or villages assigned to him. He also took possession of the *sir* and house appurtenant thereto and which had been relinquished by the plaintiffs. The plaintiffs took possession of the zamindari property allotted to them, but the defendant refused to give up to them the possession of the *sir* and house which formed part of such zamindari property, claiming to be entitled to continue in occupation as ex-proprietary tenant. This suit is brought to recover possession of such *sir* and house in accordance with the terms of the deed of partition, and for certain subsidiary reliefs. The defendant sets up in his defence his right of occupancy as an ex-proprietary tenant, within the meaning of s. 7 of Act No. XII of 1881. That section is couched in the following terms:—

"Every person who may hereafter lose or part with his proprietary

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rights in any mahal shall have a right of occupancy [227] in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages.

"Persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy tenants."

The section in express terms applies to every person who "shall lose or part with his proprietary rights." Indeed I am unable to suggest any form of dispossession, voluntary or involuntary, which those terms are not large enough to cover. It is the contention of the defendant that a contract to abandon his right of occupancy as an ex-proprietary tenant conferred by that section is illegal and unenforceable in law. That he did so promise in the partition agreement seems beyond doubt, and also that such promise made by him formed an integral and inseparable part of the consideration for the reciprocal promises of the plaintiffs. I do not think there is any conflict of opinion as to whether there has been, as a matter of fact, any abandonment or relinquishment by the defendant of his ex-proprietary rights. Indeed the suit is brought upon the basis of a possession admitted and justified by himself. The only question now at issue is whether the provisions of s. 7 and s. 9 of Act No. XII of 1881 are a bar to the maintenance of this suit. If the words of s. 7 are to be taken in their simple and natural meaning, they clearly include, without any distinction whatever, all alienations of whatsoever nature. Upon this construction I fail to see any ground for distinction between alienation by partition and voluntary alienation by sale, or by exchange, or by proceedings *in invitum* conducted in execution of a decree. The words "proprietary rights" include the rights of a shareholder as well as those of a single exclusive owner. Nor does it appear to me that the nature of the consideration affects the applicability of the section. The zamindar is equally a person who "may lose or part with his proprietary rights" in a mahal, whether the consideration for the alienation be [228] money, land in some other mahal or some other person's share in a mahal. The result would be precisely the same in all cases. He would, but for the operation of s. 7, have denuded himself of all interest in the mahal. and, if the land or share parted with or lost was spread over a score of mahals, in each one the right of ex-proprietary tenancy in relation to the *sir* therein would at once arise. This seems to me to be the plain and obvious construction of plain words, the comprehensiveness and generality of which I cannot doubt were deliberately intended by the Legislature. In my opinion the *onus* of establishing an unexpressed exception to the wide language of the section lies upon those who contend for such an exception. On behalf of the respondents I understand it to be urged that provisions in relation to partition do not lie within the scope and purview of the Rent Act, and do lie within the scope and purview of the Land Revenue Act, No. XIX of 1873, as amended. The object of the Rent Act is, generally speaking, to define and control the rights and remedies of landlords and tenants arising out of that relation. The creation of a new relation of landlord and tenant arising from expropriation would be apparently as much within the scope of that Act, whether such expropriation arose through voluntary partition, or through sale or execution proceedings. In the same way the Land Revenue Act in its provisions in respect of partition deals with the duties of revenue officers therein engaged in the formation of areas for the collection of revenue and the re-arrangements of such

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areas consequent upon and rendered necessary by partitions. All the sections on the subject, from s. 108 of Act No. XIX of 1873 up to and exclusive of s. 125, deal with partitions effected by the Revenue officers, and appear to me to exclude partitions effected solely by the private consent of the parties. The words of that latter section limit its application to land "assigned on partition and with the consent of the co-sharer." The section then, dealing with land the subject both of such assignment and of such consent shall be held by the co-sharer as an occupancy tenant. That is not a general enactment of the status of the [229] cultivating co-sharer on partition, and does not in my opinion apply to any case in which the partition is not effected by the revenue officers. If this interpretation of s. 125 be correct, then I am unaware of any extant provision of law defining the status of a person, who, by private and voluntary partition, has divested himself of his proprietary rights in the *sir* of which before partition he was a co-sharer, unless it be s. 7 of the North-Western Provinces Rent Act. I hardly think it possible to contend that a co-sharer in effecting a voluntary partition may wholly, unreservedly and absolutely part with his proprietary right, while in the case of partition by authority the law reserves for him an inalienable right of occupancy. That seems to me to involve a much graver anomaly than to suppose that the Legislature intended by s. 125 of the Land Revenue Act to differentiate the status of a co-sharer proceeding in partition by means of the revenue officers from that of an ex-proprietary tenant created by s. 7 of the North-Western Provinces Rent Act. If this section of the Rent Act does not apply to voluntary partitions it would then be possible for two co-sharers to partition the property in such a way that the *sir* would remain entirely with one co-sharer, while the other would possess a zamindari property which he might himself alienate, or of which he might be deprived in execution of a decree without retaining a single particle of interest in it. To prevent such a consummation was in my judgment the object of the Legislature in calling into existence the ex-proprietary tenant. The opinion which I have formed as to the inclusion in s. 7 of the Rent Act of expropriation by partition is largely based upon the consideration that the joint possession of land by joint families is the normal and characteristic type of proprietary possession among Hindus. The numerical importance of and the extent of property held by that constituent of the population seems to me to exclude the suggestion that the every day method of redistribution by partition should have been entirely outside the purview of the Legislature when it enacted s. 7 of the Rent Act. It seems to me that [230] nothing short of express words, excluding or excepting expropriation by partition from the scope and operation of the section, would justify us in declining to apply it to the present case. I would hold, therefore, that the contract between the parties by which each promised to divest himself of all right of occupancy in the *sir* is in respect to that promise unenforceable in law. The result is that I would allow the appeal and dismiss the suit of the plaintiff, except as to the sum of Rs. 287-8-0, but without costs. I would give the plaintiffs their costs in proportion to their success in both Courts.

BURKITT, J:—There can be no doubt that the wording of s. 7 of the North-Western Provinces Rent Act is sufficiently wide to include the present case. I nevertheless entertained great doubts as to whether the Legislature had in its contemplation the case of a transfer by partition. I have, however, (though with no little hesitation), come to the conclusion that my doubts were not well founded, and I concur with the remainder

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of the Court in holding that the appellant did acquire the status of an ex-proprietary tenant in the *sir* land formerly his, which is now included in the village wholly transferred under the partition to the respondents. I have come to this conclusion with the greatest reluctance because of the glaringly dishonest manner in which the appellant acted towards the respondents. I concur in the judgment just delivered by my brothers Knox and Banerji.

AIKMAN, J.—The parties to this suit, or their predecessors in title, were joint owners of several villages in the Basti and Gorakhpur districts. On the 20th of May 1891, they entered into an arrangement by which this joint ownership was put an end to, each party taking certain villages in sole proprietorship. It was agreed between them that, if either party had *sir* land in any village which fell to the lot of the other, the *sir* land was to be relinquished by the party to whom it had belonged. The plaintiffs owned *sir* land in a village named Sehri, which village fell to the defendant's lot. The plaintiffs carried out their part of the bargain by surrendering to the defendant possession of [231] this *sir* land. A village named Barghat, in which the defendant owned *sir* land, fell to the plaintiff's lot, but the defendant, although, as said above, he had got from the plaintiffs the *sir* land in the village of Sehri, with singular bad faith refused to carry out his part of the bargain by resigning to the plaintiffs the *sir* land in Barghat. The plaintiffs accordingly brought this suit to recover possession of this *sir* land and mesne profits for the time during which possession had been withheld. The lower Court has given the plaintiffs a decree, from which the defendant has appealed. It is contended on behalf of the appellant that the bargain which the plaintiffs seek to enforce is one which the Courts cannot, with reference to the provisions of s. 23 of the Contract Act, give effect to. I have reluctantly come to the conclusion that this contention must be sustained. The defendant was at one time joint owner with the plaintiffs in the village of Barghat. The partition deed shows that the whole of that village was transferred to the plaintiffs; consequently the defendant by that partition lost or parted with the proprietary rights which he formerly had in the village. He therefore, under the provisions of s. 7 of the North-Western Provinces Rent Act, 1881, at once acquired a right of occupancy in the *sir* lands he held in the village and became an ex-proprietary tenant thereof.

It would be absurd to hold that an ex-proprietary tenant cannot, if he chooses, relinquish his tenancy in *sir* land after he has by virtue of s. 7 acquired a right of occupancy in it. To hold otherwise would be to convert him into a serf attached to the soil, and would moreover be in contravention of s. 31 of the Rent Act, which gives a right of relinquishment to all tenants not holding under a lease. But the question we have to consider is:—Can a Court enforce specific performance of a contract, such as that on which the plaintiff relies, to relinquish a right of occupancy which is created and conferred by s. 7 of the Rent Act? In my opinion this question must be answered in the negative. It is true that a contrary view appears to [232] have been taken in *Gaya Singh* v. *Udit Singh* (1), and the performance of a similar contract enforced. But, with all respect to the learned Judges who decided that case, I am of opinion that they overlooked the difficulty created by reading

(1) 13 A. 396.

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s. 23 of the Contract Act in the light of s. 7 and s. 9 of the Rent Act. In the course of the argument in this case, it was contended that s. 7 of the Rent Act was never intended to apply to a case like the present. The defendant's case here undoubtedly falls within the four corners of s. 7. If I could find any clear indication that it was not the intention of the Legislature that s. 7 should apply to a case like the present, I would be only too glad to give effect to the respondent's contention. But I can find none. In supporting this contention much reliance was placed upon s. 125 of the North-Western Provinces Land Revenue Act, 1873, the second paragraph of which provides that where, in carrying out a partition, the *sir* land of one co-sharer has been included in the mahal assigned to another co-sharer, the former shall be an occupancy tenant of the land. The Legislature recognizes a distinction between an ex-proprietary tenant and occupancy tenant. See s. 10 of the Rent Act. Now if s. 125 of the Revenue Act had provided that the co-sharer whose *sir* was transferred in effecting a partition was to be an ex-proprietary tenant, there would have been some force in the contention that s. 7 was not intended to cover cases of partition, as, if s. 7 were intended to be of general application, such a provision as that contained in the second paragraph of s. 125 of Act No. XIX of 1873 would have been unnecessary. But there is nothing to show that the second paragraph of s. 125 was not intended to be an exception to the general rule. If it be held, as I think it must be, that the appellant by the arrangement come to on the 20th of May 1891, became an ex-proprietary tenant of his *sir* land in the village in which, by that arrangement, he parted with his proprietary rights, it would, I hold entirely defeat the provisions of s. 7 and s. 9 [233] of the Rent Act were a Court to enforce a contract to surrender the occupancy rights so acquired. If such contracts were enforced, the beneficent provisions of s. 7 of the Rent Act would, I fear, be rendered almost entirely nugatory.

For the above reasons I am of opinion that that portion of the decree of the lower Court awarding to the plaintiffs possession of the *sir* land in mauza Barghat and mesne profits thereof should be set aside. The plaintiffs also sued to recover possession of *sir* land in another village named Abraula. In their plaint they make out no cause of action as to the *sir* land of this village. An inspection of the partition proceedings shows that, with the exception of a plot of 144 bighas, the whole of Abraula was assigned to the defendant. There is nothing to show that the clause in the agreement of the 20th of May 1891, on which the plaintiffs rely, applies in the case of Abraula. On this ground alone the claim as regards Abraula ought to have been dismissed. But if the clause did apply, it was, as in the case of the Barghat *sir*, a contract which tended to defeat the provisions of s. 7 of the Rent Act, and which cannot therefore be enforced. The above findings dispose of the first five grounds in the memorandum of appeal. The last ground refers to a portion of the plaintiffs' claim in which they sought to recover money they had paid out for the defendant. The defendant put in a counter claim on account of a bond payable by the plaintiffs which the defendant had discharged. The Court below gave the defendant credit for the amount he had paid to the extent of the principal money secured by the bond and interest for one year, but refused to allow the defendant credit for the amount he had paid as *post diem* interest, holding that this was not recoverable under the bond. With reference to the terms of the bond and the decision of their Lordships of the Privy Council in the

recent case, *Mathura Das* v. *Raja Narindar Bahadur Pal* (1), *post diem* interest was due under the bond. The defendant was therefore entitled to credit for the sum he paid on that account. [234] When credit is given him for this, the amount due to the plaintiffs is reduced to Rs. 287-8-0. The result of the above findings is that the plaintiffs' suit for possession of the *sir* land and mesne profits should be dismissed, and a decree passed for Rs. 287-8-0, instead of Rs. 3009-8-0, with costs proportionate to their success.

I would allow the appeal and vary the decree of the lower Court as set forth above. But to mark our sense of the bad faith displayed by the defendant, I would not allow him any costs here or in the Court below.

BY THE COURT.—The appeal is allowed; the decree of the lower Court is varied, and the plaintiffs' suit dismissed, except as regards the sum of Rs. 287-8-0. The plaintiffs will get costs in this Court and the Court below proportionate to their success. The defendant will pay his own costs throughout.

Decree modified.

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20 A. 234 = 18 A.W.N. (1898) 23.

[234] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

OOCHI AND ANOTHER (*Defendants*) *v.* ULFAT AND OTHERS (*Plaintiffs*).*

[18th January, 1898.]

Maha-brahmans—Agreement as to distribution of offerings—Contract—Cause of action.

Amongst the Maha-brahmans of a particular village an agreement obtained that some of them should collect and receive offerings during certain months; that during those months the others should refrain from receiving any offerings, and that in certain other months the other Maha-brahmans should collect and receive the offerings and they should refrain from collecting offerings.

Held, that this was a good agreement and sufficient to support an action for damages by the persons entitled to the offerings in a particular month as against the persons who had received those offerings contrary to the agreement.

[R., 5 O.C. 225.]

THIS was a suit of the nature of a suit for damages for breach of contract. The parties to the suit were Maha-brahmans. The plaintiffs' case was as follows:—They alleged that at a time long anterior to suit an arrangement had been come to amongst the [235] Maha-brahmans of Mainpuri by which each of them took it in turn to receive the offerings made on an *ekadasha* (eleventh day ceremony), that is to say, if such a ceremony took place during the turn of a particular Maha-brahman the offerings made were taken by him. The turn of the plaintiffs' maternal grandfather as Maha-brahman fell in the months of Jeth, Bhadon, Aghan and Phagun, and he used to receive the Maha-brahman's dues in respect of any *ekadasha* occurring during those days. After his death his widow Mithua continued to receive the dues which had fallen to his share. By a deed of gift of the 9th of December 1885 she gave that right of a Maha-brahman to the plaintiffs who held it since then. The plaintiffs further alleged that in the village of Deopura, which is attached to Mainpuri, one

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* First Appeal No. 59 of 1897, from an order of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 29th June 1897.

(1) 23 I. A. 138 = 19 A. 39.

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20 A. 234 = 18 A.W.N. (1898) 23.

Thakur Tribhawn Singh died, and his *ekadasha* was performed on the 8th Jeth Badi, Sambat 1953, corresponding to the 5th of May 1895. That day belonged to the plaintiffs' turn as Maha-brahmans, but the defendants took without any right the offerings made on that occasion to the value of some Rs. 200. The plaintiffs therefore sued to recover the offerings or their value.

The defendants pleaded, *inter alia*, that such a suit would not lie.

The Court of first instance (Munsif of Mainpuri) upheld this contention and dismissed the suit on the ground that it was not cognizable by a Civil Court.

The plaintiffs appealed. The lower appellate Court (Subordinate Judge of Mainpuri) held that the suit would lie, and made an order of remand under s. 562 of the Code of Civil Procedure. From that order the defendants appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C. J. and BURKITT, J.:—The plaintiffs sued the defendants to recover money and offerings received by the defendants in breach of an agreement between the parties. The parties were *Maha-brahmans*, and it is alleged that an agreement **[236]** had been come to between the predecessors of the parties, the effect of which now, as applied to the present parties, is that the plaintiffs should collect and receive offerings during certain months; that during those months the defendants should refrain from receiving any offerings, and that in certain other months the defendants should collect and receive the offerings and the plaintiffs should refrain from collecting offerings. The first Court dismissed the suit on the ground that such a suit would not lie. The second Court set aside the decree of the first Court, and made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand, this appeal has been brought.

In the course of the argument we have been referred to *Doorga Parshad* v. *Budree* (1); *Lala* v. *Guneshee* (2); *Durga Prasad* v. *Genda* (3); *Jhummun Pandey* v. *Dinoo Nath Pandey* (4); *Har Lall* v. *Jeorakhun Lall* (5); *Deonath* v. *Mussumat Guneyshee* (6); *Bindhu Lal* v. *Sampat Misr* (7) and *Muddun Mohan Ghossal* v. *Nuboram Chuckerbutty* (8).

Few of these authorities have any bearing on this case. The decisions in others of them, so far as they would apply here, were *obiter*. This suit is based on an alleged contract, which of course must be proved. For present purposes, and those only, we assume that the alleged contract can be proved. It is not against public policy that such a contract should be entered into, and we know no reason in law which would make such a contract bad. The cause of action would apparently be for damages for breach of the contract. The measure of these damages probably would be the amount proved to have been received by the defendants in breach of the contract. We dismiss this appeal with costs.

Appeal dismissed.

(1) 6 N. W. P. H. C. R. 189.
(2) S. D. A. N. W. P. S. C. Vol. 2, p. 448.
(3) 9 A. W. N. (1889) 169.
(4) 16 W. R. 171.
(5) S D. A. N. W. P. (1862), 314.
(6) S. D. A. N. W. P. (1860) 78.
(7) 3 A. W. N. (1883) 168.
(8) 2 W. R. C. R. 69.

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[237] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

KISHEN SAHAI (*Defendant*) *v.* BAKHTAWAR SINGH AND OTHERS (*Plaintiffs*).* [19th January, 1898.]

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20 A. 237=18 A.W N. (1898) 24.

Suit to recover compensation in respect of property sold under a decree—Decree not reversed or superseded.

A zamindar applied to a Revenue officer to commute the rent hitherto paid in kind by certain of his tenants to a fixed money rent to be paid in future. The Assistant Collector made the order asked for and fixed the money rent to be paid in future. After that order had been made the zamindar brought a suit for arrears of rent against the tenants in a Court of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. Against this decree the tenants did not appeal, and it became final. The decree was put into execution: property of the tenants was attached and sold, and the decree was partially satisfied out of the sale proceeds. Subsequently to the passing of the decree for rent, the Board of Revenue set aside the order of the Assistant Collector commuting the rent in kind to a fixed money rent. The tenants thereupon sued to recover compensation on account of the sale of their property under the decree for rent.

Held, that the suit would not lie, inasmuch as the decree for rent under which the plaintiff's property was sold was unreversed and not superseded by any competent Court. *Marriot* v. *Hampton* (1); *Shama Parshad Roy Chowdhery* v. *Hurro Parshad Roy Chowdhery* (2); *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) and *Raja Nilmoney Singh Deo Bahadoor* v. *Sharoda Parshad Mookerjee* (4) referred to.

[R., 33 A. 1 (3)=7 A.L.J. 810 (812)=6 Ind. Cas. 891; A.W.N. (1908) 211=4 M.L.T. 172 (179).]

THE facts of this case are as follows:—

The plaintiffs were occupancy tenants of the defendants of some 20 bighas and 6 biswas of land in the town of Meerut. The plaintiffs used to pay their rent in kind. The defendant sued them for enhancement of rent (describing his suit as one for determination of the rent payable by the plaintiffs) and got a decree on the 13th of September 1889. This decree was set aside by the Board of Revenue on appeal on the 14th of October 1890. Between the 13th of September 1889 and the 14th of October, 1890, the defendant sued the plaintiffs for rent at the enhanced rate allowed by the decree of the 13th of September 1889 and got [238] a decree for Rs. 1,960-2-0 on the 18th June 1890. Notwithstanding the order of the Board of Revenue of the 14th of October, 1890, the defendant executed his decree for rent and realized Rs. 1,010.

The plaintiffs sued for cancelment of the decree of the 18th of June 1890 and the case went up to the Board of Revenue on appeal. The Board held that the decree of the 18th of June 1890 could not be cancelled by them and directed the plaintiffs to seek their remedy in the Civil Court. The plaintiffs accordingly brought a suit for a declaration that the decree of the 18th of June was incapable of execution; but their suit was dismissed by the Subordinate Judge on the 28th of September 1893.

The plaintiffs thereupon brought the present suit in which they claimed to recover the amount realized in execution of the decree of

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* First Appeal No. 78 of 1897, from an order of Babu Jai Lal, Officiating Subordinate Judge of Meerut, dated the 15th July 1897.

(1) 7 T.R. 269=2 Smith L.C. 409, 10th Ed.
(2) 10 M.I.A. 203.
(3) 3 C. 80.
(4) 18 W.R.C.R. 434.

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the 18th of June 1890 on the allegation that the said decree had been superseded by the order of the Board of Revenue of the 14th of October 1890.

The defendant pleaded, *inter alia*, that the decree in question was still subsisting and that therefore the defendant could not recover anything realized under it.

On this issue the Court of first instance (Munsif of Meerut) found that the decree in favour of the defendant for rent at the enhanced rate had not been set aside, and dismissed the plaintiffs' suit.

On appeal by the plaintiffs the lower appellate Court (Subordinate Judge of Meerut) found that the "main decree of the 13th of September 1889 being reversed by the Board of Revenue and that being the basis of the decree of the 18th of June 1890, this latter decree being a dependent decree must be taken as superseded." The Subordinate Judge accordingly set aside the decree of the Munsif and made an order of remand under s. 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

[239] EDGE, C. J., and BURKITT, J.—The plaintiffs, who are respondents here, brought their suit against their landlord, who was the zamindar, the appellant here, to recover compensation for their property which was sold in execution of a decree for rent made by a competent Court. The first Court dismissed the suit, holding that the suit did not lie. The Court of first appeal set aside the decree of the first Court and made an order of remand under s. 562 of the Code of Civil Procedure. From that order this appeal has been brought.

The facts of this case are these:—The zamindar applied to a revenue officer to commute the rent theretofore paid by these plaintiffs as his tenants in kind to a fixed money rent to be paid in future. The Assistant Collector made the order, and fixed the money rent to be paid in future. After that order had been made, the zamindar brought a suit for arrears of rent against his tenants, these plaintiffs, in the Court of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. That decree was put in execution; property of these plaintiffs appellants was attached and sold, and the decree was partially satisfied out of the sale proceeds. This suit is brought to recover the money so realized, the Board of Revenue having, before the commencement of this suit and subsequently to the passing of the decree for rent, set aside the order commuting the rent in kind into a fixed money rent.

For the defendant appellant reliance has been placed on the principle of the decision in *Marriot* v. *Hampton* (1), and it has been contended that, as the Board of Revenue had not jurisdiction to interfere in appeal or otherwise with the decree for rent, the decision of their Lordships of the Privy Council in *Shama Parshad Roy Chowdhery* v. *Hurro Parshad Roy Chowdhery* (2), the decision of the majority of the Full Bench of the High Court at Calcutta in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3) and of the Calcutta Court in *Raja Nilmoney Singh Deo Bahadoor* v. **[240]** *Sharoda Parshad Mookerjee* (4) did not apply, as in all these cases

(1) 7 T. R. 269=2 Smith L.C. 409, 10th Ed.
(2) 10 M.I.A. 203.
(3) 3 C. 30.
(4) 18 W.R.C.R. 434.

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the Court which passed a subsequent decree, which had the effect of reversing or superseding the decree under which the money was paid which was sought to be recovered, had jurisdiction over the suit in which such last mentioned decree was made.

On the other hand for the plaintiffs respondents it has been contended that the setting aside in revision by the Board of Revenue of the order of the Assistant Collector commuting the rent in kind into a fixed money rent had the effect of superseding the decree for rent of the Court of Revenue, as that decree was based on the order of the Assistant Collector commuting the rent.

As a matter of fact it is questionable whether in this case the Assistant Collector had any jurisdiction to make his order commuting the rent in kind to a fixed money rent. The Board of Revenue had absolute jurisdiction in revision over that order of the Assistant Collector. The decree for rent made by the Court of Revenue being for a sum exceeding Rs. 100 was one over which the Board of Revenue had no jurisdiction of any kind, and was one the appeal from which lay exclusively to the District Judge. No appeal in fact was made from the decree for rent. It appears to us that their Lordships of the Privy Council, in the case which was before them and to which we have referred, when speaking of a decree being reversed or superseded, were, as to reversal certainly, speaking of reversal by a competent Court, and as to supersession were referring to such supersession as had taken place in the case before them. That was a case in which the money sought to be recovered had been paid under decrees which were based solely on a decree between the same parties which was subsequently reversed by their Lordships of the Privy Council. We think the supersession to which their Lordships were referring must have been a superseding by a decree of a Court which had competent jurisdiction to reverse the decree under which the money had been paid, if it had been brought before them. It is quite plain to our minds that if there had been no order made [241] at all for a commutation of the rent in kind into a fixed money rent, but a Court of Revenue had erroneously made a decree for a money rent and that decree was executed and was not reversed in appeal or superseded by a Court competent to reverse it, a tenant whose goods had been sold in execution of such decree for rent or who had satisfied that decree by payment, could not recover so long as the decree for rent was not reversed or superseded by a Court competent in that respect. The defendants had a remedy against this decree for rent, and that was by appealing. Of that remedy they did not avail themselves, and it may be observed that, as the Assistant Collector apparently acted without jurisdiction in making his order of commutation, the defendants had a good ground of appeal. The fact that the order of the Board of Revenue in revision set aside the order of the Assistant Collector commuting the rent cannot, in our opinion, put the plaintiffs in a better position than they would have been in, if, as we think is probable, the Assistant Collector had no jurisdiction to make the order of commutation. In our opinion, as the decree of the Court of Revenue stands unreversed and not superseded by a competent Court, this suit must fail. We allow this appeal with costs in this Court and in the Court below, and, setting aside the order under appeal, we dismiss the appeal to the Court of first appeal and restore and affirm the decree of the first Court.

Appeal decreed.

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20 A. 241 =
18 A.W.N.
(1898) 29.

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APPELLATE CIVIL.

Before Mr. Justice Aikman.

DAULAT RAM (*Defendant*) *v.* ANWAR HUSEN (*Plaintiff*).*
[19th January, 1898.]

Jurisdiction—Civil and Revenue Courts—Suit to set aside, on the ground of duress, an agreement by an ex-zamindar for surrender of his sir land.

On the sale of a village the vendor covenanted with the vendee to hold his *sir* land as a tenant of the vendee for a certain term and then to surrender it to the vendee. *Held* that there was nothing to preclude the vendee from suing in a Civil Court for a declaration that the said agreement was void and [242] unenforceable and had been extorted from him by undue influence. *Mahesh Rai* v. *Chandar Rai* (1), *Ajudhia Rai* v. *Parmeshar Rai* (2) and *Husain Shah* v. *Gopal Rai* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.
Mr. *W. Wallach* and Munshi *Badri Das*, for the appellant.
Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

AIKMAN, J.—On the 18th January 1893, the appellant Daulat Ram purchased from the respondent Anwar Husen his proprietary rights in a certain village. On the following day Anwar Husen executed in favour of Daulat Ram a kabuliat by which he undertook to hold his *sir* land as a tenant of Daulat Ram, for a term of three years, at a rental of Rs. 175, and then surrender it. It is found that the rental entered in the kabuliat is far in excess of the rate Anwar Husen would have been bound to pay under the provisions of s. 7 of the North-Western Provinces Rent Act. The object of the agreement on the face of it was clearly to defeat the provisions of that section, and the agreement was therefore, under the provisions of s. 23 of the Indian Contract Act, unlawful and void. In the following year Daulat Ram sued Anwar Husen to recover rent at the rate agreed upon. The suit was dismissed by the Assistant Collector, but on appeal was decreed by the then District Judge of Mainpuri. I must express my surprise that the District Judge should have given effect to an agreement, the object of which was so clearly unlawful. To the suit for the arrears of rent the defendant Anwar Husen pleaded—"that the kabuliat was unenforceable, as having been extorted from him by undue influence for an exorbitant rent." In his judgment the District Judge said :—"I think that the question as to whether it (that is, the kabuliat) was executed under pressure of undue influence cannot be properly decided in the present suit. If the respondent wishes to have it set aside he can sue in the Civil Court." On the 19th of September 1895, Anwar Husen instituted the suit out of which this appeal arises. [243] He asks for two reliefs, first; that the kabuliat and the decree passed by the Revenue Court on the basis of the said kabuliat might be cancelled and held unenforceable; secondly, that a sum of Rs. 418-10-0, being a balance alleged to be due out of the price of his zamindari estate, should be awarded to him. The Court of first instance, the Munsif of

* Second Appeal No. 969 of 1896, from a decree of T. E. Piggott, Esq., Additional Judge of Aligarh, dated the 5th September 1896, modifying a decree of Munshi Achal Behari, Munsif of Etah, dated the 13th December 1895.

(1) 13 A. 17. (2) 18 A. 340. (3) 2 A. 428.

Etah, gave the plaintiff a decree for Rs. 100 under the second relief set forth above and dismissed the rest of the claim. On appeal, the District Judge gave the plaintiff a decree cancelling the kabuliat and declaring it inoperative. *Quoad ultra* the decision of the Munsif was affirmed. The defendant Daulat Ram comes here in second appeal and impugns the decree of the lower appellate Court on two grounds. First, that the claim for the cancellation of the kabuliat was barred by s. 13 of the Code of Civil Procedure, and secondly, that the claim for the cancellation of the kabuliat was not cognizable by the Civil Court. The appellant's case has been ably argued by the learned counsel who appears in support of the appeal, but after full consideration I have come to the conclusion that the appeal must fail.

The lower Court has decreed the cancellation of the kabuliat on several grounds, one being that it was extorted from the plaintiff by undue influence. With reference to the extract from the previous judgment which has been set forth above, I cannot hold that the issue as to whether the kabuliat was obtained through undue influence was heard and finally decided in the previous suit.

In support of the second ground of appeal the learned counsel relies on two Full Bench decisions of this Court, *i.e.*, *Mahesh Rai* v. *Chandar Rai*(1) and *Ajudhia Rai* v. *Parmeshar Rai*(2). For the respondent reliance is placed on a decision of this Court in *Husain Shah* v. *Gopal Rai* (3). If the cases relied on by the learned counsel for the appellant are in point I am of course bound to follow them and sustain the appellant's contention, but I think the cases are distinguishable from the **[244]** present case. In the first case a Revenue Court had held that the defendants were occupancy tenants; the plaintiffs brought a suit in a Civil Court asking for a declaration that the judgment of the Revenue Court in so far as it was injurious to the plaintiff's rights might be declared as set aside and of no effect, and that it should be decided that the defendant's possession was that of sub-tenants. This was clearly a suit of which the cognizance was barred by s. 95, clause (*a*) of the North-Western Provinces Rent Act. In the second Full Bench case, the Settlement Court had entered the defendants as tenants at fixed rates and the plaintiffs as mortgagees of the holding. The plaintiffs asked for a decree for maintenance of possession "by invalidating the proceeding of filling up the columns at the recent settlement." It was held that if a Civil Court exercised jurisdiction in the case by declaring that the plaintiffs were and the defendants were not the tenants at fixed rates of the holding in question, it would be exercising a jurisdiction which s. 241 of Act No. XIX of 1873 prohibits the Civil Courts from exercising.

In this case it may be true that the ultimate result of the decree which the plaintiff obtained will be that he may, by adopting proper steps, succeed in establishing his status as an ex-proprietary tenant, but the decree as given does not, in my opinion, trench upon the jurisdiction of the Revenue Courts. Suppose that a landholder by duress obliges his tenant to execute a kabuliat for the land which he holds, undertaking to pay an exorbitant rent, the tenant might, it appears to me, wait until he is sued upon the kabuliat and put forward the defence that it had been extorted from him, and in that case it would be incumbent on the Revenue Court to find whether or not the defendant's plea was good. But in my opinion the tenant would not be bound to wait until he was made defendant in a

(1) 13 A. 17. (2) 18 A. 340. (3) 2 A. 428.

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20 A. 241 = 18 A.W.N. (1898) 29.

suit for arrears. He might, I hold, bring a suit to have it declared that the kabuliat was not binding upon him. If he could bring such a suit, there is no provision, so far as I can see, in the Rent Act by which a Revenue Court could [245] entertain it; it would necessarily lie, therefore, in the Civil Court. In this case the tenant has executed a kabuliat by which he undertook to surrender the holding after a certain period. It is stated that the landholder has not as yet taken any steps to enforce the agreement to surrender. I am unable to see what there is to prevent the tenant from maintaining the present suit to have it declared that the agreement is not binding upon him. With reference to the fact that, as I read it, the District Judge in his judgment of the 7th of November 1894, refrained from deciding the question as to whether the agreement to pay an enhanced rent had or had not been obtained under pressure of undue influence, there is, in my opinion, no bar to the tenant maintaining this suit for the cancellation of the kabuliat as a whole. In the case relied upon by the respondent it was held that a suit to set aside a perpetual lease of agricultural land on the ground that the word importing perpetuity had been fraudulently inserted in this lease was "peculiarly within the jurisdiction of the Civil Court." I see no reason why this view should not be extended to a suit to set aside a kabuliat on the ground that it had been obtained by undue influence. For the above reasons I dismiss this appeal with costs.

Appeal dismissed.

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20 A. 245 = 18 A.W.N. (1898) 34.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

ABDUL MAJID KHAN (*Defendant*) *v.* KADRI BEGAM (*Plaintiff*).* [25th January, 1898.]

Construction of document—Award—Award of the nature of a family settlement directing an annuity to be paid "ta haiyat walidain."

An award drawn by an unprofessional arbitrator in India is not to be construed according to the same principles as an award settled by counsel or a solicitor in England, but in accordance with what may reasonably be supposed under the circumstances of the case to have been the intentions of the arbitrator.

Where an award, which was of the nature of a family settlement between a father, mother and son, of certain property which had been given by the father to the mother in lieu of dower and then by the mother to the son, directed that a certain annuity should be paid out of the property to the father [246] and mother "*ta haiyat walidain*," it was *held* that the annuity was to be paid during the joint lives of the father and mother and also during the life of the survivor.

THIS appeal arose out of a suit to recover money in virtue of an award. The plaintiff was the widow of one Nawab Rashid Khan, and the defendant Abdul Majid Khan was her son. Rashid Khan had assigned certain property to his wife, the plaintiff, in lieu of her dower, and she during his minority made a gift of the property so assigned to the defendant. Subsequently the defendant apparently showed a disposition to become extravagant, and thereupon the father, mother and son agreed that a settlement of the property should be made through an arbitrator. An arbitrator was appointed and made his award on the 7th of February

* Appeal No. 27 of 1897, under s. 10 of the Letters Patent.

1885, which award was subsequently registered. By this award it was provided that the defendant should pay out of the property the subject of the award Rs. 600 yearly to his father and mother; and it was provided that his payment should be made "*ta haiyat walidain*," which is, literally translated, "to the term of the lives of the two parents." The annuity was duly paid during the lifetime of the father and for a short period after his death. Subsequently, however, the defendant ceased paying anything to his mother, who accordingly sued to recover a certain instalment of the annuity by sale of the property in question.

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The Court of first instance (Munsif of Bareilly) gave the plaintiff a decree for half the amount of her claim, which decree was in substance affirmed by the lower appellate Court (Subordinate Judge of Bareilly). The defendant appealed to the High Court, and his appeal coming before a single Judge of the Court was dismissed. From the judgment of the single Judge the defendant appealed under s. 10 of the Letters Patent.

Mr. *A. E. Ryves* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *T. Conlan*, for the respondent.

JUDGMENT.

EDGE, C. J. and BURKITT, J.—In this suit Musammat Kadri Begam sues her son, Abdul Majid Khan, on an award, to obtain [247] a decree for sale. The facts of the case are somewhat peculiar. The plaintiff was the wife of one Nawab Rashid Khan, who was the owner of the property sought to be sold. He assigned the property to his wife, the plaintiff, in satisfaction of dower due by him to her, and she during his minority made a gift of the property to the defendant. When the defendant came of age he showed a disposition to be extravagant, and thereupon the father, mother and son agreed that an arbitrator should determine what provision should be made for the family. Now the arbitrator made an award, and upon that award this suit has been brought. He awarded that 600 rupees yearly should be paid out of the property in question to the father and mother, and ordered that the payment should be made "*ta haiyat walidain*" which has been translated "to the term of the lives of the two parents." Nawab Rashid Khan, the husband, has died, and for some time after his death the money was paid regularly to the mother by the son. He has now, however, taken a different view of his legal and filial duties, and he declines to pay his mother anything. Of course, if in point of law he is not liable to make any payment to his mother, the fact that he is her son and the fact that the property in question belonged to her and that she need not have given it to him cannot impose on him any liability in law to make any payment of the kind. It has been contended that the arbitrator intended by his award that this annual payment of Rs. 600 should be made for the joint lives only of the father and mother, and that after the death of either the son should be under no obligation to make any payment to the survivor. It is difficult to conceive that the arbitrator, who at the time was carrying out the wishes of the family, should have entertained any such intention. It is difficult to understand how he could have intended that on the mother's death the father should be left penniless by his dutiful son. And if that was not his intention in the case of the mother dying and the father surviving, his intention must have been that the money should be paid during the joint lives of the father and mother and during the lifetime [248] of the survivor. There is no doubt that the language used in the award is somewhat ambiguous, and we were pressed by Mr. *Ryves* with

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the decision of Kindersley, V. C., in *Grant* v. *Winbolt* (1). In that case the Vice-Chancellor arrived with great difficulty at the conclusion which he expressed. We have not to construe this award as we should have to construe an award settled by counsel or a solicitor in England, but as an award drawn by a plain man of Bareilly, probably of no great business habits, who would know little or nothing about the subtleties of the English system of conveyancing. We have to construe it as we think it was intended by the arbitrator it should be construed, and we hold that it was his intention that the liability to make the payment should continue during the life of the survivor of the parents.

We have said this was a suit for sale. A decree for sale under s. 88 of the Transfer of Property Act was made, treating the award as if it were a mortgage or document creating a charge upon land. It does not appear from anything put before us that the arbitrator had any power to charge the lands in question: consequently a decree for sale was bad. However, the plaintiff is entitled to a decree for money. We set aside the decree for sale, and we give the plaintiff a decree for the Rs. 600 (six hundred) annuity for the year in question, together with interest from the date of suit until realisation at 12 per cent. per annum. We also give her her costs of this appeal.

To the extent above indicated we modify the decree below. In other respects we dismiss the appeal.

Decree modified.

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20 A. 248 = 18 A.W.N. (1898, 27.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

SRI GIRDHARIJI MAHARAJ (*Plaintiff*) *v.* CHOTE LAL AND OTHERS (*Defendants*).* [28th January, 1898.]

Land holder and tenant—Rights of zamindars in land forming part of the abadi—*Custom—Customary law of the North-Western Provinces.*

According to the general custom prevalent in the North-Western Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar [249] to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. *Narain Prasad* v. *Dammar* (2) and *Chajju Singh* v. *Kanhia* (3) referred to.

[F., 22 A.W.N (1902) 140; R., 27 A. 338 (341) = 1 A.L.J. 673 = A.W.N. (1904) 240; 4 A.L.J. 754 = A.W.N (1907) 287; 6 A.L.J. 57 (58) = 1 Ind. Cas 921 (822); 8 A.L.J. 61 (64) = 9 Ind. Cas. 314 (316); 9 A.L.J. 701 (705); A.W.N. (1908) 282; 20 A.W.N. 182; 4 N.L.R. 155 (157); 1 O C. 231 (250); D., 1 N.L R 93 (96).]

THE facts of this case are as follows:—

The plaintiff came into Court alleging that about twenty-six years previously one Nand Kishore had received from his, the plaintiff's agent,

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* Appeal No. 29 of 1897 under s. 10 of the Letters Patent.

(1) 23 L.J. Ch. 282.
(2) 8 A.W.N. (1888) 125.
(3) 1 A.W.N. (1881) 114.

permission to build a house on a piece of land in the village of which the plaintiff was zamindar, on the condition that it should be inhabited by Nand Kishore and his heirs, and alleging further that the house which was built could not legally be transferred. The plaintiff also relied upon a clause in the *wajib-ul-arz*. The house so built by Nand Kishore was sold in execution of a decree against a son of Nand Kishore and purchased by one Chote Lal. The plaintiff zamindar asked for a declaration of his right to the land on which the house stood. Further that he should be put in possession of that land, the auction-purchaser being ordered to remove the materials of the house, or if the Court saw fit, being ordered to receive from the plaintiff the value of those materials.

The Court of first instance (Munsif of Muttra) gave the plaintiff a decree declaring (what was never seriously contested) that the site of the house had not been and could not be sold in execution of Chote Lal's decree, and dismissed the rest of the plaintiff's suit. This decree was affirmed on appeal by the Subordinate Judge of Agra.

The plaintiff appealed to the High Court, and his appeal coming before a single Judge was dismissed on the ground that no custom of inalienability or special agreement not to alienate **[250]** the house had been proved. From this judgment the plaintiff appealed under s. 10 of the Letters Patent.

Mr. *B. E. O'Conor*, for the appellants.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This appeal has arisen in a suit brought by the zamindar against the occupiers of a house in the *abadi* of his village and against one Chote Lal, who purchased at auction-sale under a decree against the occupiers such rights as the occupiers had in the house. The occupiers made no defence to the suit. Chote Lal only has defended the suit. The plaintiff alleged a special agreement under which the house had been originally built; he also relied upon the *wajib-ul-arz*. He did not specifically set up in his plaint, or apparently in his argument before our brother Aikman in this Court, the real point on which this case must be decided, and that is that, according to the general and well known custom of these Provinces, a custom so well established that it may be treated as the common law of the Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar, as in this case, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. There is good reason why such a custom should have grown up and have been established. If it were otherwise, agricultural tenants or cultivators who, for the purposes of the cultivation of the agricultural lands of the village, were permitted by the zamindar to build or occupy a house in the *abadi* of the particular village might sell the right to occupy the **[251]** house to some person unconnected with the cultivation of the agricultural land in the village, and thus in course of time the *abadi*

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provided and reserved by the zamindar for the use of those cultivating his lands would come to be occupied by persons in no way connected with the cultivation of the agricultural lands in the village. In such a case the zamindar would practically lose his rights in the *abadi* and would be compelled to restrict the area of culturable land in the village so as to provide sites for fresh houses for agriculturists. It might happen that a purely agricultural village, every single site in the *abadi* of which belonged to the zamindar solely, might come to be a village, for example, of weavers, who neither paid rent to the zamindar nor promoted the cultivation of the agricultural lands of the village.

It is contended that it was for the plaintiff to prove a special contract. In our opinion the plaintiff had only to rely on the common custom of the Provinces, and it was for the auction-purchaser, who alone defended this suit, to show that there was some special contract between the zamindar and the person of the predecessor of the person whose interest he had bought which created, contrary to the general custom, an interest which might be attached and sold in execution of a decree against the occupier. If the defendant, auction-purchaser, had set up, not a special contract, but a local custom of the village in question by which an occupier of a house in the *abadi*, holding under no special contract, but merely occupying a house the site of which belonged to the zamindar, could sell his right to occupy or have it sold for him in execution of a decree against him, we should be prepared to hold that such a special custom was bad.

Our attention has been drawn to the decision of the Court *Narain Prasad Dammar* (1). So far as that decision is based upon an assumption that, apart from special contract, the occupier of a house in the *abadi* under the zamindar has any interest in the occupancy of that house which can be sold privately or by auction sale we entirely dissent from it. The **[252]** occupier's right is a mere personal right of residence. The other case to which we have been referrred is *Chajju Singh* v. *Kanhia* (2). There the Full Bench held that the zamindars of a village are, as a rule and presumably, the owners of all the house sites in the village, and that a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or of other lawful assignees of the last occupier. "Other lawful assignees" must not be understood to mean purchasers by private or auction-sale from such occupier.

Chote Lal, the only defendant defending this suit, has made out no case. This appeal must be allowed. We give the plaintiff a decree declaring that the occupiers of the house had no right, except to the timber, the wood-work and the roofing, which could be sold in execution of a decree against them, that a right to occupy the house was not transferable by sale either private or in execution of a decree, and a decree that the plaintiff be put in possession of the site claimed. Chote Lal will be allowed thirty days from the notification of this decree in the Court below to remove such of the materials of the house as were not part of the land; that is, he cannot remove the walls of the house if they are constructed of soil belonging to the village. We allow this appeal with costs in all Courts.

Appeal decreed.

(1) 8 A.W.N. (1888) 125.

(2) 1 A.W.N. (1881) 114.

20 A. 252=18 A.W.N. (1898) 32.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

DIWAN SINGH AND OTHERS (*Defendants*) *v.* JADHO SINGH (*Plaintiff*).* [31st January, 1898.]

Act No. III *of* 1897 *(Indian Registration Act)*, *s.* 50—*Registered and unregistered documents—Priority—Notice.*

Held that s. 50 of the Indian Registration Act, 1877, will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registerable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed.

[R., 25 A. 366=23 A.W.N. (1903) 81.]

[N.B.—This is an appeal from a judgment of AIKMAN, J., reported in 19 A. 145.—Ed.]

[253] THE suit out of which this appeal arose was a suit to recover money due under a mortgage-bond held by the plaintiff, dated the 14th of January 1893. The mortgage was for a sum not exceeding Rs. 100, and was not registered. Subsequently to the date of this mortgage the mortgagee sold the mortgaged property by a registered sale deed, dated the 9th January 1895. The defendants to the suit were the mortgagor and the vendees.

The Court of first instance (Munsif of Phaphund) decreed the plaintiff's claim against the mortgagor alone, holding it not established that at the time of the execution of their sale-deed the vendees had notice of the prior unregistered mortgage.

The plaintiff appealed, and the Lower Appellate Court (Subordinate Judge of Mainpuri), finding that the vendees had in fact had notice of the plaintiff's mortgage and therefore could not claim priority under s. 50 of Act No. III of 1877, decreed the plaintiff's claim also as against the defendants vendees.

The defendants vendees appealed to the High Court, and their appeal coming before a single Judge of the Court was dismissed (see I.L.R., 19 All., p. 145). From that judgment the defendants vendees appealed to the High Court.

Munshi *Madho Prasad*, for the appellant.

Mr. *Muhammad Ishaq Khan*, for the respondent.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—In this case it is contended in appeal that the holder of a registered deed of sale of immoveable property who, at the time of the making of his contract of sale, had notice of a prior unregistered mortgage, which did not require registration, was entitled to priority by reason of s. 50 of the Indian Registration Act, 1877, over the holder of the unregistered mortgage. The rule of equity on this subject which has always been followed in this Court has been applied by our brother Aikman in the decree from which this appeal has been brought. We dismiss this appeal with costs.

Appeal dismissed.

* Appeal No. 87 of 1897, under s. 10 of the Letters Patent.

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20 A. 254 = 18 A.W.N. (1898) 37.

20 A. 254 = 18 A.W.N. (1898) 37.

APPELLATE CIVIL.

[254] *Before Mr. Justice Blair and Mr. Justice Aikman.*

JAIKARAN BHARTI (*Plaintiff*) *v.* RAGHUNATH SINGH (*Defendant*).*
[31st January, 1898.]

Civil Procedure Code, ss. 244, 258—Execution of decree—Suit to set aside a sale on the ground of an adjustment of the decree out of Court—Adjustment not certified—Suit not maintainable.

Held that no separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of the decree had been certified in the manner provided by s. 258 of the Code of Civil Procedure. *Shadi* v. *Ganga Sahai* (1) and *Kalyan Singh* v *Kamta Prasad* (2) distinguished. *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (3) and *Pat Dasi* v. *Sharup Chand Mala* (4) not followed. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (5). *Azizun* v. *Matuk Lal Sahu* (6) and *Bairagulu* v. *Bapanna* (7) referred to.

[R., 31 C. 480 = 8 C.W.N. 395 ; 13 C.P.L.R. 177 (179) ; D., 17 C.P.L.R. 60 (62).]

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Mr. *Roshan Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

BLAIR, J.—This is a plaintiff's second appeal. His suit has been dismissed by the Court of first instance and also by the Lower Appellate Court. The suit was brought to set aside an auction-sale which had taken place in execution of a decree in a suit for sale. The point raised in appeal is that the Courts below were wrong in holding that ss. 244 and 13 of the Code of Civil Procedure bar the suit.

In the course of the proceedings in execution the parties agreed to refer their differences to arbitration and to abide by the award which should be made. Such an award was made, but it was not certified to the executing Court, as required by s. 258 of the Code of Civil Procedure. The execution was proceeded with in spite of objection taken, and the property was sold and bought [255] in by the decree-holder. The judgment-debtor in that suit is the plaintiff and appellant here.

An argument has been addressed to us on behalf of the appellant based upon the amendment of s. 258 of the Code of Civil Procedure made by the Civil Procedure Code Amendment Act of 1888. The words in the Act of 1882 were—"No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." In the amending Act the substituted words are :—"Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree." The argument was that it was a reasonable inference to draw from the words of limitation imported by the amendment that the

* Second Appeal, No. 999 of 1895, from a decree of W.F. Wells, Esq., District Judge of Shahjahanpur, dated the 11th June 1895, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 21st February 1895.

(1) 3 A. 539. (2) 13 A. 339. (3) 9 C. 788. (4) 14 C. 376.
(5) 19 C. 683. (6) 21 C. 437. (7) 15 M. 302.

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Legislature did not intend to exclude the recognition of payments of adjustments by Courts other than those executing the decree in question. My attention has been called to sundry cases, two of which have been the subject of decision in these Provinces. The first is the case of *Shadi* v. *Ganga Sahai* (1). In that case a payment had been made by a judgment-debtor in satisfaction of a decree, but such payment had not been notified to the executing Court. The Court proceeded to execute the decree on the application of the decree-holder. The judgment-debtor then brought a regular suit to recover the money which he had paid to put an end to the execution proceedings. It was held that the suit could be maintained. But the reliefs asked for in that suit contained no prayer asking that the execution proceedings in the prior suit should be set aside or otherwise interfered with. That case is therefore in a very material particular distinguishable from the one with which we are now dealing. In another case *Kalyan Singh* v. *Kamta Prasad* (2) it was held by a single Judge that a suit would lie in the following circumstances. Pending the execution of a decree an adjustment by transfer of some trees to the decree-holder had been made, but not certified. In a later suit brought by another plaintiff against the same judgment-debtor, **[256]** it was sought in execution to attach the trees in question. The decree-holder in the previous suit objected that the trees were his by virtue of the uncertified adjustment. The objection being disallowed, the objector brought a regular suit to establish his right to the trees. It was held that the suit was maintainable. In this case also no setting aside or modification of execution proceedings in the first suit was asked for. Two cases have, however, been cited for the appellant which appear to be authorities in favour of his contention. In the case of *Ishan Chunder Bandopadhya* v. *Indro Narain Gossami* (3) and in the case of *Pat Dasi* v. *Sharup Chand Mala* (4). suits to set aside execution proceedings in the course of which adjustments had been made, but not certified, were held maintainable. In my opinion the decisions in those cases cannot now be held to be law. They are disposed of by the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (5). The suit in that case was a suit to have set aside a sale in execution proceedings of certain zamindari, on the allegation that the decree-holder had made with certain co-sharers in the zamindari an agreement that their shares should be exempted in execution. The agreement was not notified to the executing Court, and those shares were sold. In appeal in a suit to set aside the sale the Committee of the Privy Council held that s. 244 of the Code of Civil Procedure barred the plaintiff's suit, inasmuch as the question which had arisen was a question arising between the parties to the suit in which the decree was passed within the true intent and meaning of s. 244 of the Code of Civil Procedure. The decision of their Lordships was followed by a majority of the Judges who decided the case of *Azizan* v. *Matuk Lal Sahu* (6). In my opinion, the ruling of the Judicial Committee of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* governs this case, and is fatal to this appeal. I would dismiss the appeal.

[257] AIKMAN, J.—I am of the same opinion. Amrit Gir, the father of the plaintiff, gave the defendant, Raghunath Singh, a mortgage over certain property. After the death of Amrit Gir, the mortgagee brought a suit against the plaintiff upon his mortgage-deed, obtained a decree, and

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(1) 3 A. 538. (2) 13 A. 339. (3) 9 C. 788.
(4) 14 C. 376. (5) 19 C. 683 = 19 I. A. 166. (6) 21 C. 437.

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in execution thereof brought the hypothecated property to sale. The execution was transferred to the Collector, by whom the property was sold. It was purchased by the mortgagee decree-holder. The plaintiff Jaikaran Gir, in the course of the execution proceedings, filed an objection based on an alleged adjustment of the decree which had taken place out of Court. His objection was disallowed, and, as stated above, the property was sold and purchased by the decree-holder. The plaintiff has now brought a regular suit to set aside the sale on the ground that the decree had been adjusted out of Court. His suit was dismissed by the Subordinate Judge, whose decree was confirmed on appeal by the District Judge. The Courts below held that the present suit was barred by the provisions of s. 244 of the Code of Civil Procedure. The plaintiff comes here in second appeal contending that that section does not bar his suit. By the provisions of that section, all questions arising between the parties to the suit in which a decree was passed, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof, must be determined by order of the Court executing the decree, and not by separate suit. Now, it cannot be denied that the question which arises in this suit is one between the parties to the former suit in which the decree was passed, and it is clear to me that it is a question relating to the execution of the decree. The cognizance of the suit, therefore, is barred by the provisions of s. 244 unless it can be shown that there is any other provision of law which excepts it from that section. The learned counsel who appears in support of the appeal, relies upon the last paragraph of s. 258 of the Code of Civil Procedure. In my opinion, that paragraph cannot be taken as overriding the clear provisions of s. 244. As to this I concur with the learned Judges who decided the case of *Bairagulu* v. *Bapanna* (1) **[258]** and with the majority of the Bench which decided the case of *Azizan* v. *Matuk Lal Sahu* (2). The plaintiff in this suit, if any adjustment of the decree took place out of Court, ought to have taken steps to have that adjustment certified to the Court. I do not think that his negligence in failing to take such steps can give the Court a jurisdiction which is clearly barred by the provisions of s. 244. It may be that he may have some other relief against his decree-holder, for instance, by a suit for damages, but I do not think that he can maintain a suit which would have the effect of nullifying a decree regularly obtained in a suit between him and the present defendant. For these reasons, I would dismiss the appeal with costs.

BY THE COURT.—The order of the Court is that the appeal is dismissed.

Appeal dismissed.

(1) 15 M. 302.

(2) 21 C. 437.

20 A. 258=18 A.W.N. (1898) 41.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

BRIJ BHUKHAN (*Plaintiff*) *v.* DURGA DAT AND OTHERS (*Defendants*).* [1st February, 1898.]

Jurisdiction—Civil and Revenue Courts—Act No. I *of* 1877 (*Specific Relief Act*), *s.* 42—*Letters Patent, s.* 10—*Appeal—Appellant not entitled to be heard on points not argued before the single Judge—Practice.*

A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property.

Held, that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third unidivided share; further, that s. 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates.

[259] *Held*, also that in appeals under the Letters Patent, s. 10, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing.

[R., 1 A.L.J. 703; D., 11 M.L.J. 10 (19).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Govind Prasad*, for the respondents.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—The zamindar of the village in which Brij Bhukhan Pande, the plaintiff in this suit, claims to be a tenant, sued Brij Bhukhan and other persons for arrears of rent. Brij Bhukhan's co-defendants denied that he was a tenant of the holding, which apparently was a fixed-rate holding. That we do not decide. The first Revenue Court decreed the claim for arrears of rent against the other defendants, but dismissed the claim against Brij Bhukhan on the ground that he had not been properly entered in the Revenue papers as a tenant, and that a decree for rent could not be made against him until he had obtained an amendment of the record of rights and had been properly entered in the record as a tenant. It is obvious that the Revenue Court did not actually or impliedly decide that Brij Bhukhan was not in fact, a tenant of the land in respect of which the rent was claimed. There was an appeal to the Collector, which was dismissed, but the Collector did not decide whether or not Brij Bhukhan was a tenant. He appears to have disposed of the case on the same lines as the first Court. Brij Bhukhan has brought this suit in a Civil Court, alleging that the lands in respect of which the suit for rent was brought in the Court of Revenue were ancestral lands belonging to a Hindu family of which he was a member, that the family was joint and that he was entitled as a member of that joint family to a one-third undivided share

* Appeal No. 47 of 1897, under s. 10 of the Letters Patent.

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in this ancestral property. He asked for a declaration that he was a tenant at fixed rates of the lands and in joint possession of them with the other defendants to the suit in the Court of Revenue, who are defendants here, and for maintenance of such possession, and, the event of its being found that he was out of possession, [260] he asked for a decree for joint possession as a tenant at fixed rates. The first Court dismissed the suit. The Court of first appeal, partly on findings of fact and partly on admissions of the parties, found that the tenancy in question was part of the ancestral property of the joint Hindu family of which the plaintiff and the defendants are members, and that there had been no partition, and gave in general terms a decree decreeing the plaintiff's claim. It probably would puzzle the Court of first appeal to say now precisely what was the decree which it gave, the relief claimed being in the alternative and the decree merely decreeing the plaintiff's claim generally. That is not the way in which decrees should be made.

The defendants appealed to this Court from the decree in first appeal. The appeal came before a single Judge of this Court, and it was argued on behalf of the plaintiff, respondent to the appeal, on the basis that he was entitled to a decree declaring his right as a tenant and his right to be maintained as a tenant or to be put in possession as a tenant at fixed rates. On the case so presented, our brother Blair properly applied the decision in *Ajudhia Rai* v. *Parmeshar Rai* (1) and allowed the appeal. No matter how the case had been presented to our brother Blair, it would have been necessary for him in any event to have allowed the appeal to some extent, for the decree of the Court of first appeal declaring Brij Bhukhan's title as a tenant at fixed rates of the holding and his right to possession as such tenant and giving him possession as such tenant was a decree which the Civil Court had no jurisdiction to pass. Our brother Blair allowed the appeal, and, setting aside the decree of the Court of first appeal, restored the decree of the first Court dismissing the suit. The plaintiff has brought this appeal under the Letters Patent from the decree of our brother Blair.

Probably, we should be right in dismissing this appeal, and certainly it will be necessary to dismiss it so far as it is based on the case which was argued before our brother Blair. It was many [261] years ago decided by the High Court at Calcutta, and rightly in our opinion, that in appeals under the Letters Patent, an appellant was not entitled to be heard on points which he had not raised before the Judge whose decree he was appealing, that is, that it was not intended that in an appeal under the Letters Patent an appellant should be entitled to make a new case. That is a rule which is approved by all the Judges in this Court, and which certainly has been, and, so long as the Court is constituted as at present, will be followed.

However, in this appeal Brij Bhukhan's case has been presented, not probably as an absolutely new case, certainly in a different light from that in which it must have been put by another vakil who appeared for him before our brother Blair. Mr. *Haribans Sahai* has contended, and we think rightly, that the Full Bench decision in *Ajudhia Rai* v. *Parmeshar Rai* (1) does not preclude a Civil Court in such a case as this from giving a member of a joint Hindu family a decree that the family has been and still is joint; that he is a member of it; that the lands or property in dispute are and were ancestral property in the hands of the family and have

(1) 18 A. 340.

not been partitioned. He has also contended that it is immaterial whether his client is or is not in possession, as the proviso to s. 42 of the Specific Relief Act would not bar Brij Bhukhan's claim to such a declaration, the Civil Court being the only Court which could make the declaration, and the Civil Court having no jurisdiction to grant further consequential relief in the shape of a decree for possession as a tenant. We consider that that argument is well founded. We allow this appeal, and we set aside the decree of this Court, and vary the decree of the Court of first appeal by giving the plaintiff a declaration that the holding, whatever its nature may be, is part of the ancestral property of a joint Hindu family; that it has not been partitioned; that the plaintiff and the defendants are members of that joint Hindu family, and that the plaintiff's interest is a one-third undivided share of that ancestral property; in other [262] respects the suit of the plaintiff is dismissed. As this suit was necessitated by the action of these defendants in taking a very technical objection in the Court of Revenue, which in fact was an objection without substance or merits, we give the plaintiff Brij Bhukhan Pande his costs in all Courts in this civil suit.

Appeal decreed.

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20 A. 262 = 18 A.W.N. (1898) 32.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

HADI ALI (*Defendant*) *v.* AKBAR ALI (*Plaintiff*).*

[1st February, 1898.]

Muhammadan law—Dower—Widow's lien for dower purely personal and not heritable.

The lien which a Muhammadan widow whose dower is unpaid may obtain on lands which have belonged to her deceased husband is a purely personal right and does not survive to her heirs *Ali Muhammad Khan* v. *Azizullah Khan* (1) and *Ajuba Begam* v. *Nazir Ahmad* (2) referred to.

[R., 29 A. 640 = 4 A L.J. 521 = A.W.N. (1907) 221; 32 A. 551 (559) = 7 A.L.J. 567 (574) = 6 Ind. Cas. 376.]

THIS was an appeal under s. 10 of the Letters Patent from a judgment in second appeal of Banerji, J. The facts of the case appear from that judgment, which is as follows:—

"The appellant brought the suit out of which this appeal has arisen to recover possession of his share out of the estate of his deceased uncle. Karim Bakhsh, one of whose heirs he was. The suit was brought against Huran Bibi, the widow of Karim Bakhsh, and Hadi Ali, the donee of a portion of the property from Huran Bibi. Hadi Ali is the son of a daughter of Karim Bakhsh, who predeceased Karim Bakhsh. The Court of first instance decreed the claim. An appeal was preferred by Huran Bibi and Hadi Ali. Huran Bibi's appeal had reference to that portion of the estate which was not included in the gift to Hadi Ali. During the pendency of the appeal Huran Bibi died. Her legal representatives were her three daughters, who are admittedly alive, and not Hadi Ali, the son of a fourth predeceased daughter. The right as regards the property not comprised in the gift did not survive to Hadi Ali, therefore he alone could

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* Appeal No. 43 of 1897 under s. 10 of the Letters Patent.

(1) 6 A. 50.

(2) 10 A.W.N. (1890) 115.

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not maintain the appeal. As he was not one of the legal representatives of Huran [263] Bibi he could not be brought upon the record in the place of Huran Bibi, and as her legal representatives did not apply to be made parties to the appeal within the time allowed by law, the appeal of Huran Bibi abated, and, so far as the property in respect of which the appeal is concerned, the decree of the Court of first instance became final.

"As regards the property which is the subject of the alleged gift to Hadi Ali, the lower appellate Court has found that Huran Bibi was in possession of it in lieu of her dower. She was not entitled to transfer that property by way of gift or otherwise, and the gift was not legally valid. Having been put in possession in lien of her dower, she was entitled to continue in possession so long as her dower debt remained unpaid: that was a right personal to her and became extinct on her death. Hadi Ali is not entitled to remain in possession of the estate left by Karim Bakhsh. The result is that the plaintiff is entitled to the decree granted to him by the Court of first instance.

"I allow this appeal with costs, and, setting aside the decree below with costs, restore that of the Court of first instance."

From this judgment the defendant Hadi Ali appealed.

Babu *Durga Charan Banerji*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

EDGE, C.J., and BURKITT, J.—This is an appeal under the Letters Patent from the decree of our brother Banerji. He decided that a lien for her dower which a Muhammadan widow had obtained on lands of her husband was a purely personal right and did not survive to her heirs. This decision is supported by *Ali Muhammad Khan* v. *Azizullah Khan* (1) and *Ajuba Begam* v. *Nazir Ahmad* (2). It is contended that the latter case is not an authority, as it does not appear that the widow had obtained the lien by consent of her husband's heirs. In our opinion it is a very direct authority. Mr. Justice Mahmood held, rightly or wrongly, that the widow had obtained a lien——he may have been right or he may have been wrong on that point——[264] and, holding that she had a lien he held that it did not survive. We agree with our brother Banerji that such a lien does not survive, but is purely personal, and we dismiss the appeal with costs.

Appeal dismissed.

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20 A. 264 = 18 A.W.N. (1898) 52.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* AHMADI.* [1st February, 1898.]

Criminal Procedure Code, s. 208—Evidence—Procedure—Duty of Magistrate inquiring into a case triable by the Court of Session to take the evidence of the witnesses produced by the accused.

A Magistrate inquiring into a case under Chapter XVIII of the Code of Criminal Procedure is not empowered to frame a charge or make out an order for

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* Criminal Revision No. 684 of 1897.

(1) 6 A. 50.

(2) 10 A.W.N. (1890) 115.

commitment until and after he has taken all such evidence as the accused may produce before him for hearing.

[Diss., 36 C. 48=12 C.W.N. 1014 (1016)=8 Cr.L.J. 221=1 Ind. Cas. 469 (470); F., 26 A. 177 (178)=23 A.W.N. (1903) 215; R., 13 Cr.L.J. 778=23 M.L.J. 368=13 M.L.T. 116 (117)=(1912) M.W.N. 1243 (1244)=17 Ind. Cas. 410 (411); 17 Ind. Cas. 813=6 L.B.R. 129.]

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THE facts of this case sufficiently appear from the order of the Court.

Alston and *Madan Mohan Malaviya*, for the appellant.

JUDGMENT.

KNOX, J.—Musammat Ahmadi Begam was suspected of having committed the offence of murder. The case was under inquiry with a view to commitment, if necessary, to the Court of Sessions. The evidence produced in support of the prosecution had apparently been put forward up to the 4th of December. On that date a petition was put in by Musammat Ahmadi Begam asking the Court to take the evidence of her witnesses under s. 208 of the Criminal Procedure Code before taking her statement. Upon that petition the first order passed is dated the 4th of December, and was as follows :—"It is too late to pass an order now, as it is about 5 p.m." With this order apparently the proceedings of the 4th of December came to a close. I understand that the accused had witnesses present in Court on that day who could have been then and there produced and examined. In that case I do not understand what difficulty the learned **[265]** Magistrate could have had in passing the only proper order under the circumstances, namely,—"those witnesses shall be heard either to-day or as soon as the Court re-opens to-morrow." This would have been in accord with what appear to me to be the very clear words of the Code, and would have obviated all the difficulties which arose from the way in which the Magistrate subsequently dealt with the case.

On the 5th December, the accused put in another petition to the effect that, in the event of the Court deciding that her case must be committed to the Sessions, she wished to reserve her defence, and that she would in that Court make her replies to any questions that might be put to her for the purpose of enabling her to explain any circumstance appearing in the evidence against her. It was optional and entirely within the power of the accused to put in an application of this kind. The fact that she did do so would not absolve the Magistrate from his duty in carrying out the provisions of the law and from examining her, whether she answered or refused to answer. I mention this because of the order subsequently made by the learned Magistrate, from which it would appear that he thought that as soon as the accused reserved her defence he was not absolved from the duty of asking her for her statement, but he was absolved from the equally imperative duty of taking all such evidence as was produced on her behalf.

On the petition of the 5th of December the Magistrate writes that he must ask the accused herself what statement she has to make, in spite of what he terms an attempt on the part of the barrister for the accused to waive its right to examine the accused vested in it by s. 342 of the Code of Criminal Procedure. But he declined to hear the evidence tendered on her behalf, and then and there committed the accused for trial before the Court of Sessions. The Magistrate was not empowered to frame a charge or make out an order for commitment until and after he had taken all

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such evidence as the accused produced before him for hearing. I accordingly set aside the order of [266] commitment and return the case to the Deputy Magistrate of Gorakhpur with directions to give notice to the prosecution and to the accused of a convenient day, and on that day to hear all and such evidence as may be produced on behalf of the accused and after that to complete the inquiry according to law. Let the record be returned.

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20 A. 266=18 A.W.N. (1898) 34.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

MUZAFFAR ALI KHAN (*Defendant*) *v.* KEDAR NATH (*Plaintiff*).*
[2nd February, 1898.]

Civil Procedure Code, ss. 556, 559—*Application to restore an appeal dismissed ex parte —Evidence—Practice.*

When an application is made to restore an appeal which has been dismissed *ex parte* for default of appearance the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of appeal on appeal from the order dismissing his application. *Hari Das Mukerji* v. *Radha Kishen Das* (1) followed.

[R., 31 C. 150 (152).]

IN this case an appeal was dismissed by the Additional District Judge of Moradabad for default of appearance, the pleader for the appellant being absent when the appeal was called on for hearing. An application for the restoration of the appeal to the list of pending appeals was made, but no affidavit in support of such application was filed therewith. The Additional District Judge dismissed the application on two grounds, first, that it was not accompanied by an affidavit, and, secondly, that it disclosed no sufficient cause for the failure of the appellant or his pleader to appear. Against this order of dismissal the applicant appealed to the High Court, tendering an affidavit in support of his petition for restoration of the appeal.

Maulvi *Abdul Majid*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

[267] EDGE, C.J., and BURKITT, J.—No affidavit in support of the application was filed in the Court below. Affidavits are necessary, not only for the information of the Court but for the information of the opposite side, and an affidavit should have been filed in the Court below. We agree with the decision of this Court in *Hari Das Mukerji* v. *Radha Kishan Das* (1) and dismiss this appeal with costs.

Appeal dismissed.

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* First Appeal, No. 87 of 1897, from an order of F. E. Taylor, Esq., Additional District Judge of Moradabad, dated the 9th August 1897.

(1) 10 A.W.N. (1890) 166.

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Davey, and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

BALWANT SINGH (*Plaintiff Appellant*) *v.* RANI KISHORI (*Defendant Respondent*).

[7th and 8th December, 1897, and 18th February, 1898.]

Hindu law—Mitakshara—Power of a member of a joint family to alienate self-acquired immoveables—Construction of words of a sanad granting an absolute estate of inheritance—Change of ancestral character of immoveables—Mortgage and foreclosure —Bona fide ***re-acquisition for value by the mortgagor's descendant.***

A father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his own discretion over immoveables which he has himself acquired, as distinguished from ancestral property.

The immoveables alienated by a father's gift, disputed by his son, partly consisted of zamindari rights in villages which had been, at one time, ancestral in the family, but had been transferred to satisfy the debts of an ancestor, and had been acquired back by his descendant, the donor. As to one of these villages the Courts below had differed whether it was self-acquired property in the donor's hands. It had been mortgaged by the ancestors; and the mortgage had been foreclosed, under Regulation XVII of 1806, before having been re-acquired by the donor.

That the foreclosure, and re-acquisition were genuine were facts found upon evidence, including that of prior, concurrent, decrees maintaining the foreclosure, as between other parties.

Held, that the re-acquisition was not a redemption of an estate inherited from an ancestor, and merely incumbered; but that the once ancestral character of this village had been destroyed by the foreclosure. Like the other villages alienated by the father's gift it was self-acquired by the donor.

[268] Other immoveable property comprised in the gift consisted of a malikana payable out other villages conferred upon the donor by a Government sanad granting a muafi on seven villages to him for life, and declaring that "the "zamindars who now pay the revenue will pay it to him, and after him they "shall ever pay ten per cent. as malikana allowance to his heir after the deduc- "tion of Government revenue for generation after generation."

Held, that the grant of the malikana was absolute to the one grantee: that there were not two gifts, one for life to the grantee, and the other a distinct gift after his death, to the person who should then be his heir. The malikana formed part of the grantee's heritable property and was self-acquired.

Held, also, in reference to the High Courts' Act, 1861, in which no time is mentioned for the appointment of an acting judge on the occurrence of a vacancy, that such an appointment could not be questioned on the ground of its not having been made until after a period alleged to be unreasonable.

[R., 30 A. 197 (224) = 5 A.L.J. 200 = A.W.N. (1908) 79; 15 C.L.J. 97 (104) = 7 Ind. Cas. 427 = 15 C.W.N. 524 (531); 15 C.L.J. 517 (574) = 16 Ind. Cas. 257 (294) = 16 C.W.N. 1105 (1129) = 13 Cr. L.J. 609 (646); 8 Ind. Cas. 999 (1036) = 97 P.R. 1910 = 142 P.W.R. 1910; 16 M.L.J. 491 (493); 5 M.L.T. 67 (69) = 32 M. 377 = 2 Ind. Cas. 519 (520); 150 P.R. (1907); Cons., 21 A. 460 (478) = 22 M. 398 (415) (P.C.) = 9 M.L.J. 67 (77).]

CONSOLIDATED appeals from two decrees (14th August 1893) of the High Court.

The first decreed the respondent's appeal from a decree (28th January 1890) of the District Judge of Mainpuri. The second dismissed the appellant's cross-appeal from the same decree; the effect of the two decrees of the appellate Court being that the suit was dismissed.

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The suit out of which these appeals arose, was brought by the appellant who was the only son of the late Raja Jaswant Rao, C.S.I., who died on the 24th August 1879. The claim was for estate that had belonged to the late Raja, now in the possession of his widow, Rani Kishori, the defendant, who set up a title to it under a deed of gift, dated the 4th September 1875. By that deed the Raja conveyed to Rani Kishori what was virtually the whole of his property to the exclusion of the plaintiff, his son by another wife who was then deceased; and to this son the Raja left only an allowance of Rs. 100 a month, and this dependent upon his conducting himself to the widow's satisfaction. The suit alleged the invalidity of that gift.

All the facts material to this report appear in their Lordships' judgment.

The two Courts below concurred in findings of fact disentitling the plaintiff to the greater part of the estate claimed, which **[269]** consisted of zamindari, muafi, and malikana, interests in villages, and of moveable property.

The principal question among those now raised was whether, under the Mitakshara, if the property comprised in the deed of gift of 1895 had been acquired by the late Raja himself, he could deal with it at his own discretion: the plaintiff contending that the gift must be set aside, whether the property was ancestral or self-acquired. Another question related to whether the property, given by the deed fell within the description of self-acquired, or was ancestral. There was a third question; whether a malikana granted by sanad to the Raja and to his heir was, in regard to the words of inheritance, the Raja's own property to give away, or there was a gift over to the heir over which the Raja had no control. Also whether one of the judges who had heard the appeal had been duly appointed was now disputed.

The above principal question of Hindu law was applicable, after the concurrent findings of fact below in regard to the bulk of the estate claimed, only to five villages. And the subordinate question, whether they all were rightly under the description "self acquired," applied, as far as this appeal was concerned, only to one village; inasmuch as the two Courts below had concurred upon facts, proving that four of the villages were in that class of property, and in finding that the four were so.

It was ground common to both parties that the zamindari interest in the five villages had, at one time, formed part of the ancestral property of the family, having been inherited by the late Raja Jaswant's father, Rao Khaman Singh; and it was found by both Courts that, to satisfy the debts of Kaman Singh, the ancestral property had been sold or transferred. Both Courts had also found that four of the five villages had been re-acquired by the Raja Jaswant without recourse to any ancestral funds. The District Judge, however, had been of opinion that the fifth, named Bakewar, had not been so dealt with as to have got rid of its ancestral character in the hands of the late Raja when he made the gift of the 4th of September 1875. But the High Court **[270]** on the contrary, had found that the re-acquisition by the late Raja out of his own resources applied to Bakewar as well as to the other four villages, and that this village was his self-acquired property as well as the others.

The question as to whether the malikana passed by the Raja's gift to his wife, as being the donor's property, arose on the construction of a

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jaghir sanad, dated the 6th of April 1861, from the Government to the Raja. That sanad entitled him to a muafi, or remission of the revenue upon seven villages, including the five above referred to, and declared that, "after him the zamindars shall ever pay ten per cent. as malikana allowance to his heir, after the deduction of Government revenue, for generation after generation."

First.—In regard to the question whether a member of an undivided family has or has not the power to alienate at his discretion self-acquired property the judgment of the District Judge was as follows:—"The "authorities on the point are reviewed in para. 318 of Mayne's well-"known work on Hindu Law and Usage, 4th edition, from which it will "be seen that the tendency of the later decisions is to hold that a father "may dispose of his self-acquired property in any way he pleases. Fol-"lowing the latest rulings, I hold that, if the property referred to in the "deed of gift was Raja Jaswant Rao's self-acquired property, he could "deal with it as he saw fit; and his disposition of it cannot be successfully "attacked by the plaintiff. It will follow that so far as it can be shown "that the property comprised in the deed of gift is ancestral, to that "extent the deed must be held to be invalid, and the plaintiff entitled to "succeed, whilst on the other hand, the deed will hold good in respect of "all property shown to be self-acquired.

"*Secondly.*—The plaintiff comes into Court alleging that the transfers "of the five villages, in which his father possessed zamindari rights, were "fictitious, and that his father all along remained in possession of them. "It was necessary for him to prove [271] this allegation and I "hold that as to the four villages Lakhman, Berikhera, Aberipur and "Indraokhi, he has failed to do so. His claim, therefore, as regards "these villages must be dismissed. As to the fifth village, Bakewar, the "case stands on a different footing from that of the other villages. "From documentary evidence filed in the case it appears that it was "mortgaged by Rao Khuman Singh to one Kunjbehari Lal by a deed of "conditional sale executed on 19th August 1839. It had been previously "mortgaged to one Mahant Lachman Das in 1836. On the death of "Khuman Singh, which took place in 1845, litigation took place between "the rival mortgagees. The dispute between them was referred to arbi-"tration and decided on the 11th May 1846, the result being that "Kunjbehari Lal paid off the amount due to the prior mortgagee. He "got a decree on the 20th of March 1854, to have his name entered as "proprietor, and Jaswant Rao's name expunged. But in a suit between "him and Jaswant Rao, decided on the 19th of August 1869, it was "held that this decree was never executed and had become barred by "lapse of time, and that Kunjbehari Lal had been in possession only as "mortgagee.

"Evidence has been given on behalf of defendant to prove that on "the 22nd of June 1858, in lieu of a payment of Rs. 4,526-12-0 received "from Thakurain Adhar Kunwar, through Jaswant Rao, her general "manager, and Sheo Charan Lal, her agent, Kunjbehari Lal gave up the "decrees he had, and declared his foreclosure proceedings cancelled (see "No. 104 of defendant's documents). The defendant's counsel contends "that this was a sale of the proprietary rights of the village; but this is "a contention I cannot sustain. In the suit above referred to, decided "on the 19th of August, 1869, it was held that Kunjbehari Lal was in "possession of the village only as mortgagee and the amount paid, which "is less than the annual revenue of the village, bears out the plaintiff's

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"contention that what took place on the 22nd of June 1858 was nothing "but the discharge of an incumbrance on the village. On an application "to a Revenue Court of March 18th, [272] 1868, Jaswant Rao represented "it as having been in his proprietary possession up to that year, "and as always having been entered in his name. Although in "the deed of gift he asserted that this village had been bestowed "on him by Adhar Kunwar, this is without foundation, as I consider. "This village is not included in the deed of 1871 by which "she conveyed to Jaswant Rao the villages of Lakhman, Berikhera, "Aheripur, and Indraokhi, and no reason is suggested for this exclusion. "The evidence adduced to prove the gift is extremely feeble....To hold "that a transaction of this nature has the effect of destroying the ancestral "character of property would be a most dangerous doctrine, as it would put "it in the power of any Hindu father to defeat his children's rights by a "temporary alienation of the property he himself had inherited. The con-"clusion I come to, then, as regards this village, is that Jaswant Rao "inherited the proprietary rights in it from his father; that he had, there-"fore, no power to convey these rights to his wife, and that in respect of "this village the plaintiff is entitled to a decree."

Proceeding to another class of property included in the gift, *viz.*, the assigned revenue of seven villages, the District Judge said:—"The effect "of the grant as regards the seven villages, of which the Raja did not own "the proprietary right, was that the zamindars of those villages had to pay "their land revenue to him as long as he lived, instead of to the Govern-"ment, and after his death had to pay a percentage of it to his successor. "I am of opinion that an estate of this nature is self-acquired property, "and in this opinion I am borne out by the views expressed in para. 262 "of Mayne's Hindu Law and usage, where it is laid down that estates "conferred by Government in the exercise of their sovereign power become "the self-acquired property of the donee, whether such gifts are absolutely "new grants or only the restoration to one member of the family of "property previously held by another but confiscated."..."As to the "ten per cent. malikana allowance from the other villages it was for the "plaintiff to show that his father had no power of disposing of it, and "that [273] he, the son, was entitled to succeed to it under the terms of "the sanad. This contention, in my opinion, is likewise unsound." The decision, accordingly, was that the plaintiff's claim to this part of the assigned revenue failed.

On appeal and cross appeal to the High Court the three principal points were dealt with as follows in the judgment of a Divisional Bench (KNOX and BURKITT, JJ.). First, as to the general question of the right to dispose of self-acquired immoveables the Court said:—

"There is a last plea in the memorandum of appeal to the effect that "Raja Jaswant Rao was not competent to disinherit his only son, the "appellant. To this plea the learned counsel for the appellant made no "allusion beyond stating that he did not withdraw it. The respondent's "counsel did not answer the plea. An attempt was made on behalf of the "appellant at the very end of the reply to address us upon it. We, however, "ruled that, under the circumstances, it was not competent to the learned "counsel to address any argument to us then for the first time. The plea "will be dealt with towards the end of our judgment in this appeal."

At the end, however, it was added:—"In the view of the above facts "no necessity arises for considering the plea."

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Secondly, the Judges considered the question as to the village Bakewar, holding that the lower Court had arrived at a wrong conclusion in regard to it, by reason of overlooking the fact that this village had lost its ancestral character as soon as the year of grace allowed by Reg. XVII of 1806 expired in 1854. They continued thus :—"From that "date Kunjbehari Lal became absolute proprietor. Even granting that "the effect of the decree of the 19th of August 1869, in the suit to "which we shall next refer between Kunjbehari Lal and Jaswant Rao, in "which it was held that Kunjbehari Lal had been in possession only as "mortgagee, gave Jaswant Rao the status of proprietor with a right to "redeem, he would be proprietor of self-acquired, not of ancestral pro-"perty.

[274] "When Kunjbehari Lal transferred his rights in Bakewar to "Thakurain Adhar Kunwar he realized that he was proprietor. Otherwise, "there would have been no force or meaning in his pretence to set aside "and annul the foreclosure transaction—an act which he had absolutely "no power to do. As full proprietor, he transferred to Thakurain Adhar "Kunwar thereby making her full proprietor. It seems to us that this "document did not receive the force and construction which it should "have received at the hands of the lower Court. It supplements and "corroborates the evidence given by Gursahai.

"In 1869 the village became again the subject of litigation. This "time between Kunjbehari Lal and Raja Jaswant Rao, and in that suit "the extraordinary decision was arrived at that, as Kunjbehari Lal had "never executed his decree of the 20th March 1854, and it had become "barred by lapse of time, Kunjbehari Lal had been in possession only as "mortgagee. The Court of first instance apparently accepts the conclu-"sion, and holds that Bakewar never passed out of the hands of Khuman "Singh or his family, and that Kunjbehari Lal never had any higher title "in regard to it than that of mortgagee. This conclusion is attacked by "the appellant. He contends before us that Kunjbehari Lal, by his "decree of the 20th of March 1854, became full proprietor over the village, "and that on that day at any rate Bakewar ceased to be ancestral pro-"perty.

"It appears to us that there is great force in this contention. Under "Reg. XVII of 1806 the conditional sale-deed had been judicially "declared absolute, and nothing more was needed to clothe Kunjbehari "Lal with the status of full proprietor. He had been in possession as "mortgagee, but from the date of the decree of the 20th of March 1854, "his possession as proprietor became at once adverse to that of Jaswant "Rao, and the property ceased to be that of Jaswant Rao's in any sense "ancestral or otherwise. It matters little that by the endorsement on the "decree above alluded to, *viz*, the endorsement of the 22nd of June 1858, "Kunjbehari Lal professed to set aside the foreclosure proceedings and "**[275]** to render them null and void; no words and no document of his "could effect such an act or could restore to Bakewar its former condi-"tion, *viz.*, that of ancestral property in the hands of Jaswant Rao.

"The language of s. 8 of Regulation XVII of 1806 is very clear "and precise, and provides that if the mortgagor, in this case Raja "Jaswant Rao, shall not redeem the property, the property mortgaged in "the manner provided for by s. 7 of the same regulation, the mortgage "will be finally foreclosed and the conditional sale will become conclusive. "Thakurain Adhar Kunwar held the village for some months, and then "made it over to Jaswant Rao. In 1868, Jaswant Rao sold the village

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" to Sheo Narayan, and immediately upon the sale arose the litigation of " 1869, between Kunjbehari Lal and Raja Jaswant Rao which ended in " the decision above referred to.

" The respondent takes his stand upon the judgment and decree of " 1869, that was delivered in the suit above-mentioned, brought by Kunj- " behari Lal for establishment of right to, and maintenance of possession " over, Bakewar, and to set aside a sale-deed under which Raja Jaswant " Rao had, on the 15th of February 1868, conveyed it to Sheo Narayan. " It is a most involved and in many places obscure judgment, but there " was no doubt that under it Kunjbehari Lal's claim was dismissed, and " it was held that the foreclosure proceedings were fictitious, the only object " being to save the property.

" In considering the value of this judgment it must not be forgotten " that, so far as the appellant was concerned, it was not a judgment *inter* " *partes*, and that at its highest it cannot be looked upon as conclusive, " but only as a piece of evidence. Both the appellant and respondent in " this appeal are representatives of Raja Jaswant Rao who was defendant " in that case. No one in this appeal derives title through Kunjbehari Lal, " who was then plaintiff. Moreover, it was in no way competent to the " Court which decided the case in 1869 to set aside the foreclosure judg- " ment and decree of 1854.

[276] " The Sadr Dewani Adalat in 1856 had determined that the " mortgage-deeds of Lachman Das and Kunjbehari Lal were both genuine " instruments ; that the deed of conditional-sale held by Kunjbehari Lal " was considered as being still in force and in nowise modified by the " arbitration-award, positions both of which are assailed by this judg- " ment without any reference to the determination of the case, by the " Sadr Dewani Adalat. The judgment in question virtually amounts to " a setting aside of those findings.

" Much stress was laid upon the improbability of a valuable village " like Bakewar being conveyed for a sum of Rs. 4,526-12-0. This con- " sideration is not, however, entitled to much weight ; the transaction took " place just after the mutiny and at the time when Kunjbehari Lal was, " if any value is to be attached to the judgment of 1869, under great obli- " gations to Raja Jaswant Rao for procuring him release from custody. " Matters at this time had, so far as Kunjbehari Lal was concerned, reached " a very serious crisis, and if the bargain relating to Bakewar saved "Kunjbehari Lal from death by hanging, it was, so far as he was con- " cerned, a valuable bargain. Kunjbehari Lal, so says the judgment " aforesaid, and there is other evidence to corroborate it, had been arrested " and was about to be tried by martial law, and according to the Special " Commissioner deserved to be hanged. The value of property too at a " time like this would be very different from its value in days of security.

" Putting all this evidence together, and bearing in mind that it was " for respondent to establish that the transfer of Bakewar was fictitious, " we do not think that he has established his case. We find that on the "20th of March 1854, Bakewar had ceased to be ancestral property. It " matters little how Raja Jaswant Rao afterwards became possessed of " it. It could only be self-acquired property in his hands, and capable of " alienation by him at his pleasure.....
" The village Bakewar, when we first came upon it, is mortgaged to " strangers. The equity of redemption, it is true, remained **[277]** with "Raja Jaswant Rao, but passed away from him finally, and without

"power of recall, as soon as the year of grace given under "Reg. XVII of 1806 expired. This was before the year 1854. Hence it "was clearly upon Balwant Singh to establish that the property re- "tained its ancestral character, and that the transfer to Kunjbehari "Lal, by force of the foreclosure proceedings, and the transfers after "1854, were one and all fictitious."

Thirdly, the judgment disposed of the question as to the malikana in this Raja's gift in the following words :—

"Now as regards the interpretation to be put on the grant made by "Government and bearing date the 6th day of April 1861. The first fact "to be noticed in connection with it is that it makes no allusion what- "ever to the appellant or to any service rendered by him. The grant "confers certain of the villages on Raja Jaswant, Rai Bahadur, 'for generation "after generation.' As to the rest the words are that they are granted "for his lifetime and that the revenue of the seven villages granted for "lifetime shall remain under remission during his life, and that after his "death the zamindars are to pay 10 per cent. *malikana* to Jaswant Rao's "heirs after the deduction of Government revenue for generation after "generation. The whole language of the deed shows that it was a deed "granted in return for personal good services rendered to the Govern- "ment. There is nothing in the deed to lead us to hold that the property "conveyed by it was not property over which Raja Jaswant Rao had full "right of disposal.

"The interpretation which we have put upon the deed and which "was put upon it by the lower Court, is in accord with the view taken "by their Lordships of the Privy Council in *Gulab Das, Jagjiwan Das* v. "*The Collector of Surat* (1). Their Lordships held that 'a *jaghir* must "'be taken *prima facie* to be an estate only for life, although it may "'possibly be granted in such terms as to make it hereditary.'"

[278] "Jaswant Rao had in our opinion as much right and control "over all the property granted under it as if it was self-acquired property."

The decrees of the High Court dismissed the suit entirely, and these two appeals were preferred by the plaintiff.

Mr. *G. E. A. Ross*, for the appellant, argued that although the District Judge was right in attributing to the later decisions of the Courts in India a uniform ruling to the effect that, under the Mitakshara, a member of an undivided family has absolute power of disposition over property acquired by himself, yet the question whether the exercise of that power was in accordance with the Hindu law, had never been actually decided by the Judicial Committee. It was therefore still open to argument. The point was whether, in an undivided family under the Mitakshara, the father could so deal with immoveables acquired by himself as to disinherit his only son. Reference was made to *Babu Pertab Sahee* v. *Maharaja Rajender Pertab Sahee* (2), the *Hansapur* case, as showing that the question of the power of the head of the family in this respect had been designedly left open by this Committee. There were conflicting texts in the Mitakshara as to the power of a member of an undivided family on this point. He referred to the Mitakshara, Ch. I., s. 1, v. 27, and to Ch. I, s. 5, v. 10, arguing that, contrary to the decisions of the Indian Courts, the conflict of these authorities should be decided in favour of the view that the power could not be held established. Reference was also made to Strange's Hindu Law, vol. 1, p. 261, and to vol. 2, pp. 436, 439, 441, 450

(1) 6 I.A. 54=3 B. 186.

(2) 12 M. I. A. 1 (39).

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and to the Vivada Chintamani, which he described as a compendium of law prevalent in Mithila, not materially differing from the Mitakshara, and also having conflicting paragraphs, see pp. 76, 309, 228, 229. Reference was also made to the Vayavahara Mayukha. There was one case decided by the Judicial Committee, according to the Mithila law as stated in a dictum in the Vivada Chintamani, to the effect that the owner of self-acquired property has [279] full power of disposition over it. *Raja Bishen Perkash Narain Singh* v. *Bawa Misser* (1). He referred also to the *Bithoor* case, *Nana Nurain Rao* v. *Huree Punth Bhao* (2). For decisions in the North-West Provinces on this point he referred to *Rajah Buldeo Singh* v. *Koonwer Mahabeer Singh* in 1866 before Spankie and Turner, JJ. (3), *Maha Sukh* v. *Budree* (4), and *Sital* v. *Madho* (5). As a Madras Decision in his favour he referred to *Tara Chand* v. *Reeb Ram* (6).

Upon the second point, whether the District Judge was right in deciding that Bakewar retained its original character of ancestral estate, he examined the evidence at length arguing that the acts of the mortgagee Kunjbehari Lal, with reference to the foreclosure, showed collusion with the late Raja. The arrangement was in effect fraudulent on the creditors of Khuman Singh who were now all barred by time, and was contrary to the rights of the appellant as heir of the mortgaged property.

The forclosure could even at this distance of time be re-opened. He referred to the Regulation XVII of 1806, ss. 1, 7 and 8, and to *Forbes* v. *Ameeroonissa Begum* (7). In an early case—*Morley* v. *Elwayes* (8)—it was shown that to re-open a foreclosure the facts cou'd be examined, and the Court, on fraud established, could restore the parties to their original position.

Upon the third point, the construction of the sanad of 1861, the contention was in reference to the malikana, that the grant was only for life to Jaswant, and after him to his heir, as an absolute gift to the latter, that heir being the son, the appellant, to whom there was a distinct gift apart from the assignment for life to his father. Thus the malikana in perpetuity was not within the control of Jaswant to confer upon his wife.

Lastly, it was submitted that the appointment of *Burkitt, J.*, to act as a Judge of the High Court had not been made in due [280] time under the High Court's Act, 1861, with the result that there had been no Court properly constituted to hear these appeals. The argument was to the same effect as that in the *Queen-Empress* v. *Ganga Ram* (9). The decision in that case had been in favour of the validity of the appointment, but the judgment of the Full Bench was of a date subsequent to that of the judgment now under appeal, 24 and 25 Vic., C. 104, referred to.

Mr. *J. D. Mayne* and Mr. *H. Cowell*, for the respondent. Some of the texts, in condemning the leaving a family without means of support, seemed to make objection to the alienation of even self-acquired property. But for the last twenty-five years the decisions in India had been unanimous as to the power of the owner under the Mitakshara to dispose absolutely of self-acquired property. The judgment of the Bengal High Court in *Mudhu Gopal* v. *Ram Buksh Pandey* (10) had disposed of all controversy in regard to the conflict of dicta found in the Mitakshara.

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(1) 12 B.L.R 430. (2) 9 M.I.A. 96. (3) 1 Agra 155.
(4) N.W.P. (1869) 57 = (1 N.W.P H.C.R. 153). (5) 1 A. 394.
(6) 3 M.H.C.R. 50 (55). (7) 10 M.I.A. 340 (348).
(8) 1 Ch. 107. (9) 16 A. 136. (10) 6 W. R 71.

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Reference was made to the *Hansapore* case (1), and to the *Bithoor* case (2), where the question was raised as to this power. In the latter case, the judgment, in deciding upon a question of fact, proceeded upon the view that that the law had been settled in favour of the acquirer of property having power to dispose of it. *Raja Bishen Parkash Narain Singh* v. *Bawa Misser* (3), was cited.

On the question as to Bakewar, the decision of the High Court was right. The operation of Regulation XVII of 1806 was referred to, and its effect, after the expiration of the year of grace. Neither the plaint, nor any of the proceedings, raised the question whether, assuming the mortgage to have been valid, the foreclosure was collusive. The plaint raised only the question whether Khuman Singh's mortgages were valid. The litigation after the foreclosure did not tend to show collusion. The judgment of the District Judge of Mainpuri, reported in the North-Western **[281]** Provinces District Reports for September 1854 (Mainpuri), and in the Reports of the Sudder Court, Agra, S.D.A. 1856 at p. 119, did not indicate any such fact. The later litigation, to which Kunjbehari Lal was a party, did not attack the foreclosure, but raised the issue whether the indorsement of transfer was genuine. The ancestral quality of the property has been lost when it was re-acquired. In regard to the third point, the construction of the sanad of April, 1861, it was clear that nine-tenths of the remitted revenue was to revert to Government, and the one-tenth, malikana, was to continue, upon the death of the Raja. But his heir was not to take any interest distinct from the estate of inheritance given to the Raja himself absolutely.

Upon the validity of the appointment of Burkitt, J., the point had not been taken in the Court below, and there were no facts on this record to give rise to any question about it.

Mr. *G. E. A. Ross* replied.

Afterwards on the 18th February, 1898, their Lordships' judgment was delivered by Lord Hobhouse:—

JUDGMENT.

In the suit which gives rise to this appeal, the plaintiff now appellant claimed as he r-at-law of Raja Jaswant Rao to be entitled to properties valued at 40 lakhs of rupees, of which Jaswant's widow Kishori, the defendant below and the respondent here, had become possessed. As regards the larger portion of this property, principally moveable, the plaintiff has failed in both the Courts below, and raises no further question. He still claims (1) the proprietary right in five villages conveyed as a gift by Jaswant to Kishori by deed dated 4th September, 1875; (2) the proprietary right in two other villages purchased by the defendant after Jaswant's death; and (3) a perpetual charge by way of malikana amounting to 10 per cent. of the revenue of seven other villages which were the subject of a grant by the Government of India to Jaswant, dated 6th April, 1861. The District Judge decided against the plaintiff as to all these properties except one of the five villages named Bakewar. As to that village the District Judge held that it was ancestral property which Jaswant had **[282]** no power to alienate by way of gift, and he decreed possession of it to the plaintiff. Both parties appealed to the High Court. Separate orders were made on the two appeals. The plaintiff's appeal was dismissed; the defendant's was allowed; so that the plaintiff's suit stood

(1) 12 M.I.A. 1 (39). (2) 9 M.I.A. 96. (3) 12 B. L. R. 430.

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dismissed as to all his claims. The plaintiff has appealed from both these orders and his appeals, in form two, but in substance one, have now been argued.

Except as regards the village of Bakewar, which has been the subject of difference between the two Courts below, the facts of the case may be briefly stated :—All the villages in suit were at one time the estate of Khuman Singh, the father of Jaswant. Through extravagance or misfortune Khuman fell into poverty and he parted with the villages: whether in fact or only in appearance is matter of dispute in this suit. Jaswant became a successful man of business, and he also rendered active and valuable services to the Government at the time of the Sepoy mutiny. Thus, he became able to repossess himself of the estates which Khuman had enjoyed, and the Government acknowledged his services by the grant in question. Khuman died in December, 1844. His eldest son, Lal Barian, married Adhar Kunwar, a lady of considerable private fortune, and died without issue. Jaswant was the only other son, and he married Kishori, as his third wife. He died in August, 1879.

The plaintiff's claim under the grant stands on an entirely different footing from his other claims, and it may be disposed of at once. The Sanad of April 1861 recites the services of Jaswant and that they had been recognised by the bestowal of the title of "Raja" and were worthy of further recognition by the grant of a "jaghir." It then continues :—"Be it known that the possession and *jama* (revenue) of the "five villages granted for generation after generation, shall for ever be "given up and remitted, and that the revenue of the seven villages "granted for lifetime shall remain under remission till his lifetime, to wit, "their *zamindars* who now pay the revenue to the British Government "shall pay it to him, and after him they shall ever pay 10 per cent. as "**[283]** *malikana* allowance to his heir after the deduction of Govern-"ment revenue, for generation after generation." The five villages are the five villages before mentioned as contained in the deed of gift.

Mr. Ross does not contend that the words "generation after generation" confer any interest less than absolute ownership, nor does he now sustain the contention urged in the lower Courts that the jama of the five villages did not pass to Jaswant in absolute ownership. His contention is, that as regards the seven villages, there are two distinct gifts : one to Jaswant for his life, and the other after his death ; and that at his death the malikana is given in absolute ownership to the person who may then happen to be his heir. That would attribute to the Government the strange intention of acknowledging the personal merits of Jaswant by conferring a benefit on some unknown heir for whom he might or might not have a regard. The construction also appears to their Lordships to be as strained as it is improbable. They think that the obvious meaning of the expression "his heir for generation after generation" is that the malikana is to form part of his heritable property ; and that whereas he takes the whole income for his life only, he is to take the 10 per cent. malikana in absolute ownership. Both the Courts below have taken substantially the same view, and the appeal fails on this point.

The next question is whether Jaswant could lawfully give the property in question to his wife. The District Judge states that the point is one on which there has been a great conflict of opinion ; and without discussing it further he says that he follows the latest rulings in holding that if the property comprised in the gift was Jaswant's self-acquired property, he could deal with it as he saw fit. The High Court

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have given no opinion on the point except so far as an opinion is involved in their affirmation of the District Judge's decree, nor did they hear argument upon it. It was one point of appeal by the plaintiff but his counsel did not open it till at the very end of his reply, when the Court ruled that it was not competent for him to argue it. In delivering judgment, they **[284]** stated their opinion that the plaintiff, by not addressing to them any remarks in support of this argument, must be taken virtually to have abandoned it.

Mr. *Ross* has raised the question again in this appeal, and has addressed to their Lordships a serious argument which requires consideration. His proposition is that a member of an undivided family subject to Mitakshara law has not the power of disposition over self-acquired immoveable property at his will. The Indian Courts have differed on this question, and there is no decision of this Board which after examination of the authorities affirms the power in unqualified terms.

It is not surprising that conflicts of opinion should have arisen, seeing that the texts of the Mitakshara itself, as translated by Colebrooke, whose translation has long been accepted as correct, are apparently and literally in conflict with one another. The passage cited by Mr. *Ross* is found in Chapter I, s. 1, clause 27, and is as follows :—Speaking of the father of a family, it says that " he is subject to the control of his sons " and the rest in regard to the immoveable estate whether acquired by him- " self or inherited from his father or other predecessor. Since it is " ordained, ' though immoveables or bipeds have been acquired by a man " 'himself, a gift or sale of them should not be made without convening all " 'the sons. They who are born, and they who are yet unbegotten, and " 'they who are still in the womb, require the means of support. No gift " 'or sale should therefore be made.' " And immediately below the commentator insists on a man's duty not to leave his family without means of support. Mr. *Ross* further points out that the rule so stated as to immoveable property is accepted as law by Sir Thomas Strange : see Vol. I, p. 261, Vol. II, pp. 436 and following.

On the other hand, we find in the same source of law quite opposite precepts. In clause 21 of the same chapter and section the commentator quotes two texts, one from Yajnavalkya himself, to the same effect with clause 27 and then adds "they both **[285]** relate to immoveables which have " descended from the paternal grandfather." In s. V of the same chapter, clause 9, the commentator, speaking of a donation made by a father, says : —" the son has no right of interference if the effects were acquired by the father ;" and in clause 10 the same precept is repeated with more particularity. So in s. IV, where the commentator appears to be dealing with the principle which lies at the root of the system of joint family property. He there explains what may not be divided ; and in Clause 1 he says :— " Whatever else is acquired by the co-parcener himself.....does " not appertain to the heirs.....nor shall he who recovers hereditary " property which had been taken away give it up to the parceners." Clause 2 enlarges on the same point.

Pausing there to consider the authorities apart from decisions, their Lordships observe that the rule laid down in s. 1, clause 27 of the Mitakshara rests upon an ulterior reason, " since it is ordained," and so forth ; and the reason ranges so far beyond the rule as seriously to weaken its support of a positive rule. The necessity of support to children applies in principle to the alienation of moveable property as well as immoveable. And the assertion of rights in those who are unbegotten conflicts with the

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principle uncontradicted as their Lordships understand by any decision, that a man may alienate even his descended estate if he has no child, or at least if he has no co-parcener, in existence. See the cases cited for this proposition in Mr. Mayne's book on Hindu Law, s. 318.

All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir W. Macnaghten says:—"It by no means follows that because an act has "been prohibited it should therefore be considered as illegal. The "distinction between the *vinculum juris* and the *vinculum pudoris* is "not always discernible." (Hindu Law, Principles and Precedents, p. vi of the preliminary remarks.) He illustrates this position by the [286] example of the very subject of the present discussion. It is, as their Lordships think, the most reasonable inference that the passage in s. I belongs to the former class of precepts and those of ss. IV and V to the latter.

As regards the authority of Sir T. Strange, which undoubtedly is great, their Lordships observe that, though he does not bring the conflicting texts of the Mitakshara into comparison with one another, he introduces similar contradictions into the body of his own work. In his "Addenda" he corrected his own opinions by the authority of Sir Francis Macnaghten's Considerations on Hindu Law, which work he had seen after he had written his own. He says that he has used Macnaghten's work for supplementing, for correcting, or for confirming his own (Addenda, p. 4). Among the passages which he adopts is the following:—"It is "desirable that the extent to which a Hindu in his lifetime may give or "make an unequal distribution of his property should be ascertained. I "think it clear that he has a right to dispose of his self-acquired property "whether moveable or immoveable, according to his own pleasure, and "that he has the same right as to ancestorial moveable property." Addenda, p. 8. It seems then that Strange intended to accept for Madras the opinion of Macnaghten who, though a Bengal Judge, wrote of the Benares as well as the Bengal school. Macnaghten's opinion, clearly applying to the Mitakshara law, is that the father of a family, with regard to all kinds of property acquired by himself, is at liberty to make any alienation he may think fit, subject only to spiritual responsibility.

To turn to the decided cases, there is no decision of this Board which is adverse to the power of alienation claimed by the defendant. Mr. *Ross* referred to the language of the Board in the Hansapore case (1) decided in 1867. Sir James Colvile, after showing that by that time testamentary powers, long disputed, had been established in Hindu law, spoke thus:—"Accordingly it has been settled that even in those "parts of [287] India which are governed by the stricter law of "the Mitakshara a Hindu without male descendants may dispose by "will of his separate and self-acquired property whether moveable or "immoveable; and that one having male descendants may so dispose of "self-acquired property if immoveable; subject perhaps to the restriction "that he cannot wholly disinherit any one of such descendants." It is argued that this passage shows that in the opinion of the Board the power of disposition by will does not extend to land and does not exist if there are male descendants. In that case, however, the Board gave no judicial opinion upon the point, because they held that the property in

(1) 12 M.I.A. 1 (38).

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dispute was an indivisible Raj, subject to the custom of primogeniture, and that, as the heir was a consenting party to the disposition in dispute, the question of the testator's power did not arise. It is true that they did not affirm the proposition now contended for by the defendant.

In the Bithoor case (1), there came into question the validity of a will devising self-acquired property. There was a long and intricate discussion as to the genuineness of the will, which was ultimately established. It appears also that objection was taken to the legal power of the testator, but it does not appear on what grounds that point was argued. The only passage in the judgment bearing on this question is as follows:—"The rest of the evidence consists of the testimony of "Pundits, who say that the Soobadar was always obedient to the Shasters, "and that the Shasters forbid a father who has several sons to appropriate "by will to one the property which by law ought to be equally divided "amongst all. It is clear that in this district a strong feeling prevails among "the Brahmins upon the subject of testamentary disposition, which "though at length established by law as to self-acquired property is "opposed to the ancient usages and feelings of the country." That was a decision in favour of the power to make such a will; but the grounds of it do not appear; the attention of the Board would seem to have been directed to the [288] general question of testamentary power, rather than to distinctions between ancestral and self-acquired estate; and in the Hansapore case the present proposition was treated by this Board as still open to argument and to qualifications.

Their Lordships do not think it necessary to go through the series of Indian decisions bearing on this point, but they will refer to some of the most important and of the latest date. It appears to them that the subject is one of those in which from the earliest times there have been two conflicting principles of law, one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half century or so. On each of those subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, *viz.*, the use of property by the living generation, or its living heads. This their Lordships conceive is the kind of change referred to by Lord Kinsdown in the Bithoor case.

The earliest case in which their Lordships have found any exact comparison of the texts of the Mitakshara was decided by a division Bench of the High Court of Calcutta in the year 1863. *Mudhu Gopal* v. *Ram Buksh* (2). In that case the plaintiff's father had sold to the defendant property which was held to be self-acquired. The learned Judges carefully compared the texts of the Mitakshara. They treat those of ss. IV and V as the governing ones. They conclude:—"We must hold that according to the law as laid "down in the Mitak-"shara, a father is not incompetent to sell immoveable property acquired by himself."

In the year 1872 the question was discussed before a Full Bench in Calcutta (3). A son disputed his father's disposition of property

(1) 9 M.I.A. 96.
(2) 6 W.R. 71.
(3) *Nand Coomar* v. *Razoodeen*, 10 B.L.R. 183 (192).

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inherited by the father from a cousin and not from [289] the grandfather. Sir Richard Couch compares the texts and quotes cases which as he says exhibit the better opinion among commentators. His conclusion is this:—"It is only in respect of property not liable to obstruction "that the wealth of the father or grandfather becomes the property of his sons or grandsons by virtue of birth." In this case the property being inherited by the father from a cousin was held to be obstructed as to inheritance.

As regards the North-Western Provinces the question was carefully considered in the year 1877 by two experienced civilian Judges [*Sital* v. *Madho* (1)]. Those learned Judges did not consider themselves bound by a previous decision of the High Court in 1869, which negatived the father's power to alienate, but without citing the authorities. In their elaborate judgment they make more than one suggestion for reconciling the conflicting texts. They say that the Courts have recognised the principle that the prohibition of certain acts may be implied, yet where it is not declared that there is absolutely no power to do them those acts if done are not necessarily void. And in the end they adopt Sir Wm. Macnaghten's view "that with respect to personal property whether "ancestral or acquired, and with respect to real property acquired or "recovered by the occupant, he (the father) is at liberty to make any "alienation which he may think fit, subject only to spiritual responsibility." (*See* Principles, &c., p. 3.) This is the same view as is expressed by Sir Francis Macnaghten, and adopted by Sir T. Strange in the passage above quoted.

Their Lordships fully assent to the reasoning contained in the judgments they have cited; and they find that in India there is a decided preponderance of judicial authority in favour of the power claimed for Jaswant in this case.

It remains to mention a decision of this Board in the year 1873, which, though it falls under the Mithila law, appears to their Lordships to bear closely on the present case. It is reported [290] in 12 Beng. L. R., p. 430, *Raja Bishen* v. *Bawa Misser*. The Mithila law differs in some respects from that of the Mitakshara, but on the subject in question follows it very closely. The leading text-book is the Vivada Chintamani, and their Lordships quote from the translation made in 1863. In page 76 and again in page 229 are passages giving a free hand to the owners of self-acquired property. In p. 229 it is written:—"Such property as is "acquired or recovered by the father without the aid of the ancestral "estate shall be divided equally, or unequally, or not divided at all, at his "pleasure. The father has full dominion over ..... that property which "is gained by him through skill, valour or the like, he may give it away "at his pleasure," and so forth. In p. 309 occurs this passage:—"It is "declared in the work called Prakasa that immoveable and biped property, "even if it be self-acquired, cannot be sold or given away without the "consent of the sons. They who are born ..... even they who are not "yet conceived, require paternal property for their maintenance therefore "it is improper to deprive them of it." The decision of this Board was in accordance with the first set of texts. It is true that p. 309 is not referred to in the judgment, but it can hardly be supposed that in a case fought up to the highest tribunal it was overlooked.

(1) 1 A. 394.

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For the foregoing reasons their Lordships have no hesitation in laying it down that the law of the Mitakshara is shown after long conflicts of opinion due to the conflicting nature of the original texts, to be that which has been adopted from Sir William Macnaghten by the Courts of Calcutta and Allahabad.

Such being the law it remains to apply it to this case. The plaintiff contends that the property in question was ancestral. As regards the four villages the dispute turns on matters of fact and the Courts below are agreed in finding against the plaintiff. That dispute cannot be reopened here. As regards Bakewar they have differed, and the plaintiff asks their Lordships to say that the High Court is wrong in finding that this village was the self-acquired property of Jaswant. The question turns on transactions [291] which took place in the year 1852. In 1836 Khuman the father of Jaswant executed a simple mortgage of Bakewar to Lachman Das. In 1839 he executed a second mortgage by way of conditional sale to the father of Kunjbehari. Disputes arose between the two mortgagees, who under an award were put into possession each of a moiety. In 1847 Kunjbehari bought out Lachman and was placed in sole possession. In 1852 one Harbans Rai, a creditor of Jaswant who had then succeeded to the property, got a decree against him. In the same year Kunjbehari applied for foreclosure under Regulation XVII of 1806. The year of grace expired, and the foreclosure became absolute. Harbans endeavoured to execute his decree against Bakewar; but was opposed by Kunjbehari who brought a suit against both Jaswant and Harbans to assert his title. The First Court decided against him, apparently on the ground that his title was no better than that of Lachman whose simple mortgage did not carry the right to foreclosure or to possession. The Zillah Judge thought differently, and held that the mortgage has been finally foreclosed. Harbans appealed to the Sudder Dewani Adawlat, who upheld the Zillah Judge's decree and granted Kunjbehari's claim to have the sale of the estate of Bakewar made absolute by expungement of the name of Jaswant and the entry of his own name. That final decree bears date the 14th February 1856. Kunjbehari was then in possession and he remained in possession, but he did not procure any mutation of name.

The subsequent events are involved in some obscurity. It seems that Kunjbehari got into trouble during the mutiny; that he was charged with serious offences and was in great danger of being hung; that Jaswant took up his cause, saved his life, and even gave him compensation to the amount of some thousands of rupees for injuries done to his estate (Rec., p. 274). On Kunjbehari's part we find that in an irregular way, by endorsement on the decree of February 1856, he purported to annul that decree in favour of Adhar Kunwar. The consideration [292] stated is the sum of Rs. 4,526 apparently less than a year's revenue. That endorsement is dated 22nd June 1858. The defendant alleges that soon afterwards Adhar Kunwar, also in an irregular way, made a verbal gift of the property to Jaswant (Rec., p. 480). The certain thing is that about this time Jaswant regained possession and remained in possession until his death. How far his title depended on Adhar Kunwar's gift, how far on Kunjbehari's relinquishment of possession and practical reconveyance, and how far Kunjbehari's acceptance of the small sum given for purchase money was influenced by Jaswant's services to him or why he took so small a sum, are questions which are not and which need not be, cleared up.

In the year 1868 Kunjbehari sued to establish his right to Bakewar.

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The defendants were Jaswant and Sheo Narain, to whom it was stated that Jaswant had sold the property. Kunjbehari alleged that the endorsement on the decree was a forgery and gave a different account of his transactions with Adhar Kunwar ; admitting however that he took the money from her and that he, as he calls it, annulled the decree. The Subordinate Judge held that the arrangement of the 22nd June 1858 was a *bona fide* one, and that Jaswant got actual proprietary possession. (Rec., p. 280.)

On one of the issues he found that the foreclosure of the decree of February 1856 and the other previous transaction between Kunjbehari and Jaswant were wholly fictitious and collusive. It is impossible to accept such a finding as of any value. Nobody disputes that Kunjbehari had a genuine mortgage from Khuman, or that the estate and the liability devolved on Jaswant. And the Subordinate Judge himself points out that the validity of the foreclosure was challenged by Harbans who had a strong interest to upset it ; but he adds "unfortunately these objections "were not entertained by any Court." (Rec., p. 273.)

There is also another finding on a separate issue, of a most extraordinary character. The Subordinate Judge finds that because Kunjbehari did not effect a mutation of names therefore [293] his foreclosure decree became void and that he remained in possession as a mortgagee.

It is mainly on account of these two findings, on which Mr. *Ross* dwelt at great length, that this voluminous intricate and confused judgment of the Subordinate Judge of 1869 has been put in. Of course they have no legal force as between the heir and the grantee of Jaswant. Nor had they any result as between the parties to that suit ; seeing that it was dismissed with costs. (Rec., p. 283.)

The decision of the District Judge in this case is apparently founded on the last-mentioned finding of the Subordinate Judge of 1869, which he quotes as though it were conclusive. Their Lordships think it clear that the point of time and the event to look at is the foreclosure of 1853. If that were a mere sham, the conclusion that the mortgage continued and that on its payment Jaswant only redeemed the estate he had inherited from Khuman might have some colour. But in the suit of 1853 the two appellate Courts held that the foreclosure was genuine and valid. That was held against the appeal of the execution creditor whose claim was defeated by it. It is not a decision between the present parties, but it is strong evidence, and their Lordships cannot find any substantial evidence for disputing it. If the foreclosure took place the former title of Bakewar was broken and its ancestral character destroyed. The exact mode of its re-acquisition by Adhar Kunwar and Jaswant is not material. For money or for services, it passed from Kunjbehari to Jaswant and so was acquired by him. For the above reasons their Lordships agree with the High Court on this point.

The only other point taken for the appellant is one of a very unusual character. It is alleged that the decree of the High Court is void because one of the Judges, Mr. Burkitt, was not properly appointed. The point was not taken in the Court below ; nor is the nature of it explained in the printed case of the appellant. Their Lordships understand that the appointment is questioned on the ground that it was not made immediately [294] upon, or within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot discover any ground for the objection. Under the High Courts Act the

Lieutenant-Governor of the North-Western Provinces has power to appoint an acting Judge upon the happening of a vacancy among the puisne Judges of the Court. No limit of time is mentioned within which the appointment shall be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a Court of Law to invent a restriction not contemplated by the Legislature.

The result is that the appeals fail on all points, and their Lordships will humbly advise Her Majesty to dismiss them. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: *Messrs. Pyke and Parrott.*

Solicitors for the respondent: *Messrs. Ranken, Ford, Ford and Chester.*

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20 A. 294 = 18 A.W.N. (1898) 35.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

CHIRANJI LAL (*Plaintiff*) *v.* KUNDAN LAL AND OTHERS (*Defendants*).*

[3rd February, 1898.]

Civil Procedure Code, ss. 556, 558 —*Appeal—Dismissal of appeal—Default of appearance.*

Where, on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hands too late for him to prepare himself in the case, and the appeal was in consequence dismissed, it was *held* that this was not a dismissal for default of appearance. *Shankar Dat Dube* v. *Radha Krishna* (1) distinguished. *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (2) referred to. *Rakhal Chandra Rai Chowdhuri* v. *The Secretary of State for India in Council* (3) dissented from.

[R., 34 C. 403 = 5 C.L.J. 247 = 11 C.W.N. 329 = 4 M.L.T. 123; 17 C.P.L.R. 1 (4); 8 C.W.N. 621 (624).

THIS was an appeal under s. 10 of the Letters Patent from an order dismissing an application for the restoration to the [295] file of pending appeals of an appeal which had been dismissed. The appeal was a second appeal, which under the Rules of the Court came for hearing before a single Judge. The circumstances under which it was dismissed are indicated by the following order:—"This appeal is not supported. The pleader for the appellant has made over his brief to another gentleman when the appeal was called on for the second time. The latter says he is unable to argue the case. I dismiss the appeal with costs." The appellant applied to the Judge who passed the above order for restoration of the appeal as an appeal dismissed for default. This application was rejected by the following order:—"This case cannot be reinstated. It was not dismissed for default. Rejected." The appellant thereupon appealed under s. 10 of the Letters Patent.

Mr. *B. E. O'Conor* and Pandit *Moti Lal*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

JUDGMENT.

KNOX and BANERJI, JJ.—Upon a second appeal being called on for hearing, the vakil who appeared for the appellant told the Court that he

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* Appeal No. 3 of 1897 under s. 10 of the Letters Patent Act.

(1) 20 A. 195. (2) 16 B. 23. (3) 12 C. 603.

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was unable to argue the case; the appeal was accordingly dismissed. An application was then presented to the learned Judge who heard and decided the case praying that the appeal might be restored to its original number and heard in the ordinary course. The order passed was:—"This case cannot be reinstated: it was not dismissed for default." It is contended before us to-day that under the circumstances the case is one which was practically dismissed for default and should have been so treated. In support of this contention, the case of *Shankar Dat Dube* v. *Radha Krishna* (1) was cited.

The circumstances, however, of that case differ materially from the circumstances in the appeal before us. In that case, the pleader who had been retained by the defendant came before the Court and stated that no one had ever come near him on the part of his client, and he had no instructions of any kind. His case was rightly treated as one in which the pleader engaged had retired **[296]** from the case. In the appeal before us, there was no retirement. The learned vakil who was engaged came forward with instructions in his hand and said he was unable to argue the case. From an affidavit which was filed along with the application for reinstatement the cause of inability is stated to be that the brief had come to the hands of the vakil so late that he could not prepare himself to argue the case. That, as pointed out in the case of *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (2), was a good reason to pray for an adjournment, but it was not a retirement from the case, and not a default of appearance. We were also referred to *Rakhal Chundra Rai Chowdhuri* v. *The Secretary of State or India in Council*(3). That case, no doubt, supports the contention of the appellant, but we find ourselves unable to follow it. We prefer to follow the ruling of the Bombay Court, with which we are in accord. We dismiss this appeal with costs.

Appeal dismissed.

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20 A. 296 = 18 A.W.N. (1898) 38.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

DEBI SINGH (*Plaintiff*) *v.* MUHAMMAD ISMAIL KHAN (*Defendant*).* [3rd February, 1898.]

Jurisdiction—Civil and Revenue Courts—Suit against an evicted tenant for damages for use and occupation—Landholder and tenant.

If a landholder wishes to get rent from a tenant of his agricultural land he must, during the continuance of the tenancy, either come to an agreement with the tenant as to the rent to be paid, or get the rent fixed by means of an application under Act No. XII of 1881. If no rent has been fixed, the landholder cannot, after the determination of the tenancy, sue his *quondam* tenant in a Civil Court for damages for the use and occupation of the land. *Ram Prasad* v. *Dina Kuar* (4), *Radha Prasad Singh* v. *Jugal Das* (5), and *Debi Singh* v. *Jhanno Kuar* (6), referred to. *Brijbawan Singh* v. *Mehdi Ali* (7), and *Ranjit Singh* v. *Diwan Singh* (8) overruled.

[D., 11 A.L.J. 377 (378).]

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* Civil Revision No. 26 of 1897.

(1) 20 A. 195. (2) 16 B. 23. (3) 12 C. 609.
(4) 4 A. 515. (5) 9 A. 185. (6) 16 A. 209.
(7) 7 A W.N. (1887), 140. (8) 9 A.W.N. (1889), 175.

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[297] THIS was an application for revision of a decree made by the Subordinate Judge of Meerut, in an appeal from the Munsif of that place. It appears that the plaintiff, applicant, purchased at an auction-sale certain landed property belonging to the defendant's father. He got the defendant ejected from that land by proceedings under s. 36 of Act No. XII of 1881. He then brought a suit in the Court of the Munsif to recover from the defendant compensation for the use and occupation by the defendant of the land so purchased by him, alleging that, as the rent of the land had not been hitherto determined, the claim was not entertainable by a Court of Revenue. The defendant pleaded *inter alia* that the claim was not cognizable by a Civil Court. The Court of first instance, (Munsif of Meerut) held that the suit was cognizable by a Civil Court and gave the plaintiff a decree. The defendant appealed. The lower appellate Court (Subordinate Judge of Meerut) held that the suit would not lie in a Civil Court, and, reversing the decree of the Munsif, dismissed the plaintiff's suit. Against this decree, the present application for revision was presented on behalf of the plaintiff.

Babu *Jivan Chandar Mukerji*, for the applicant.

The opposite party was not represented.

JUDGMENT.

EDGE, C.J., and BURKITT, J:—This was a suit for compensation for the use and occupation of agricultural land. Judging from the record, the plaintiff had purchased the zamindari rights of the defendant's father. Whether the land in respect of the occupation of which compensation is claimed was *sir* land of the ex-zamindar, we do not know. One thing is clear. The plaintiff had, by proceeding under s. 36 of Act No. XII of 1881, obtained the ejectment of the defendant from the lands to which this claim relates. He could not have obtained ejectment under such a proceeding unless the defendant had been a tenant of this agricultural land. The plaintiff, if he wanted to get a decree for rent and did not agree with the defendant as to the rent to be paid whilst the defendant was his tenant, ought to have got the **[298]** rent determined whilst the tenancy subsisted by an application under Act No. XII of 1881. Mr. *Jivan Chandar* argues that, the rent not having been determined during the tenancy and not having been agreed on, the Court of Revenue would not now determine it. The Court of Revenue would of course act wisely in not determining the rent of a tenancy which no longer subsisted; it has other work to do. Mr. *Jivan Chandar* also contended that, on the authority of the decisions of Mr. Justice Tyrrell in *Brijbawan Singh* v. *Mehdi Ali* (1) and *Ranjit Singh* v. *Diwan Singh* (2), it was competent to a Civil Court in such a case, although it could not decree the claim *sub nomine* rent, to award to the plaintiff compensation for the use of his land by the defendant. Mr. Justice Tyrrell apparently had forgotten that he had delivered the judgment of a Bench of two Judges in 1882, which was directly in conflict with the view which he was expressing in 1887 and 1889. Sir Robert Stuart, C.J., and Mr. Justice Tyrrell in *Ram Prasad* v. *Dina Kuar* (3) held, and we think rightly, that in such a case the zamindar cannot sue for use and occupation. If he wants to enforce payment of rent by his tenant, he must agree on the rent with his tenant, if the case be one in which such an agreement would be lawful under, and not contrary to, the provisions

(1) 7 A.W.N. (1887) 140. (2) 9 A.W.N. (1889) 175. (3) 4 A. 515.

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of Act No. XII of 1881 and could be enforced under that Act, or he must have the rent determined under the Act, and then he could sue for the arrears of the rent so agreed on by the tenant or determined under the Act, and he could sue in the Court of Revenue, which is the only Court having jurisdiction. This view of the law is supported by the judgment of this Court in *Radha Prasad Singh* v. *Jugal Das* (1). Some decisions bearing on this subject are referred to in *Debi Singh* v. *Jhanno Kuar* (2). Zamindars must comply with the law of Act No. XII of 1881, or they will go without remedy, not only in the Court of Revenue, but also in the Civil Court, in respect of **[299]** compensation for the occupation of their land. This case came before us as an application in revision from the judgment of a Civil Court dismissing the suit. We dismiss this application.

Application dismissed.

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20 A. 299=18 A.W.N. (1898) 36.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

KAMRAKH NATH (*Applicant*) *v.* SUNDAR NATH (*Opposite Party*).*

[4th February, 1898.]

Civil Procedure Code, ss. 406, 407—*Application for leave to sue in* forma pauperis—*Applicant to make out that he has a good subsisting cause of action.*

Clause (c) of s. 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction, but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. *Chattarpal Singh* v. *Raja Ram* (3), *Dulari* v. *Vallabdas Pragji* (4), and *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (5), referred to; *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (6), dissented from; *Venkubai* v. *Lakshman Venkoba Khot* (7) distinguished.

[F., 27 M. 37 (39); 18 Ind. Cas. 491=58 P.L.R. 1913=29 P.W.R. 1913; R., 27 M. 120; 13 C.L.J. 593 (595)=11 Ind. Cas. 55 (56); 2 L.B.R. 333; 13 M.L.J. 425; 4 M.L.T. 302; 6 M.L.T. 359=3 Ind. Cas. 29; 91 P.L.R. 1909, 131 P.W.R. 1909=4 Ind. Cas. 975 (976).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *S. S. Singh* and Pandit *Madan Mohan Malaviya*, for the applicant.

Munshi *Ram Persad* and Pandit *Sundar Lal*, for the opposite party.

JUDGMENT.

EDGE, C.J. and BURKITT, J.—This is an application asking the Court to revise, under s. 622 of the Code of Civil Procedure, an order of the Subordinate Judge of Gorakhpur rejecting an application for leave to sue as a pauper. The applicant alleged that he was the eldest chela of the deceased mahant; that whilst he was on a pilgrimage the mahant died and the proposed defendant to the suit had wrongfully usurped the gaddi and the position of mahant of the temple, and the applicant alleged that he was entitled to the gaddi by law and custom. **[300]** We may observe here that that was a very loose allegation. In

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* Civil Revision No. 27 of 1897.

(1) 9 A. 185. (2) 16 A. 209. (3) 7 A. 661. (4) 13 B. 126.
(5) 19 M. 197. (6) 4 M. 323. (7) 12 B. 617.

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nearly all these cases of succession to the gaddis of temples the succession is governed by the custom of the class to which the temple is appropriated. Sometimes the mahant nominates his successor, and that successor on the death of the mahant becomes entitled by virtue of the nomination. In other cases the successor is appointed by the representative of the founder of the temple. In others again the successor is appointed by the mahants of the neighbouring temples, but the instances we have given are not exhaustive of the customs which have been found to apply in such cases. Consequently the mere allegation that a claimant is entitled by law and custom to the gaddi of a temple is not in our opinion a sufficient allegation of title. Something more than general allegations are requisite in the plaint where a claim is made to the possession of property which is in the possession of another person, always of course provided that the case is not one falling under s. 9 of the Specific Relief Act. The case of *Philipps* v. *Philipps* (1) and that of *Dawkins* v. *Lord Penrhyn* (2) are instructive as to the law on this subject in England.

The Subordinate Judge examined, under s. 406 of the Code of Civil Procedure, the applicant regarding the merits of his claim. The fact that he was a pauper was not disputed. It appeared from the examination that, according to one custom at least affecting the particular temple, a jar with water in it was placed on the gaddi in the event of the mahant dying during the absence of the person entitled to succeed him on the gaddi. This is not alleged to have been done in the present case, and it also appeared that the defendant had taken possession of the gaddi without any serious opposition on the part of the panches of the temple. On these facts the Subordinate Judge came to the conclusion that the applicant had not shown a *prima facie* reasonable cause of action, and rejected the application for leave to sue as a paurer.

[301] It has been contended that this case comes within the ruling of the Bombay High Court in *Venkubai* v. *Lakshman Venkoba Khot* (3). It appears to us that that case does not apply here. Here the Judge addressed himself to the question of whether or not the applicant had shown grounds from which it might be inferred that he had a probable cause of action. It is obvious that the mere statements in the plaint which accompanies an appliction for leave to sue as a pauper cannot be accepted as the sole materials on which a decision as to whether the applicant's allegations do or do not show a right to sue can depend. If the allegations in the plaint were the sole matters to be looked to and the applicant were admittedly a nauper, the granting of this application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of the gentleman who drafted his petition and his plaint, and the examination as to the merits under s. 406 would be superfluous.

It has been held by this Court in *Chattarpal Singh* v. *Raja Ram* (4) that clause (*c*) of s. 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction, but that the applicant must make out that he has a good, subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. That Full Bench ruling was cited with approval by Jardine, J., in *Dulari* v. *Vallabdas Pragji* (5), and even if the Madras Court in *Koka Ranganayaka Animal* v. *Kaka Venkatachellapati Nayudu* (6) took a different view, we are bound to follow the

(1) L.R. 4 Q.B.D. 127.
(2) L.R. 4 App. Cas. 58.
(3) 12 B. 617.
(4) 7 A. 661.
(5) 13 B. 126.
(6) 4 M. 323.

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Full Bench ruling of our own Court. We may say that we entirely approve of that Full Bench ruling. Further, the Madras Court in *Vijendra Tirtha Swami* v. *Sudhindra Thirtha Swami* (1) did not follow the case in I. L. R., 4 Mad. 323. Assuming the Full Bench ruling to be correct, as we do, it was within the jurisdiction of the Subordinate Judge to decide whether or not the applicant's allegations showed a right to sue. It has been held by their [302] Lordships of the Privy Council in *Rajah Amir Hassan Khan* v. *Sheo Bakhsh Singh* (2) that where a Court has jurisdiction to decide a question, and does decide it, the High Court cannot under s. 622 of the Code of Civil Procedure interfere merely because the Court has wrongly decided the question. There is no question in this case of illegality or material irregularity. The result is that the Subordinate Judge had jurisdiction to decide this question and did decide it. He was not guilty of any illegality or irregularity, and it is unnecessary to consider whether he decided the question rightly or wrongly. We cannot interfere. We dismiss this application with costs.

Application dismissed.

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20 A. 302 = 18 A.W.N. (1898) 40.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

CHUNNI LAL (*Judgment-debtor*) *v.* HARNAM DAS (*Decree-holder*).*

[7th February, 1898.]

Execution of decree —Act No. IV of 1882 (Transfer of Property Act), s. 89—Order absolute for sale — Limitation Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 179.

An application for an order absolute for sale under s. 89 of the Transfer of Property Act, 1882, is an application to which article 179 of the second schedule to the Indian Limitation Act, 1877, applies. *Oudh Behari Lal* v. *Nageshar Lal* (3) referred to; *Ranbir Singh* v. *Drigpal* (4) overruled.

[F., 20 A. 357; 25 M. 244 (283, 295) (F.B); Appl., 23 B. 644 (650); R., 24 A. 542; 27 A. 625=3 A.L.J. 371=A.W.N. (1905) 136; 33 C. 867 (875, 876)=4 C.L.J. 141; 11 A.L.J. 224 (229)=18 Ind. Cas. 731 (732)=35 A. 178; Cons., 26 M. 780 (787)]

THIS appeal arose out of an application for an order absolute for sale under s. 89 of the Transfer of Property Act, 1882. The respondent obtained a decree for sale under s. 88 of the Transfer of Property Act on the 30th of March 1893 against the appellant. By the decree six months were allowed for payment of the decretal sum. That period expired on the 30th of September 1893. On the 10th of March 1897, the respondent decree-holder applied for an order for sale under s. 89 of the [303] Transfer of Property Act. That was the first application made for execution of the decree or to take a step in aid of the execution of the decree. The Court of first instance (Munsif of Bisauli) held that the application was barred by limitation. On appeal by the decree-holder the lower appellate Court (Subordinate Judge of Shahjahanpur) held, following the decision in *Ranbir Singh* v. *Drigpal* (4), that the application was not barred, and, reversing the decree of the Munsif, made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand the judgment-debtor appealed to the High Court.

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* First Appeal No. 82 of 1897, from an order of Babu Baijnath, Subordinate Judge of Shahjahanpur, dated the 17th June 1897.

(1) 19 M. 197. (2) 11 I.A. 237. (3) 13 A. 278. (4) 16 A. 23.

Munshi *Ram Prasad*, for the appellant.
Mr. *D. N. Banerji*, for the respondent.

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APPELLATE CIVIL.

20 A. 302 = 18 A.W.N. (1898) 40.

JUDGMENT.

EDGE, C. J., and BANERJI, J.—On the 30th of March 1893 the respondent here obtained a decree under s. 88 of the Transfer of Property Act, against the appellant here. By the decree six months were allowed for payment of the decretal sum. That period expired on the 30th of September 1893. On the 10th of March 1897, the respondent-decree-holder applied for an order for sale under s. 89 of the Transfer of Property Act. That was the first application made for the execution of the decree or to take a step in aid of the execution of the decree. The first Court held that the application was barred by the Indian Limitation Act, 1877, and dismissed it. On appeal the lower appellate Court held, following the decision in *Ranbir Singh* v. *Drigpal* (1) that there was no period of limitation provided for such an application, and set aside the order of the first Court and made an order under s. 562 of the Code of Civil Procedure remanding the case. From that order of remand this appeal has been brought. A Full Bench of this Court has held in *Oudh Behari Lal* v. *Nageshar Lal* (2) that an application for an order under s. 89 of the Transfer of Property Act is a proceeding in execution of decree and subject to the rules of procedure governing such matters. Applying the decision of the **[304]** Full Bench, we hold that an application for an order under s. 89 of the Transfer of Property Act is an application to which art 179 of the second schedule to the Indian Limitation Act, 1877, applies, and consequently, having regard to s. 4 of the Act, the application was rightly dismissed by the first Court If we were to hold that there was no limitation in such a case the decree-holder might postpone without loss of any rights his application under s. 89 for fifty years after the date when he obtained his decree under s. 88 of the Transfer of Property Act, as there would be nothing in the Limitation Act to bar his application, and s. 230 of the Code of Civil Procedure would not apply. We allow this appeal with costs in this Court and in the Court below, and set aside the order under appeal, dismiss the appeal to the Court below, and restore and affirm the decree of the first Court.

Appeal decreed.

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20 A. 304 = 18 A.W.N. (1898) 43.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

DAYA KISHAN (*Opposite Party*) v. NANHI BEGAM AND OTHERS (*Petitioners*).* [9th February, 1898.]

Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 179—Application to the proper Court—Civil Procedure Code, s 206.

An application under s 206 of the Code of Civil Procedure does not give a fresh starting point to limitation and cannot be regarded as an application to the proper Court to take a step-in-aid of execution. *Kishen Sahai* v. *The Collector*

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* First Appeal No. 231 of 1897, from an order of Maulvi Muhammad Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 22nd May 1897.

(1) 16 A. 23.
(2) 18 A. 278.

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of Allahabad (1), *Tarsi Ram* v. *Man Singh* (2) and *Kallu Rai* v. *Fahiman* (3), referred to.

[F., 4 A.L.J. 469=A.W.N. (1907) 169; R., 10 C.L.J. 467 (469)=3 Ind. Cas. 391 (392).]

THE facts of this cass eufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

EDGE, C.J., and BANERJI, J.—This appeal arises out of proceedings taken for the execution of a decree. A decree for sale **[305]** was made under s. 88 of the Transfer of Property Act, 1882, on the 31st of March 1891. An order absolute for sale was made on the 17th of December 1892, under s. 89 of that Act. On the 23rd of January 1893, an application for execution was made. On the 1st of July 1893, the judgment-debtor paid into Court the amount decreed, which included costs. On the 5th of July 1893, the decree-holder, having found that by the judgment he was entitled to a sum of about Rs. 1,000 more than the decree had given him, applied under s. 206 of the Code of Civil Procedure to have the decree brought into accordance with the judgment. For some reason best known, if known at all, to the Judge to whom that application was made, he shelved the application on the 18th of November 1893. On the 28th of November 1895, the decree-holder made a second application under s. 206 to the same effect as the previous one, and on the 25th of July 1896, the decree was brought into accordance with the judgment. The decree-holder delayed making his next application until the 17th of March 1897. It was for execution of the decree as amended. That application was dismissed on the ground that it was barred by limitation. From the order dismissing that application this appeal has been brought. Unless the decree-holder is entitled to call in aid his applications of the 5th of July 1893, and the 28th of November 1895, as applications to the proper Court to take a step-in-aid of the execution of the decree, execution of the decree is barred by limitation under art 179 of the second schedule to the Indian Limitation Act, 1877, as the last application to execute the decree was that of the 23rd of January 1893.

In *Kishen Sahai* v. *The Collector of Allahabad* (1) it was held that an application under s. 206 of the Code of Civil Procedure to bring a decree into accordance with the judgment was substantially an application for a review of judgment and gave, under s. 167 of sch. ii of Act No. IX of 1871, a fresh starting point for limitation. We cannot regard **[306]** proceedings under s. 206 of the Code as of the same nature in any respect as proceedings under s. 623 of the Code. In the former case, namely, under s. 206, the correctness of the judgment is not questioned; it is assumed; but the jurisdiction arises from the fact that the decree as drawn up and signed is not in accordance with the judgment. In the latter case, namely, under s. 623, not only the correctness of the decree, but the correctness of the judgment is questioned, and, if the application under s. 623 is allowed, a re-hearing of the suit or appeal to which it refers becomes necessary. In the former case there is no re-hearing. That part of the decision in *Kishen Sahai* v. *The Collector of Allahabad* to which we

(1) 4 A. 137. (2) 8 A. 492. (3) 13 A. 124.

have referred was explained by Straight, J., in *Kallu Rai* v. *Fahiman* (1) on the ground that, though ostensibly the application in *Kishen Sahai* v. *The Collector of Allahabad* had been made under s. 206 of the Code, the proceedings which were taken were proceedings which could only have been taken under s. 623 of the Code. We need not consider whether that explanation is correct or not. The decision in *Kallu Rai* v. *Fahiman* shows that an application under s. 206 of the Code of Civil Procedure does not give a fresh starting point to limitation, and cannot be regarded as an application to a proper Court to take a step-in-aid of execution. That this is so is obvious from a consideration of art. 179, cl. (4) of the second schedule to Act No. XV of 1877. The application under that clause must be one in accordance with law made to "the proper Court" for execution or to take some step-in-aid of execution of the decree. By explanation II to art. 179 "proper Court" means the Court whose duty it is to execute the decree. The Court executing a decree may or may not be the Court which would have jurisdiction to take action on an application under s. 206 of the Code, and, even if it was the Court which passed the decree, its functions as a Court executing the decree are not the same as its functions were as the Court making the [307] decree. In executing the decree the Court executing it must take the decree as it finds it. It cannot amend the decree or alter it in any way. It is bound of course to construe the decree. The decree in execution may be the decree of the High Court, and the proper Court to execute that decree may be the Court of the Munsif by whom the suit was first decided. The Munsif could not act under s. 206 in respect of a decree made by an appellate Court, and he would be bound, as the Court executing the decree, to execute the decree whether he approved of it or not, even if the decree had been one made by himself. For these reasons we are of opinion that the applications of the 5th of July 1893, and the 28th of November 1895, were not applications made to the proper Court within the meaning of art. 179 to take a step-in-aid of execution of the decree, and consequently that execution of the decree was barred by limitation. It was decided, and we think rightly, in *Tarsi Ram v. Man Singh* (2) that an application under s. 206 of the Code does not give a fresh starting point for limitation. We dismiss this appeal with costs.

Appeal dismissed.

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20 A. 307 = 18 A.W.N. (1898) 52.

APPELLATE CRIMINAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. MUHAMMAD SHAH KHAN AND ANOTHER.*

[11th February, 1898.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 218—*Public servant framing incorrect record—Injury to the public—Police officer framing a false report.*

A report of the commission of a dacoity was made at a thana. The police officer in charge of the thana at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false

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* Criminal Appeal, No. 1556 of 1897.

(1) 13 A. 124.

(2) 8 A. 492.

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report—of the commission of a totally different offence—to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant.

Held that on the above facts the Police officer was guilty of the offences punishable under s. 204 and s. 218 of the Indian Penal Code.

[308] THE facts of this case are fully stated in the judgment of the Court.

Messrs. *W. M. Colvin* and *C. C. Dillon*, for the accused persons.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—Muhammad Shah Khan, who was a clerk or muharrir at the thana of Didauli, and Kutb-ud-din, who was the thanadar, were tried for the offences punishable under ss. 204 and 218 of the Indian Penal Code. Kutb-ud-din was acquitted; the Government has appealed against that acquittal, and that appeal is before us. Muhammad Shah Khan was convicted of the offence punishable under s. 204 of the Indian Penal Code and was sentenced therefor to two years' rigorous imprisonment. He has appealed, and his appeal is now before us.

The facts of this case, although the evidence was taken at considerable length, are very simple. A dacoity had been committed on the night of the 24th-25th of May, and in that dacoity one Abdul Wahid, who was the zamindar's karinda, was injured rather severely. He first went to make his report to the thana at Amroha, apparently because he had been told that a difficulty had arisen about one Roshan belonging to the village getting a report made as to a previous dacoity alleged to have taken place in the same village on the night of the 23rd. He was directed at Amroha to make his report at the thana of Didauli, within the circle of which thana the village in question was. He arrived at the thana late at night, and made a statement to the thanadar; and early the next morning, he made a report. He says in his evidence that he mentioned that two dacoities had been committed, and that he signed a book three times, and that later on they again put before him a book for his signature and he again signed it two or three times. He says that he did not take away any cheque-receipt. A cheque-book which was printed at the Government Press in 1891 was produced in Court, and **[309]** in that cheque-book there was a counterfoil taken from a cheque-book which was printed at the Government Press in 1892, and which otherwise shows on the face of it that it was of a different issue from that of the cheque-book of 1891. On the interpolated counterfoil, there was what purported to be a report by Abdul Wahid, of a theft committed by three persons in the village. According to that report, after the three men had put the grain and other things into their bags, Abdul Wahid and his servant awoke, and in trying to seize the men were hurt. That report bears the genuine signature of Abdul Wahid. He says that that was not the report which he made, and we have no doubt that it was not. There must have been some strong motive to induce the thanadar and the clerk to concoct the report on a sheet of a cheque-book of the issue of 1892, to get Abdul Wahid's signature to that report and to substitute that report for the report which was first recorded and signed by Abdul Wahid. No explanation is given by Muhammad Shah Khan or

Kutb-ud-din of how it happened that in the cheque-book of the issue of 1891, a sheet of the issue of 1892 has found a place. No reasonable man could believe that when the cheque-book of 1891 was being bound a sheet from a cheque-book printed the following year was inserted by mistake, and that by a fortuitous concourse of circumstances, the report which is questioned in this case happened to be written on the sheet which, by mistake, had got into the wrong book in binding. Further, all the other sheets in the book of the issue of 1891 have the mark of three holes where the binding string has passed through them. The sheet from the book of 1892 has got three holes corresponding with the holes in the book of 1891, and in addition three other holes which do not correspond with any of the holes in the book of 1891. These are facts which speak for themselves.

The report made in the cheque-book was a report which the muharrir or clerk, according to the Police Regulations, was bound to report correctly word for word as it fell from the man making the report, and it was a report which, according to the same [310] Police Regulations, the officer-in-charge of the thana was bound to sign, with the object of making the two men responsible for the correctness of the report. Consequently, it was a report which, in our opinion, must be taken to have been recorded by the two men. Further, as the report was signed by the person making it, namely, Abdul Wahid, the document bearing his signature would have been admissible in a Court of Justice to contradict any statement which he might make at variance with the report and might for that purpose be sent for on a subpœna and could have been proved, if necessary, by the thanadar and the clerk in whose presence it was made and signed. No doubt, the object in preparing the false report and substituting it for the true report, was to keep from the knowledge of the District Superintendent of Police and the Magistrate of the District, the fact that two dacoities were reported to have taken place in a village in the district. The offence, in our opinion, was a very serious one. It is in the interest of the public necessary that these reports should be recorded faithfully and truly by police officers. It is to the injury of the public that offences should be concealed by the police, and that reports should be falsely recorded. We bear in mind in dealing with the appeal of Muhammad Shah Khan, that he is a young man, and that what he did was done no doubt at the suggestion and by the orders of the thanadar. However, we cannot pass over his offence lightly. We dismiss his appeal; but we alter the sentence to one of 12 months' rigorous imprisonment, which will count from the date of his conviction in the Court of Session. As to Kutb-ud-din, he was the responsible officer at the thana. It was his duty not only to show a good example of acting lawfully, but to take care, as far as he could, that those under him at the thana acted according to law. There is, in our opinion, a wide difference between his case and that of his subordinate Muhammad Shah Khan. We convict Kutb-ud-din of the offence punishable under s. 204 of the Indian Penal Code; he certainly secreted or destroyed the first signed report; and we sentence him under that section to be rigorously imprisoned for [311] two years. We convict him also of the offence punishable under s. 218 of the Indian Penal Code; he framed a record which he knew to be incorrect knowing it to be likely that he would thereby cause injury to the public. The record in respect of which we convict him under s. 218 was the false record to which he obtained the signature, on the second

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occasion, of Abdul Wahid. Under s. 218, we sentence Kutb-ud-din to be rigorously imprisoned for two years. The latter sentence will commence on the expiration of the former. A warrant will forthwith issue for the arrest of Kutb-ud-din.*

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20 A. 307 = 18 A.W.N. (1898) 52.

20 A. 311 = 18 A.W.N. (1898) 45.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt

SHAH MUHAMMAD KHAN AND OTHERS (*Defendants*) *v.* HANWANT SINGH (*Plaintiff*).† [12th February, 1898.]

Civil Procedure Code, s. 108—Application to set aside a decree passed ex parte—Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. ii, art. 164—Suit for partition—Nature of decree in such suit—Civil Procedure Code, s. 396—Execution of process for enforcing the judgment.

The action of an Amin appointed under s. 396 of the Code of Civil Procedure in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of article 164 of the second schedule to the Indian Limitation Act, 1877. *Dwarka Nath Misser* v. *Barinda Nath Misser* (1) referred to.

[F., 21 I.A. 409; 19 A.W.N. (1899) 124; 23 A.W.N. (1903) 187]

IN this case, the respondent obtained on the 30th September 1896, a decree for partition of certain immoveable non-revenue-paying property against Shah Muhammad Khan and others. This decree was a decree of an interlocutory nature not capable of execution until the actual shares of the parties to it had been properly demarcated by means of the procedure prescribed by s. 396 of the Code of Civil Procedure. An application, [312] described by the Court which passed the decree (Subordinate Judge of Meerut) as an application for execution, was made by the respondent on the 13th of February, 1897, in pursuance of which an Amin was sent to prepare lots for partition. The Amin on the 3rd and 4th of March, 1897, made a survey of the property and prepared lots, and on the 18th of March returned a report to the Court, on the basis of which report notice was issued to the defendants fixing the 17th of April, 1897, for the allotment amongst the parties of the lots prepared by the Amin. On that date some of the defendants applied under s. 108 of the Code of Civil Procedure, to have the decree of the 30th of September, 1896, set aside, as having been passed *ex parte* without due notice having been served upon him. This application was dismissed by the Subordinate Judge as barred by limitation, he being of opinion that the sending of the Amin to demarcate the lots was the "executing of a process for enforcing the judgment" within the meaning of art. 164 of the second schedule to the Indian Limitation Act, 1877. Against this order of dismissal, the applicants appealed to the High Court.

Munshi *Kam Prasad*, for the appellants.

Pandit *Moti Lal*, for the respondent.

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* See in this connection 17 A. W. N. (1897) 227.—ED.

† First Appeal, No. 58 of 1897, from an order of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 1st May 1897.

(1) 22 C. 425.

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20 A. 311 = 18 A.W.N. (1898) 45.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—This appeal has arisen in a suit for the partition of immoveable property not paying revenue to Government. The Court in which the suit was made a decree for partition, which we must construe as an interlocutory decree, but a decree nevertheless within the meaning of s. 2 of the Code of Civil Procedure, defining the interests of the parties to the suit; that is, it was in effect an interlocutory decree declaring the interests of the parties. Now, in suits for partition of immoveable property not paying revenue to Government, the Court, no doubt, if it has the information before it necessary to enable it to make a decree not only declaring the rights of the parties but actually fixing the particular areas, or rooms, or parts of the houses, as the case may be, of which possession is to be given to the parties respectively on partition, may make such a decree [313] without employing the procedure of s. 396 of the Code of Civil Procedure, and the decree so made would be enforceable in execution, and possession of the respective areas, rooms, &c., could be given to the parties in execution of the decree. But where, as most generally happens, a Court has not the information necessary to the making of such a decree, it must make a preliminary or interlocutory decree of a declaratory nature, and then adopt the procedure of s. 396 of the Code of Civil Procedure by appointing a commissioner or commissioners, whose duty will be, not to give possession, for at that period there would be no decree capable of execution by possession, but who should allot such shares to the parties, award the sums to be paid in case sums are to be paid, and then prepare and sign a report appointing the shares and distinguishing such shares by metes and bounds, if ordered so to do. The commissioner or commissioners must then submit that report to the Court, and the Court, after giving the parties an opportunity of objecting to the report, may quash the report and proceedings of the commissioner or commissioners and issue a new commission, or pass a decree in accordance with the report. The decree in accordance with such report would be a decree allotting the specific shares, areas, rooms, &c., distinguishing them where possible by metes and bounds or other adequate description, and decreeing to the respective parties possession of those portions of the property allotted to them. In the latter case which we have been putting that would be the final decree. It is true that the interlocutory decree—following the principle laid down by their Lordships of the Privy Council—would be appealable, but for all that it is not the final decree or the decree which is capable of execution, except possibly for such costs as it might award to be paid. It is merely of the character of an interlocutory and declaratory decree. In such a case as the present, which falls under the second category, the appointment of a commissioner, whether he be the amin of the Court or some one else, is not the issuing of a process in execution of a decree, nor are any proceedings of such commissioner [314] the carrying out of any process in execution. The time has not yet arrived for execution of the decree. It was in our opinion correctly decided by the High Court at Calcutta in *Dwarka Nath Misser* v. *Barinda Nath Misser* (1) that proceedings under s. 396 of the Code of Civil Procedure for the purpose of effecting partition are proceedings in the suit itself and not proceedings in execution of a decree.

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(1) 22 C. 425.

1898
FEB. 12.
APPELLATE CIVIL.
20 A. 311 = 18 A.W.N. (1898) 45.

In the present case a decree, which we must regard as simply declaratory and interlocutory, was made in the absence of the defendants, who are appellants here. All these appellants with one exception were minors. They applied for an order to set aside the decree under s. 108 of the Code of Civil Procedure. The Court considering that the appointment of an amin under s. 396, under which section only at the stage of the case he could have been appointed to act, was the issuing of a process for enforcing the judgment, and that the action of the amin in proceeding to the place and making the allotment was the executing of a process for enforcing the judgment, applied art. 164 of the second schedule of the Indian Limitation Act, 1877, and dismissed the application. There has been in this case no execution of a process for enforcing the judgment. The application was within time. We set aside the order of the Court below with costs and remand the case under s. 562 of the Code of Civil Procedure to that Court to be disposed of on the merits.

Appeal decreed and cause remanded.

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20 A. 315 (F.B.) = 18 A.W.N. (1898) 61.

[315] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BATUL BEGAM (*Plaintiff*) *v.* MANSUR ALI KHAN AND OTHERS (*Defendants*).* [16th February, 1898.]

Pre-emption—Suit for pre-emption based on a mortgage by conditional sale—Limitation—Act No. XV of 1877 *(Indian Limitation Act), sch. ii, arts.* 10 *and* 120—"*Physical possession.*"

Held (1) that, the other conditions being present necessary to make art. 10 of the second schedule to Act No. XV of 1877 applicable, art. 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone.

(2) That in such a case as above limitation begins to run, where Regulation No. XVII of 1806 applies, from the expiry of the year of grace.

(3) That a share in an undivided zamindari mahal is not susceptible of "physical possession" in the sense of art. 10 of the second schedule to Act No. XV of 1877.

(4) That constructive possession, *e.g.*, by receipt of rent from tenants, is not "physical possession" within the meaning of said article.

Ali Abbas v. *Kalka Prasad* (1); *Nath Prasad* v. *Ram Paltan Ram* (2); *Goordhun* v. *Heera Singh* (3); *Ganeshee Lall* v. *Toola Ram* (4); *Jageshar Singh* v *Jawahir Singh* (5) and *Unkar Das* v. *Narain* (6), referred to.

[Affr., 24 A. 17 (P.C.) = 23 I.A. 248; F., P.L.R. (1900) p. 45 (48); R., 20 A. 375 (376) = 18 A.W.N. 1898 78; 5 A.L.J. 98 (N); 1 C.L.J. 73; 1 N.L.R. 6 (7, 8) 3 O.C. 184 (188, 189), 7 O.C. 8 (9), 120 P.L.R. (1901) = 103 P.R. (1901); 140 P.L.R. (1904) = 14 P.R. (1904); 63 P.L.R. 1908 = 49 P.R. (1908) = 1 P.W.R. 1908; 16 P.R. 1902.]

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* First Appeal, No. 14 of 1895, from a decree of Kuar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 28th November 1894.

(1) 14 A. 405. (2) 4 A. 218. (3) S.D.A.N.W.P. (1866) 181.
(4) N.W.P.H.C.R. (1868) 376. (5) 1 A. 311. (6) 4 A. 24.

1898
FEB. 16.
FULL BENCH.
20 A. 315 (F.B.) = 18 A.W.N. (1898) 61.

THE facts of this case are as follows:—

One Zabur Ali mortgaged by conditional sale certain shares in each of four villages. Two of these villages were of pure zamindari tenure, the others were imperfect pattidari. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by s. 8 of that Regulation expired in 1882. Before the expiry of the year of grace the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage-debt. They subsequently brought a suit for redemption, which was dismissed [316] by the Privy Council on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by the High Court on the 6th of July 1893. Formal possession was given on the 27th of November 1893. Whether or not actual possession was given under the decree of the 6th of July 1893 was a matter disputed by the parties. The mortgage by conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. The plaintiff brought her suit for pre-emption on the 4th of July 1894. The Court of first instance (Subordinate Judge of Gorakhpur) dismissed the suit as barred by limitation, having regard to the provisions of art. 120 of the second schedule to the Indian Limitation Act, 1877, and the case of *Ali Abbas* v. *Kalka Prasad* (1). The plaintiff appealed to the High Court.

On the appeal coming on for hearing before a Division Bench of two Judges, an issue was remitted to the lower Court under s. 566 of the Code of Civil Procedure as to whether the property in suit admitted of physical possession. The lower Court returned a finding that the property did not admit of physical possession. After the receipt of this finding, to which the appellant took objections under s. 567 of the Code of Civil Procedure, the appeal was laid before a Full Bench.

Pandit *Sundar Lal* (with whom Mr. *Ghulam Mujtaba*) for the appellant contended that the suit was not barred by limitation. Article 10 of schedule II of Act No. XV of 1877 applies to all cases of sales of property. It applies equally to a sale which, though in its inception it was only a mortgage by way of conditional sale, has now matured into an absolute sale by foreclosure. On the facts found by the Court below on the issue remitted by the High Court under s. 566 of the Code of Civil Procedure the whole of the property sold is susceptible of physical possession being taken. Each co-sharer collected his share of rent [317] directly from the tenants, and being thus in possession of his share in the zamindari, he was also in possession of the joint lands unoccupied by tenants which appertained to the zamindari. The word "physical" implies some corporal or perceptible act done which of itself conveys, or ought to convey, to the mind of a person notice that his right has been prejudiced. (*Shiam Sundar* v. *Amanant Begam*) (2). The collection of his share of the rents from the tenants was such act, and it indicated that the vendee had taken physical possession. The suit being instituted within a year from the date the physical possession was so taken is within time.

Mr. *T. Conlan* and Munshi *Jwala Prasad*, for the respondents, do not appear to have been called on.

The judgment of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J.:—

(1) 14 A. 405.

(2) 9 A. 234 (239).

1898

FEB. 16.

FULL BENCH.

20 A. 315 (F.B.) = 18 A.W.N. (1898) 61.

JUDGMENT.

This was a suit for pre-emption. The Court of first instance dismissed the suit on the ground that it was barred by art. 120 of the second schedule of the Indian Limitation Act, 1877. The facts of the case are shortly these :—In 1868 Zahur Ali Khan mortgaged by conditional sale certain shares in each of four villages. Two of those villages were of pure zamindari tenure, the others were imperfect pattidari. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by s. 8 of that regulation expired in 1882. Before the expiry of the year of grace the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage debt. They subsequently brought a suit for redemption, which was dismissed by the Privy Council on the 13th of July 1886, on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by this Court, on the 6th of July 1893. It is alleged on the one side and denied on the other that the heirs of [318] the mortgagee obtained possession in execution of the decree of the 6th of July 1893, on the 27th of November 1893. Formal possession at any rate was given on that date. The mortgage by way of conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. This suit for pre-emption was brought on the 4th of July 1894. It is contended on behalf of the plaintiff, appellant here, that art. 10 of the second schedule to Act No. XV of 1877 applies—that contention being based on the argument that the property sold, in respect of which pre-emption was claimed, does and did admit of physical possession being obtained of it. The Court below, misunderstanding the question actually decided by the Full Bench in *Ali Abbas* v. *Kalka Prasad* (1), applied art. 120 to the suit, and, as the year of grace had expired more than six years before suit, dismissed the suit on the ground of limitation. We should point out here how the Full Bench ruling has been misunderstood by the Court in question. The Full Bench in that case had not to decide what article of the Limitation Act applied. In effect what the Full Bench had to decide was—when does a pre-emptor's right to sue accrue when he claims pre-emption in respect of a mortgage by conditional sale which has become absolute? That question, although the Bench referring the case had to decide the question of limitation, was one, so far as the Full Bench was concerned, apart from the question of limitation.

The real question before us turns on what is the meaning of "physical possession." The first question is—can art. 10 apply to a sale which was in its inception a mortgage by conditional sale, but which in the result has become an absolute sale? In *Nath Prasad* v. *Ram Paltan Ram* (2), the Full Bench decided that the limitation applicable to a suit to enforce a right of pre-emption in respect of a conditional sale of a share in an undivided mahal was that prescribed by art. 120 of the second schedule to Act No. XV of 1877. So far as we can ascertain from the record, the Full Bench in deciding that question decided more [319] than was necessary for the disposal of the case before them. The learned Judges said :—"We think that the sale referred to in art. 10 must be an absolute one having immediate effect and operation, in those cases

(1) 14 A. 405.

(2) 4 A. 213.

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20 A. 315 (F.B.) = 18 A.W.N. (1898) 61.

where the interest passed is capable of physical possession, by physical possession, and where it is not by the creation of a title under an instrument duly registered."

We cannot see how a sale is any the less an absolute one because it is not to take immediate effect and operation. There is certainly nothing in art. 10 to suggest that the sale mentioned in that article is limited to a sale which is to have immediate effect and operation. In our opinion, the other conditions being present necessary to make art. 10 applicable, art. 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone. In such a case, the other conditions existing, art. 10 would apply as soon as the mortgagee had acquired the complete interest of the mortgagor. No doubt in the case before the Full Bench to which we have been referring, art. 120 was the only article which could have been applied at the particular stage of the transaction at which it came before the Court. We dissent from the proposition of law expressed *obiter* in that case.

In the present case if the whole of the property sold was capable of physical possession being taken by the mortgagee vendee, we should hold that art. 10 of the second schedule of Act No. XV of 1877 applied. The question really turns, as we have said, on what is the meaning of "physical possession" as that term is used in art. 10 of the second schedule to Act No. XV of 1877. It must mean something different from "actual possession," and it must mean something different from ordinary possession. In cl. (1) of s. 1 of Act No. XIV of 1859, which was the clause prescribing the limitation in suits for pre-emption, the term **[320]** used was "possession," and limitation ran from the time of possession being obtained by the vendee. In *Goordhun* v. *Heera Singh* (1) a Full Bench of the Sadr Diwani held that the "possession" of Act No. XIV of 1859 must be an actual and not a constructive possession. In 1868 the question came again before a Full Bench, then of this Court, and in *Ganeshee Lal* v. *Toola Ram* (2) the Full Bench decided that the possession of Act No. XIV of 1859 included constructive as well as actual possession. It is probable that that decision led to the alteration of the wording of the article relating to limitation in pre-emption suits in the next succeeding Limitation Act. In art. 10 of the second schedule to Act No. IX of 1871 it was prescribed that limitation should run from the date when actual possession was taken under the sale. Then came a Full Bench of this Court in 1876, *Jageshar Singh* v. *Jawahir Singh* (3), in which a majority of the Full Bench held that the "actual possession" of Act No. IX of 1871 was the same thing as the possession of Act No. XIV of 1859, and included constructive possession. The then Chief Justice of this Court, Sir Robert Stuart, in our opinion, was right in differing from the rest of the Full Bench. He held that the purchaser does not take actual possession of the property sold to him until he takes physical and tangible possession. The next matter to which we have to refer is that when Act No. XV of 1877 was passed, the Legislature, still determined, in our opinion, to exclude constructive possession from the possession from which limitation should run under art. 10, used the term "physical possession," and they added

(1) S. D. A. N. W. P. (1866) 181. (2) N. W. P. H. C. R. (1868) 376.
(3) 1 A. 311.

1898
FEB. 16.
FULL BENCH.
20 A. 315 (F.B.) = 18 A.W.N. (1898) 61.

a different terminus of limitation in respect of property which did not admit of physical possession. As we have said, two of the villages here were of pure zamindari tenure, that is, they were villages in which the zamindars got no shares allotted to them by metes and bounds, but held fractional shares, in respect of which fractional shares they received a proportionate amount of the profits of the village. [321] It is said that the mortgagor used to receive direct from the tenants of the zamindari body his proportion of the rents payable by them. That in our opinion does not alter the case. In *Unkar Das* v. *Narain* (1) it was held that a share in an undivided zamindari mahal was not susceptible of physical possession in the sense of art. 10 of the second schedule to Act No. XV of 1877. We adhere to that decision. The Legislature meant some limitation of the term "possession" by the use of the term "physical." In our opinion, for instance, the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised premises. In such a case the owner has parted with the physical possession to his tenant for the period of his tenancy, and the tenant alone is the person who has physical possession. It appears to us that it would be straining the English language and going contrary to the obvious intention of the Legislature to hold otherwise. In this particular case art. 10 cannot apply, because the whole of the property sold is not capable of physical possession within the meaning of that article, and no instrument of sale has been registered. The result is that, art. 10 not applying, art. 120 must apply in this case. As art. 120 applies, we have got to see when the right to sue accured to the pre-emptor. That point is concluded by the Full Bench ruling of this Court in *Ali Abbas* v. *Kalka Prasad* (2) which in our opinion was rightly decided, but which must always be regarded as deciding merely the point referred to the Full Bench and not the question of limitation. This suit was barred by limitation when brought, and we dismiss this appeal with costs. The costs of translating and printing must be borne by the appellant.

Appeal dismissed.

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20 A. 322 (F.B.) = 18 A.W.N. (1898) 58.

[322] FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

SUNDAR SINGH AND OTHERS (*Plaintiffs*) *v.* BHOLU AND OTHERS (*Defendants*).* [17th February, 1898.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *s.* 85—*Civil Procedure Code, s.* 43—*Cause of action—Mortgage—Holder of two mortgages on the same property suing separately on each.*

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.

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* Second Appeal, No. 1030 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 18th June 1894, confirming a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 10th July 1893.

(1) 4 A. 24.

(2) 14 A. 405.

[Diss., 30 M. 353=17 M.L.J. 301=2 M.L.T. 330; F., 3 Ind. Cas. 175 (176); R., 25 M. 108 (115)=11 M.L.J. 373; 3 A.L.J. 238=A.W.N. (1906) 112; 7 O.C. 152 (154); 22 M.L.J. 231 (237)=11 M.L.T. 63 (69)=1912 M.W.N. 59 (63)=13 Ind. Cas. 458 (461); D., 26 A. 14 (18); 37 C. 589 (596)=11 C.L.J. 551=6 Ind. Cas. 159.]

1898
FEB. 17.

FULL BENCH.

20 A. 322 (F.B.)= 18 A.W.N. (1898) 58.

THE plaintiffs in this case held a mortgage of certain property from one Bholu, dated the 21st of October 1878. In January 1883 they acquired the mortgagee interest in a mortgage given by Bholu over the same property in August 1882. In December 1890 the plaintiffs obtained a decree for sale on the mortgage of October 1878. In the suit in which that decree was obtained the plaintiffs made no mention of their claim under the mortgage of August 1882. In May 1893 the plaintiffs, not yet having executed their decree obtained on the former mortgage in December 1890, brought the present suit asking for a decree for sale in virtue of their second mortgage of August 1882.

The Court of first instance (Subordinate Judge of Aligarh) dismissed the suit as being barred by the provisions of s. 43 of the Code of Civil Procedure. The plaintiffs appealed. The lower appellate Court (District Judge of Aligarh) dismissed the appeal, holding that the suit was barred by the operation of s. 43 of the Code of Civil Procedure read with s. 85 of the Transfer of Property Act, 1882. From this decree the plaintiffs appealed to the High Court.

Mr. *W. K. Porter*, for the appellants.—Neither of the sections upon which the judgment and decree of the lower appellate Court were based applied to the facts of the case. Section 43 of the Code of Civil Procedure did not apply, because the plaintiffs' [323] two mortgages gave rise to two separate causes of action. Section 85 of the Transfer of Property Act could not apply, because all the necessary parties were in fact on the record. So long as the plaintiffs had not executed their first decree by sale of the mortgage property there was nothing in law to prevent their getting a decree on their second mortgage and executing both decrees together.

Pandit *Sundar Lal*, for the respondents.—Section 67 of Act No. IV of 1882 contemplates a sale of the "property" as distinguished from merely the bare rights and interests of a mortgagor, and s. 85 insists upon the joinder in a suit for sale of all persons having a claim based on a mortgage of the property sought to be sold with the object of either redeeming or foreclosing them, so that the property may be sold from the mortgage in favour of the person so joined—*Mata Din Kasodhan* v. *Kazim Husain* (1). If the mortgage in suit had been assigned to a third person the plaintiffs would have been bound to implead him in their suit on the bond of the 21st of October 1878 and the sale in execution of the decree on the mortgage of the 21st of October 1878, would have been free of the incumbrance of the mortgage in suit. The plaintiffs being the mortgagees under both the mortgages, in obtaining their decree on the mortgage of the 21st of October 1878, must be taken to have abandoned their claim on their second mortgage.

JUDGMENT.

The judgment of the Court (EDGE, C.J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by

EDGE, C.J.—This appeal has been referred to the Full Bench. The plaintiffs were mortgagees under a mortgage of the 21st of October 1878.

(1) 13 A. 432.

1898
FEB. 17.

FULL BENCH.

20 A. 322 (F.B.) = 18 A.W.N. (1898 58.

On that mortgage they obtained, on the 2nd of December 1896, a decree for sale under s. 88 of the Transfer of Property Act. Before they brought the suit in which they obtained that decree the plaintiffs had become assignees of a mortgage of the 1st of August 1882, which was made to a third party by the same mortgagor and which mortgaged the same property as that [324] which was mortgaged by the mortgage of the 21st of October 1878. The mortgage of 1882 was a mortgage by which it was agreed that the amount of the mortgage debt should be payable on demand. The present suit, which was brought on the 10th of May 1893, was brought for the enforcement of the mortgage of 1882, and in this suit the plaintiffs seek a decree for sale under s. 88 of Act No. IV of 1882. The first Court dismissed the suit, applying s. 43 of Act No. XIV of 1882 and s. 85 of Act No. IV of 1882. The application of s. 43 had reference to the previous suit. What application s. 85 of Act No. IV of 1882 could have had to this case it is impossible to say: all the necessary parties were before the Court. The plaintiffs appealed and the Court of first appeal dismissed their appeal on the same grounds. From that decree dismissing their appeal this appeal has been brought.

Each suit was a suit for the enforcement of the security which was given for the debt. Consequently each suit was a suit in respect of which the cause of action was different from the cause of action in the other. Section 43 of the Code of Civil Procedure could have no application to such a case as this. This is conceded by the learned advocate for the respondents. So far as we are aware there is nothing in the Code of Civil Procedure or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. Here the plaintiffs were entitled to obtain their decree for sale on the mortgage of 1878. It appears to us that their having obtained that decree can be no bar to their right to obtain a decree for sale on the mortgage of 1882. What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and, if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear, that the plaintiffs cannot sell the property twice [325] over, and they cannot sell under the second decree subject to the first. That would be selling the equity or redemption, a right which is not acknowledged or recognized by Act No. IV of 1882, and would be a mischief which has been struck at by s. 99 of that Act. This Court in *Mata Din Kasodhan* v. *Kazim Husain* (1), which has been followed in many other cases, has recognized that the intention of the Legislature was to put an end to the abuses which existed before Act No. IV of 1882 came into force, and that there can be no sale of the equity of redemption apart from the property itself at the instance of the mortgagee.

We allow this appeal with costs, and we set aside the decrees of the lower appellate Court and of the Court of first instance with costs and remand this case under s. 562 of the Code of Civil Procedure to the Court of first instance to be disposed of on the merits.

Appeal decreed and cause remanded.

(1) 13 A. 432.

20 A. 325=18 A.W.N. (1898) 59.

1898
MARCH 1.

APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

20 A. 325=18 A.W.N. (1898) 59.

BHAGIRATHI MISR (*Plaintiff*) *v.* SHEOBHIK AND OTHERS (*Defendants*).* [1st March, 1898].

Hindu law—Joint Hindu family—Rights of son in joint ancestral property—Mortgage.

A member of a joint Hindu family has no power in his father's life-time to make a mortgage of any part of the ancestral family property. *Balgobind Das* v. *Narain Lal* (1) and *Madho Parshad* v. *Mehrban Singh* (2) referred to.

[R., 6 A.L.J. 11=A.W.N. (1908) 163=5 M.L.T. 56=1 Ind. Cas. 83; D., 33 A. 783 (789)=8 A.L.J. 901=11 Ind. Cas. 220 (221).]

THE facts of this case are as follows :—

The land in question in the suit was the ancestral property of one Mattu and his son Daulat. Mattu sold the greater portion of the property to the plaintiffs by deed dated the 15th of January [326] 1889. The remainder of the property was hypothecated by Mattu to the plaintiffs by a registered bond, under which the property mortgaged was brought to sale and bought in by the plaintiffs on the 20th of June 1894. On the 1st of September 1891, during the life-time of Mattu, his son Daulat gave a bond to Sheobhik and Balkaran mortgaging a certain share in the property in question. Subsequently, after the death of Mattu, the plaintiffs sued for a declaration of their right to the entire property and that the mortgage given by Daulat to Sheobhik and Balkaran was of no effect so far as he was concerned. The Court of first instance (Munsif of Jaunpur) decreed the plaintiff's claim, holding that Daulat in the life-time of his father had no authority to mortgage any portion of the property so as to defeat the alienations made by his father Mattu. The defendants Sheobhik and Balkaran appealed. The lower appellate Court (Subordinate Judge of Jaunpur) decreed the appeal, holding that Daulat had a right to mortgage his share of the ancestral property. From this decree the plaintiffs appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—This is the suit of a plaintiff mortgagee for a declaration of right under his mortgage and also under a deed of sale of a certain land which were made by one Mattu. The defence was that the son of the mortgagor had during his life-time, upon the 1st of September 1891, given a mortgage to the defendants of a portion of the property. The Court of first instance decreed the claim of the plaintiff. The Court of first appeal held that the defendant's mortgage was a good and subsisting mortgage. That finding is the part of the judgment impeached in this appeal. The case of the appellant is simple. He says that Daulat as a member of a joint Hindu family, which he is found to have been, had no power, during the life-time of his father, to make a mortgage of any part of the ancestral family property.

* Second Appeal No. 1185 of 1895, from a decree of Babu Mohan Lal, Subordinate Judge of Jaunpur, dated the 19th September 1895, modifying a decree of Maulvi Shah Amjad-ullah, Munsif of Jaunpur, dated the 13th June 1895.

(1) 15 A. 339. (2) 18 C. 157.

1898
MARCH 1.
APPEL-LATE CIVIL.
20 A. 325 = 18 A.W.N. (1898) 59.

The plaintiff's contention is supported by two cases decided by the Privy Council. One is reported in [327] I. L. R., 15 All. 339; the other in I. L. R., 18 Calc. 157. It seems to us that those cases go to the full length of the appellant's contention. It is suggested for the defendants respondents that the deed executed by Daulat was voidable only and not void, and that his mortgagees ought to have been impleaded in the previous suit brought by the appellant upon his mortgage. No authority was cited in support of that proposition, which is at all upon all fours with the facts of this case. The authority upon which Mr. *Gobind Prasad* relied is in I. L. R. 19 Calc., 123. That was a special case, and the facts do not, in our opinion, appear to be upon all fours with the facts of this case. The appeal will be allowed with costs. The effect will be to restore the decree of the Court of first instance setting aside that of the lower appellate Court.

Appeal decreed.

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APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

PHUL CHAND (*Defendant*) *v.* CHHOTE LAL AND OTHERS (*Plaintiffs*)*

[1st March 1898.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 135—*Actionable claim—Person claiming the benefit of s.* 135 *not obliged to pay the amount paid by the assignee before judgment.*

Held that a person who is entitled to claim the benefit of s. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani* v. *Ajudhia Prasad* (1); *Muchiram Barik* v *Ishan Chunder Chuckerbutti* (2): *Jani Begam* v. *Jahangir Khan* (3) *Haikim-un-nissa* v. *Deonarain* (4) and *Nilakanta* v. *Krishnasami* (5).

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Munshi *Ram Prasad*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

[328] BANERJI, J., (KNOX, J., concurring).—This was a suit for sale under a mortgage, dated the 3rd of September 1873, executed by one Mohan Singh for Rs. 4,200 in favour of Mansukh Das and his son Dungar Mal. After the death of the aforesaid mortgagees, the widow of Dungar Mal, three of the sons of Mansukh Das and the widow of another son assigned, on the 8th of November 1891, their rights under the mortgage to the first four plaintiffs for a consideration of Rs. 10,000. Out of that amount, Rs. 600 was paid in the presence of the registering officer and Rs. 1,858-9-3 was kept back for the purpose of discharging a decree held

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* First Appeal No. 40 of 1896. from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 20th September 1895.

(1) 16 A. 315. (2) 21 C. 568. (3) 9 A. 476.
(4) 13 A. 102. (5) 13 M. 225.

against the widow of Dungar Mal and Baldeo Das, one of the sons of Mansukh Das, by Rao Balwant Singh. That decree was, however, not satisfied, and it was purchased from Balwant Singh by Kishan Lal, the fifth plaintiff. He put the decree into execution, and having caused the two-fifths share of Baldeo Das and Dungar Mal's widow in the aforesaid mortgage to be sold by auction, purchased it himself. The five plaintiffs having thus acquired the rights of the mortgagees have instituted this suit, claiming Rs. 10,500 as due under the mortgage. The mortgaged property was sold in execution of a decree obtained upon a subsequent mortgage, and was purchased by Than Singh and Nathu Ram, who are now represented by the appellant Phul Chand. The defendants to the suit were the legal representatives of the mortgagor and subsequent transferees of the mortgaged property. The defence raised on behalf of the defendants, whom Phul Chand appellant represents, was that the mortgage had been discharged and the mortgage bond returned to the mortgagors; that the plaintiffs had not paid consideration for their purchase; that the purchase had been made to carry on litigation and that the plaintiffs were not entitled to recover any portion of the amount claimed. The defendants produced the mortgage bond bearing endorsements of payment, which, if genuine, showed that the mortgage had been discharged in full in 1889. The Court below has held the plea of payment not to be established. It found that the bond had somehow come into the **[329]** possession of the mortgagors, that the indorsements on it were not genuine and that the mortgagors and their heirs had not the means to make the alleged payments. It also held that the assignment of the mortgage bond to the first four plaintiffs was the transfer of an actionable claim to which s. 135 of the Transfer of Property Act applied; that the purchase of the bond was in reality made by Kishan Lal in the names of the other plaintiffs; that only Rs. 600 were paid as consideration for that purchase, and that in virtue of that purchase the plaintiffs could not recover more than that amount and incidental expenses. As regards the share of the mortgage debt purchased by Kishan Lal at auction, the Court below was of opinion that by reason of cl. (*d*) of s. 2 of Act No. IV of 1882, the first portion of s. 135 of that Act did not apply. That Court accordingly made a decree for two-fifths of the mortgage money, with interest, and for Rs. 600 with incidental expenses and interest.

Both parties have appealed from this decree. In this appeal, which has been preferred by the defendant Phul Chand, two contentions have been raised on behalf of the appellant; first, that it has been proved that the mortgage has been discharged by payments, and, second, that since it has been found that Kishan Lal, plaintiff was the real purchaser of the mortgage under the assignment of the 8th of November 1891, he took the place of the judgment-debtors to the decree of Balwant Singh, and the purchase of that decree by him had the effect of discharging that decree. Consequently by virtue of the auction purchase of the rights of Dungar Mal and Baldeo Das, he acquired no interest in the mortgage in question and is only entitled to recover the price paid by him for the assignment of the 8th of November 1891, with incidental expenses and interest. On behalf of the plaintiff it is urged that there is nothing to show that Kishan Lal is the real purchaser under the sale of the 8th of November 1891; that payment of the full amount of consideration for that sale has been proved and that s. 135 of Act No. IV of 1882 does not apply to a case like this.

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[330] As regards the discharge of the mortgage by re-payment of the mortgage money we agree with the conclusion at which the learned Subordinate Judge has arrived. The mortgage deed is no doubt in the possession of the heirs of the mortgagor, Mohan Singh, by whom it has been produced. It also bears indorsements of payments. These circumstances certainly raise a presumption in favour of the defendants; but the evidence and the probabilities to which the Subordinate Judge has referred in detail completely negative that presumption. According to the indorsements on the mortgage deed, payments were made on account of it between the 9th of June 1883 and the 2nd of June 1889, and the number of payments was five. It is rather surprising that for ten years from the date of the mortgage not a farthing was paid to the mortgagees, but in the course of the next six years such a large sum as Rs. 7,025 was paid by the mortgagors, and the bond was taken back. The evidence on the record clearly shows that the mortgagor had not the means to make such large payments, that they were in very involved circumstances, that they were not even in a position to pay the Govenment revenue, that their moveable property had to be sold for the realisation of the revenue and that their zamindari share had to be let out in farm for the recovery of arrears of revenue. It is in the highest degree improbable that persons in such impecunious circumstances made the alleged payments. It appears from the evidence of Lala Lokman Das, a respectable pleader of the District Court of Aligarh, that shortly before February 1883, Dungar Mal, one of the mortgagees, showed the bond to him with a view to raise money for the purpose of bringing a suit on the basis of the bond, and, as far as Lala Lokman Das could recollect, it bore no indorsements of payment. If the indorsements which now appear on the bond are genuine, all of them, except the last, must have been on it at the time when it was shown to Lala Lokman Das, and his attention would undoubtedly have been attracted by them. Further, the only amount which would have remained due on the mortgage at that time would have been a sum below [331] Rs. 800, upon payment of which about eighteen months afterwards the mortgage is alleged to have been discharged. It seems to us to be extremely improbable that for the purpose of meeting the expenses of instituting a suit to recover that small sum, Dungar Mal would have been endeavouring to raise money by negotiating with Lala Lokman Das. There is another piece of evidence which to our minds clearly shows that no payments were made to the mortgagees on account of the bond in question. On the 16th of December 1889, Dungar Mal applied for the execution of a decree held by him against Chitra Singh and others, heirs of the mortgagor Mohan Singh, and he prayed for the sale of the 10 biswas share comprised in the mortgage now in suit subject to that mortgage. With his application he filed an affidavit in which he stated that he held a mortgage over that property for Rs.4,200, that is, the mortgage upon which the present claim has been brought. Had the mortgage been discharged in the preceding month of June, Dungar Mal's statement that there was a subsisting mortgage on the property for Rs. 4,200 would not have been allowed by the debtors to go unchallenged. It appears that they did raise objections in regard to Dungar Mal's application for execution, but they never traversed his statement that their property was subject to the mortgage for Rs. 4,200.

These facts, and the other facts stated in the judgment of the lower Court, clearly show that the mortgage was never discharged and that payments were never made on account of it. We agree with the learned

Subordinate Judge in considering the oral evidence adduced on the point to be wholly unworthy of credit. The Subordinate Judge has also, in our opinion, conclusively shown that the purchase of the mortgage bond in suit in the names of the first four plaintiffs on the 8th of November 1891, was in reality a purchase by Kishan Lal, and that the amount paid as consideration for that purchase before or at the time of the sale was Rs. 600, the sum which was paid in the presence of the registering officer. We have carefully considered the evidence **[332]** on the point to which our attention has been directed, and we think it unnecessary to refer to it in detail further than to say that we fully concur with the Court below in its estimate of that evidence and with the conclusions at which that Court has arrived. The impecunious circumstances of the first four plaintiffs, the non-production of account-books, the fabrication of accounts, the non-production of the documents by which were secured the debts alleged to have been discharged with the consideration money, and the fact that the decretal amount due to Balwant Singh was not paid by these plaintiffs clearly show that the full amount of consideration for the sale deed of the 8th of November 1891 was not paid and that the first four plaintiffs did not make that purchase on their own account. Had they been the real purchasers, why did they leave the decree of Balwant Singh unsatisfied? Why did they allow Kishan Lal to purchase that decree and why did they allow the shares of the judgment-debtors to that decree to be sold for the small sum of Rs. 200 and purchased by Kishan Lal himself? The fact is, as the learned Subordinate Judge has pointed out, that under the deed of the 8th of November 1891, Kishan Lal himself purchased the rights of the mortgagees, that, being apprehensive that the subsequent purchasers of the mortgaged property would claim the benefit of the provisions of s. 135 of the Transfer of Property Act, he took an assignment of the decree held by Rao Balwant Singh, and, putting that decree into execution, purchased at auction the shares of Dungar Mal and Baldeo Das in the mortgage in order to avoid the operation of that section. We hold, in concurrence with the Court below, that Kishan Lal plaintiff was the real purchaser of the interests of the mortgagees by virtue of the sale deed of the 8th of November 1891; that the other plaintiffs were only *benami* for him and that they were not beneficially interested in the purchase That being so, the contention of the learned counsel for the appellant that the claim of the first four plaintiffs ought to have been dismissed must prevail.

[333] It is next urged on behalf of the appellant that as Kishan Lal was the real purchaser under the sale deed of the 8th of November 1891, and thus acquired the rights of Dungar Mal and Baldeo Das in the mortgage of 1873, which Rao Balwant Singh had caused to be attached in execution of the decree held by him against Baldeo Das and the widow of Dungar Mal, he took the place of the judgment-debtors to that decree, and, as he subsequently purchased the decree from Rao Balwant Singh, the decree became extinct and incapable of execution, and consequently he acquired nothing under the auction purchase which subsequently took place at his instance in execution of that decree. The correctness of the proposition raised by this contention seems to us to be open to doubt. We are, however, of opinion, upon another ground, that no title passed to Kishan Lal under the auction sale referred to above. We have held that he was the actual purchaser of the property conveyed by the sale deed of the 8th of November 1891, so that he acquired the interests of Baldeo Das and Dungar Mal in the mortgage in question by virtue of

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that purchase. As the assignee of the decree held by Rao Balwant Singh, against those persons he could not put up to sale and purchase the interest which those persons originally had in the mortgage and which he himself had purchased before the date of the assignment of the decree. Those interests had on the date of the auction sale ceased to be the property of the judgment-debtors to the decree and had become his own property. He could not, as the holder of Rao Balwant Singh's decree, cause his own property to be sold in execution of that decree, and, as that property had, as we have said, ceased to be the property of the judgment-debtors to the decree, the auction-sale of the interests of the judgment-debtors in that property, which were no longer in existence at the time of the sale, could not and did not confer any title to the property on the auction purchaser. The auction-sale was only a device resorted to by Kishan Lal for the purpose of evading the operation of s. 135 of Act No. IV of 1882 and in our opinion he did not acquire any title **[334]** by virtue of the auction purchase. His only title in respect of the mortgage in suit consequently rests on the sale deed of the 8th of November 1891. The consideration for that sale was not only the sum of Rs. 600 which was paid in cash at the time of the registration of the sale deed, but the amount paid to Rao Balwant Singh as the price of the decree purchased from him must also be deemed to be a part of the consideration. The agreement under the sale deed was that Rao Balwant Singh's decree should be discharged out of the consideration. Instead of paying him the amount due upon the decree Kishan Lal took from him an assignment of the decree and adopted this mode of satisfying his claim. The amount paid to him must therefore, we think, be regarded as a part of the consideration for the sale deed of the 8th of November 1891. That amount, it has been proved, was Rs. 1,800. The total sum which was paid as the price of this mortgage debt in suit was thus Rs. 2,400, and if s. 135 of Act No. IV of 1882 is applicable, that is the only amount which Kishan Lal is entitled to recover, besides interest on that amount and the incidental expenses of the sale. The learned vakil for the respondent, however, contends that s. 135 of Act No. IV of 1882 has no application in this case.

This contention leads us to the consideration of the only point which remains to be determined, namely whether the appellant is entitled to the benefit of the provisions of s. 135 of Act No. IV of 1882. It is admitted that on the 8th of November 1891, when the mortgage-debt now in suit was assigned by the mortgagees, the debt had become recoverable by suit, and had matured into an actionable claim. It is also conceded that the provisions of Chapter VIII of Act No. IV of 1882 apply to a debt secured by a mortgage. That is the effect of the ruling of the Full Bench of this Court in *Rani* v. *Ajudhia Prasad* (1). It is urged, however, that a debtor cannot claim the benefit of s. 135 of Act No. IV of 1882 unless he pays before judgment the amount paid by the assignee of the actionable claim, and **[335]** in support of that contention the Full Bench ruling of the Calcutta High Court in *Muchiram Barik* v. *Ishan Chunder Chuckerbutti* (2) has been cited. That ruling is no doubt an authority in favour of the respondents. But a contrary view has been held in this Court in *Jani Begam* v. *Jahangir Khan* (3), and *Hakim-un-nissa* v. *Deonarain* (4) and by a Full Bench of the Madras High Court in *Nilakanta* v. *Krishnasami* (5).

(1) 16 A. 315.
(2) 21 C. 568.
(3) 9 A. 476.
(4) 13 A. 102.
(5) 13 M. 225.

We agree with the learned Judges who decided the cases last mentioned. The object with which s. 135 was enacted was evidently to discourage trafficking in litigation by precluding the purchaser of an actionable claim from recovering any thing beyond the actual price paid by him and the incidental expenses of the sale together with interest. That object would surely be defeated were we to hold that it was the intention of the Legislature that a debtor could not avail himself of the provisions of s. 135 if he put the assignee to proof of the price paid by him and waited till the amount of the price had been determined and declared by the Court. The section, it is true, provides that the debtor is discharged by payment to the assignee of the price and incidental expenses and interest on the price, but it does not limit the period within which the payment must be made in order to secure a discharge. There is nothing in the section, as far as we can judge, which would preclude the debtor from securing his discharge by payment after decree. Clause (*d*) of that section in our opinion contemplates the case of the sale of an actionable claim in respect of which at the time of the sale a judgment has been delivered affirming the claim or the claim has been made clear by evidence. The four clauses of s. 135 were evidently intended to provide for cases of sale of actionable claims which would not be affected by the provisions of the first paragraph of the section as in those cases the probability of gambling in litigation would be very remote. The "claim" referred to in cl. (*d*), we consider, is the claim which is sold and which at the date of the sale has been affirmed by a judgment or is about **[336]** to be so affirmed. Such a claim, if sold, would in the ordinary course of things fetch its proper value, and therefore, like the actionable claims referred to in the preceding clauses, it was excluded from the operation of the section. We fully agree with the observations contained in the judgment of Shephard, J. in the Full Bench case of *Nilakanta* v. *Krishnasami* cited above, and we are of opinion that it would be placing an unreasonable construction on s. 135 to hold, as we have said above, that a debtor would lose the benefit of the section if he called upon the assignee of the debt to prove the price paid by him. Such a construction would, we think, frustrate the very object with which the section was enacted. We may refer to the present case as an instance in point. The assignee alleged the price to be Rs. 10,000. The defendant denied that any price had been paid. We have held the true price to be Rs. 2,400. We do not think the Legislature intended that such a case would not come within the purview of s. 135, and that the defendant must pay the full amount due upon the mortgage, namely, upwards of Rs. 11,000, although the plaintiff actually paid for his purchase a much smaller sum. We hold that s. 135 precludes the assignee of an actionable claim from recovering from the debtor any sum in excess of the price paid by him, the interest thereon and the incidental expenses of the sale. That being so, the plaintiff Kishan Lal was only entitled to a decree for Rs. 2,400, the price paid by him, to interest on that amount at the rate payable under the mortgage from the 8th of November 1891, and to Rs. 39, the incidental expenses of the sale.

We accordingly vary the decree below by making a decree in favour of Kishan Lal plaintiff for Rs. 2,400, together with interest thereon at the rate of 9 per cent. per annum from the 8th of November 1891, to the 20th of August 1898, which we hereby fix as the date on or before which the decretal amount should be paid, and also for Rs. 39 the incidental expenses of the sale to him. We award to him proportionate costs here and in the Court below, and we direct that, in the event of the **[337]** amount

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decreed by us not being paid on or before the date above mentioned, the mortgaged property, or a sufficient part thereof, be sold. We dismiss the remainder of Kishan Lal's claim, and totally dismiss the claim of the other plaintiffs with costs. The appellant will recover from Kishan Lal his costs here and in the Court below proportionately to the amount of his success.

Decree modified.

20 A. 337 = 18 A.W.N. (1898) 59.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

LAKHO BIBI (*Defendant*) *v.* SALAMAT ALI (*Plaintiff*).*
[5th March, 1898.]

Civil Procedure Code, s. 206—*Application to bring decree into accordance with the judgment—Decree erroneous but in accordance with judgment—Decree not susceptible of alteration.*

Where a decree is in fact in accordance with the judgment on which it is based, such decree, however erroneous it may be, cannot be altered on an application under s. 206 of the Code of Civil Procedure to bring the decree into accordance with the judgment.

[**F.**, 31 B. 417 = 9 Bom. L.R. 547; **D.**, 4 Ind. Cas. 231 (232) = 5 N.L.R. 159.]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Datti Lal* and Babu *Baidiya Nath Das*, for the appellant.
Maulvi *Ghulam Mujtaba*, for the opposite party.

JUDGMENT.

EDGE, C. J. and BURKITT, J.:—This is an application in revision under s. 622 of the Code of Civil Procedure. It arises out of an order made by the Subordinate Judge of Allahabad on an application presented under s. 206 of the Code. The facts are these. The respondent here, Syed Salamat Ali, was the holder of a second mortgage of mauza Sondhia. The appellant here, Musammat Lakho Bibi, was the holder of a third mortgage over mauzas Sondhia, Khaura and Gaura. Her mortgage money had been applied to the discharge of the first mortgage in which the three mauzas had been mortgaged. Salamat Ali brought a suit under s. 88 of the Transfer of Property [338] Act for sale of mauza Sondhia in discharge of his mortgage. That was the only relief which he asked. Musammat Lakho Bibi had pleaded her third mortgage and the discharge of the first mortgage as a shield to protect mauza Sondhia being brought to sale until the money paid by her to discharge the first mortgage had been repaid to her. The subordinate Judge found that Lakho Bibi was entitled to avail herself of the discharge of the first mortgage as a shield, and in his judgment he held that Salamat Ali was bound to pay Lakho Bibi Rs. 2,050, being the amount paid to discharge the first mortgage, and he also held that Salamat Ali having made that payment, if Lakho Bibi did not redeem him, Salamat Ali was entitled to his decree for sale. The decree as drawn up was, in our opinion, in accordance with the judgment. It decreed that Salamat Ali should pay Rs. 2,050 to Lakho Bibi, that in default of redemption

* Civil Revision No. 36 of 1897.

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by Lakho Bibi at a specified time mauza Sondhia should be sold. Here we may observe that in our opinion the judgment and decree were incorrect. On the finding that Lakho Bibi was entitled to avail herself of the discharge of the first mortgage as a shield in this suit, the Subordinate Judge ought to have ascertained what proportionate part of the Rs. 2,050, should be attributed to the discharge of the first mortgage on mauza Sondhia as far as it was concerned, and he should have given the plaintiff, of course subject to redemption by Lakho Bibi, a decree for sale of mauza Sondhia on payment of that proportionate amount to Lakho Bibi. No party appealed; but after the decree had been drawn up and signed Salamat Ali applied under s. 206 of the Code to have the decree amended by making it a decree for sale of not only mauza Sondhia, but also of mauzas Khaura and Gaura. The Subordinate Judge granted that application and altered the decree in accordance with it. It is with reference to that order that this application for revision has been made. Now the decree as first made was, in our opinion, strictly in accordance with the judgment. The judgment was incorrect in the particulars to which we have referred, but still the decree was a decree in **[339]** accordance with the judgment, whether that judgment was right or wrong in law. The decree as altered on the application under s. 206 is not a decree in accordance with the judgment. The judgment did not decide that mauzas Khaura and Gaura should be sold: Salamat Ali had not asked in his plaint that they should be sold. In law he was not entitled to a decree for sale of those mauzas. He was not a mortgagee of those mauzas, and did not become a mortgagee of those mauzas by payment of the amount paid by Musammat Lakho Bibi in discharge of the first mortgage. If the result has been that he has paid more than he ought to have been compelled to pay in order to obtain the sale of mauza Sondhia, that result could have been avoided; it was due to his own laches in not appealing. He has brought that result upon himself. The law cannot be altered to relieve a man from the effect of his own laches. The application under s. 206 of the Code of Civil Procedure should have been dismissed and not granted. Under s. 622 of the Code we make the following order. We allow this application with costs. We set aside the order passed on the application under s. 206 of the Code with costs. We dismiss that application, and we restore the decree as originally drawn up and signed.

Application allowed.

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20 A. 339 = 18 A.W.N. (1898) 60.

REVISIONAL CRIMINAL.

Before Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* AJUDHIA AND ANOTHER.* [12th March, 1898.]

Criminal Procedure Code, s. 437—Order for further inquiry—Order to the prejudice of an accused person—Notice to show cause.

Before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. *Queen-Empress* v. *Chotu* (1) referred to.

[R., 35 A. 78 (80) = 10 A.L.J. 531 = 18 Ind. Cas. 146; 3 Bom. L.R. 703.]

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* Criminal Revisional No. 88 of 1898.

(1) 9 A. 52.

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IN this case the applicants Ajudhia and Punni had been charged before the Cantonment Magistrate of Allahabad with [340] the offence of causing grievous hurt whilst committing house-breaking, under s. 459 of the Indian Penal Code. The accused were discharged by the Cantonment Magistrate, and against this order the complainant filed an application in revision before the District Magistrate. The District Magistrate considered that there was sufficient evidence against both the accused and ordered them to be re-tried. This order was upheld by the Sessions Judge. The accused persons then applied in revision to the High Court on the ground that the Magistrate before ordering a re-trial ought to have called upon the applicants to show cause why a re-trial should not be ordered.

Mr. *W. Wallach*, for the applicants.

The Government Pleader Munshi *Ram Prasad* and Babu *Parbati Charan*, for the Crown.

JUDGMENT.

BURKITT, J.—I think it would have been well if the District Magistrate had acted on several precedents of this Court which lay down that, before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. It is quite true, as remarked by the learned Sessions Judge, that there is no distinct provision to that effect in the Code of Criminal Procedure, but several able and experienced Judges of this Court have laid down the rule that it is most advisable that such notice should be given. I may refer to the cases of *Queen-Empress* v. *Chotu* (1) and *Queen-Empress* v. *Mushtaq Husen* (unreported), Criminal Revision No. 183 of 1897, decided on the 28th of April 1897. The order made in this case was undoubtedly prejudicial to the accused person, inasmuch as, whatever may be the result of the further inquiry, the accused person is subjected to the worry and nuisance of that further inquiry. I must set aside the order of the District Magistrate directing a re-trial, and I direct that, if he thinks it necessary to take any further action in this case, he should do so after notice to the accused person. I would further point out to the District Magistrate that he was [341] wrong in directing a re-trial of the case. All that the Code empowers him to do is to direct that further inquiry be made. I order accordingly.

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20 A. 341 = 18 A.W.N. (1898) 65.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

TRIBHUWAN SUNDAR KUAR (*Plaintiff*) *v.* SRI NARAIN SINGH (*Defendant*).* [14th March, 1898.]

Hindu law—Hindu widow—Succession—Legal representative—Civil Procedure Code s. 365.

A reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound, by a decree obtained against the widow provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to, and devolves on, the

* First Appeal No. 185 of 1896.

(1) 9 A. 52.

heir of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of s. 365 of the Code of Civil Procedure. *Katama Natchiar* v. *The Raja of Shivagunga* (1); *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (2); and *Premmoyi Chowdhrani* v. *Preonath Dhur* (3); referred to.

[R., 33 A. 15 (16)=7 A.L.J. 960 (961)=7 Ind. Cas. 97; 34 C. 642=5 C.L.J. 491=11 C.W.N. 593=2 M.L.T. 207; 23 M. 125 (133); 2 C.L.J. 602; 8 C.W.N. 843 (850).]

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APPELLATE CIVIL.

20 A. 341=18 A.W.N. (1898) 65.

THE facts of this case are fully stated in the order of the Court.

Mr. *W.N. Colvin*, Munshi *Ram Prasad* and Munshi *Jwala Prasad*, for the applicant.

M. T. Conlan, Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the respondent.

ORDER.

BANERJI and AIKMAN, JJ:—Rani Tribhuwan Sundar Kuar, the appellant in this appeal, having died since the institution of the appeal, two applications have been presented, one by Rani Balraj Kuar, asking to have her name entered on the record in place of the deceased appellant, and the other by Babu Sri Narain Singh, respondent, praying that the appeal and the suit be declared to have abated. Similar applications have been made in the connected appeal No. 144 of 1896.

The suit out of which the two appeals arose, was instituted by Rani Tribhuwan Sundar Kuar for a declaration that the property in suit was the separate estate of her deceased husband [342] Raja Shambhu Narain Singh and that she was entitled to it as a Hindu widow; that the defendant Babu Sri Narain Singh had no right to interfere with it, and that an agreement, dated the 7th of November 1892, was void and not binding on her. She further prayed that, should the Court hold that she was not in possession and that the property was in the possession of the defendant, she should be put into possession.

The claim was resisted on the ground that the defendant and the deceased Raja were members of a joint Hindu family and that the defendant was entitled to the estate in preference to the widow. The Court below partially decreed the claim, and thereupon the two appeals mentioned above were preferred, one by the plaintiff and the other by the defendant.

Rani Balraj Kuar is the mother of Raja Shambu Narain Singh, and it is conceded that, if the estate was the divided property of the Raja to which the ordinary rule of succession of Hindu law would apply, she would be the next reversioner after the widow.

It is contended on behalf of Babu Sri Narain Singh that the cause of action upon which Rani Tribhuwan Sundar Kuar brought her suit was a cause of action personal to her; that it did not survive to Rani Balraj Kuar and that she is in no sense the legal representative of the deceased Rani Tribhuwan Sundar Kuar.

The whole question, in our opinion, turns upon whether, after the death of Rani Tribhuwan Sundar Kuar, the right to sue survives. And the decision of that question again depends upon the determination of the further question whether the decree passed in the suit of the widow is one which would bind the reversioner after the widow, for if the decree be binding on the reversioner the right of action would survive to him. Both these questions seem to us to be concluded by the ruling of

(1) 9 M.I.A. 539 (543). (2) 21 C. 8. (3) 23 C. 636.

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20 A. 341 = 18 A.W.N. (1898) 63.

their Lordships of the Privy Council in the case of *Katama Natchiar* v. *The Raja of Shivagunga* (1). Their Lordships held that [343] "upon the death of a Hindu widow, the right of action formerly vested in her devolves, not upon her heirs, but upon the next heirs of her husband." Upon the question whether a decree passed in a suit brought by a widow for the estate of her husband would bind those claiming the estate in succession to her, their Lordships were of opinion that "unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit * * by any person claiming in succession to" the widow. "For, assuming her to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow" (p. 604). This view was adhered to by their Lordships in the subsequent case of *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (2). Upon these authorities it must be taken to be settled law that a reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow, provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to and devolves on the heir of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of s. 365 of the Code of Civil Procedure. The cause of action of the widow as against the defendant to the suit is not a cause of action personal to herself. Therefore the heir of the husband, and not her personal heir, is [344] the person entitled to prosecute the suit. This view is supported by the ruling of the Calcutta High Court in *Premmoyi Choudhrani* v. *Preonath Dhur* (3). Rani Balraj Kuar being the next heir of Raja Shambhu Narain Singh, is in our opinion the legal representative of Rani Tribhuwan Sundar Kuar for the purposes of the suit.

Mr. *Conlan* has contended that Rani Balraj Kuar should not be allowed to continue Rani Tribhuwan Sundar's suit or appeal for two reasons, namely, first, that she could not have brought the suit, as she was not in possession, and, second, that she is estopped from claiming the estate under the terms of the deed of agreement, dated the 7th of November 1892, referred to above. As regards the first point, we observe that the estate is in charge of the receiver appointed by the Court and not in the actual possession of either of the parties. Under such circumstances the person who has the title to the property must be deemed to be in possession, and if Rani Balraj Kuar is entitled to the estate she must be held to be in possession. As for the other point, we do not deem it necessary to decide at this stage of the proceedings whether the defendant would or would not be entitled to set up the agreement as a bar to Rani Balraj Kuar's right to claim the estate. We think that, notwithstanding the existence of the

(1) 9 M.I.A. 539 (543). (2) 21 C. 8. (3) 23 C. 636.

agreement, she is the legal representative of Rani Tribhuwan Sundar for the purposes of this suit. We accordingly direct that the name of Rani Balraj Kuar be entered in the record of the two appeals before us in the place of Rani Tribhuwan Sundar, deceased. Rani Balraj Kuar will have the costs of her applications.

Application allowed.

20 A. 345 = 18 A.W.N. (1898) 68.

20 A. 341 = 18 A.W.N. (1898) 65.

[345] APPELLATE CIVIL.

Before Mr. Justice Banerji.

HAJI SYED MUHAMMAD (*Defendant*) *v.* GULAB RAI (*Plaintiff*).*

[23rd March, 1898].

Injunction—Discretion of Court as to granting mandatory injunctions—Delay on the part of the plaintiff in bringing his suit.

A plaintiff brought his suit for proprietary possession of a plot of land, and, secondly, for a mandatory injunction to demolish certain buildings which the defendant had erected on such plot. The suit, however, was not brought until upwards of two years from the time when the buildings complained of were completed. It was found that the plaintiff was not entitled to proprietary possession of the land claimed by him, but that he had a right of user over it, and that the defendant was not entitled to build upon the land. The Court, however, on account of the plaintiff's delay in bringing his suit declined to grant the mandatory injunction asked for. *Benode Coomaree Dossee* v. *Soudaminey Dossee* (1), referred to.

[R., 9 Bom L.R. 1117 (1120); 6 Ind. Cas. 1006 (1008) = 78 P.W.R. 1910; 2 N.L.R. 4.]

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Ghulam Mujtaba* for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chandra Banerji*), for the respondent.

JUDGMENT.

BANERJI, J.—This appeal and the connected appeal No. 16 of 1897 arise out of two cross-suits brought by one party against the other. They relate to two plots of land adjacent to each other on which each party has made certain constructions. The claim of Gulab Rai, who brought the suit out of which this appeal has arisen, was that the land on which the defendant Haji Syed Muhammad had built certain buildings was his (Gulab Rai's) property, and that Haji Syed Muhammad had no right to build on it. Haji Syed Muhammad, on the other hand, alleged himself to be the proprietor, not only of the piece of land on which he had built the buildings complained of by Gulab Rai, but also of the adjacent plot of land on which Gulab Rai had built certain shops. Gulab Rai claimed to be the proprietor of that piece of land also. Each party, in addition to the claim [346] for possession, has prayed for the removal of the buildings. Both parties relied on a decree of the 31st of August 1846. The Court of first instance construed that decree to have declared that the land claimed in the two suits was the property of Haji Syed Muhammad. It accordingly dismissed the suit of Gulab Rai and decreed that of Haji Syed Muhammad.

* Second Appeal No. 17 of 1897, from a decree of Rai Sanwal Singh, District Judge of Agra, dated the 29th September 1896, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 10th June 1896.

(1) 16 C. 252.

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20 A. 345 = 18 A.W.N. (1898) 68.

The lower appellate Court reversed the decree of the Court of first instance. It placed on the decree and judgment of 1846 a construction different from that put on it by the Court of first instance. It is evident that there was some confusion in the mind of the learned Judge of the lower appellate Court as to what was determined by the decree of 1846. In one part of the judgment the learned Judge says that "the decree of 1846 shows that the ancestor of Haji Syed Muhammad was declared to be the owner of all the lands on the north of a line drawn from the said platform towards the west to the shop of the ancestor of Gulab Rai and towards the east to his own shop adjoining the eastern of the four shops built." He evidently meant that the land now in dispute which lies to the north of the line referred to above had been declared by the judgment of 1846 to be the property of Haji Syed Muhammad. A few lines lower down he says that the judgment of 1846 shows that the whole of the land lying to the north of the line referred to above was the land of Gulab Rai. It is difficult to account for this inconsistency, except on the assumption that the learned Judge never carefully perused the judgment of 1846. As both the parties rely on that judgment, and as it is common ground that their right to the land in suit was determined by it, the first question to be decided in this appeal is what is the true construction to be placed on that judgment and what are the rights of the respective parties declared by it. It appears that the suit in which the judgment was passed was instituted by Ali Raza, the ancestor of Haji Syed Muhammad, against the predecessor in title of Gulab Rai for a declaration of his right to a piece of land on which he had erected certain buildings. That suit was compromised by the parties and the [347] judgment referred to above was passed in accordance with the compromise. It is abundantly clear that the dispute between the parties to the litigation of 1846 related to the plots of land in respect of which the present suits were brought. The property claimed in that suit was a plot of land lying to the north of an enclosure belonging to Haji Syed Muhammad's ancestor up to a public road, and that is the land claimed in the two suits before me. It was distinctly stated in the judgment of the 31st August 1846 that the land then in dispute had been declared by the compromise to be the property of the plaintiff Ali Raza. The judgment further declared that Ali Raza was to construct buildings towards the north up to a line drawn from the western end of his existing shop on the one side to the eaestrn extremity of the buildings of Gulab Rai's ancestor on the other; that the land lying to the north of that line as far as the road was to be used by Ghulab Rai's ancestor as *phar* land, that is, as land on which he was to stack his grain, and that neither party was to build on that land. There can be no doubt that this is what the decree of 1846 declared. Under that decree the ownership of the land now in suit was, as I have said, determined to exist in Haji Syed Muhammad, but Gulab Rai's predecessor in title was granted the right of using the land for the purpose of stacking grain, and neither party was to build on it. That being so, the suit which Haji Syed Muhammad brought against Gulab Rai to which Second Appeal No. 16 of 1897 relates was bound to succeed. Gulab Rai is not the owner of the land claimed in that suit, and he has no right to build on it. As regards the other suit, namely, that brought by Gulab Rai against Haji Syed Muhammad, Gulab Rai was not entitled to be declared the owner of the land claimed by him. A further question, however, arises in that case, namely, whether Gulab Rai is entitled to the mandatory injunction he

seeks in that case for the demolition of the buildings erected by Haji Syed Muhammad. It is contended on his behalf that under the decree of 1846 he was granted the right to use the land as *phar* land and Haji **[348]** Syed Muhammad's ancestor was declared not to have the right to build on it, and consequently Gulab Rai was entitled to ask for the removal of the buildings erected by Haji Syed Muhammad. It is urged on behalf of Haji Syed Muhammad that Gulab Rai is not entitled to the mandatory injunction claimed by him for two reasons. First, that he claimed the demolition of the buildings on the basis of a proprietary title and he has not been able to prove that he has such a title; secondly, that as the buildings were upon the showing of Gulab Rai himself completed upwards of two years before the institution of his suit, the Court in the exercise of the discretion which it possesses in the matter of granting mandatory injunctions should not grant the injunction he prays for. I am of opinion that the contention raised on behalf of Haji Syed Muhammad must prevail. It is true that if a plaintiff asserts a proprietary right but can only prove a right of easement or any other inferior right which entitles him to the relief he seeks, such relief should not ordinarily be refused to him, but when the granting of such relief on the basis of a right not originally asserted depends upon the determination of issues of fact which were never raised in the Court of first instance, an appellate Court should not allow the plaintiff to change front in such a way as to prejudice the defendant. If, in this case, the plaintiff had asserted a right of easement in the Court of first instance, that assertion might have been traversed on various grounds, the determination of which might involve the decision of several issues of fact. Further, it is alleged in the plaint that the buildings of which the plaintiff seeks the demolition were constructed in January 1893. He did not bring his suit till November 1895. It is thus clear that the plaintiff has not brought his suit or sought legal proceedings at the earliest opportunity, but has waited till the building has been completed. If under such circumstances, he seeks to have the building removed, a mandatory injunction will not be granted except under special circumstances. This was laid down in the authorities quoted in the judgment of the Calcutta High Court in *Benode* **[349]** *Coomaree Dossee* v. *Soudaminey Dossee* (1). No special circumstances have been alleged or shown to exist in this case, and therefore the plaintiff was not entitled to the mandatory injunction which he prayed for. A case like this is different from a suit in which a mandatory injunction is sought for the removal of buildings erected by one of several co-sharers on joint land. The plaintiff's suit ought to have been dismissed in its entirety. The result is that I allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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(1) 16 C. 252.

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APPEL-
LATE
CIVIL.

20 A. 349=
18 A.W.N.
(1898) 63.

20 A. 349=18 A.W.N. (1898) 63.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

THAKUR PRASAD (*Plaintiff*) *v.* GAYA SAHU AND OTHERS (*Defendants*).* [23rd March, 1898.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 52—*Transfer* pendente lite—*Lease of property in respect of which a decree for sale had been made under s.* 88.

Held that a lease of property made by a judgment-debtor against whom a decree for sale had been made under s. 88 of the Transfer of Property Act for sale of that property came within the purview of s. 52 of the Transfer of Property Act.

[R., 13 C.P.L.R. 145 (151); 15 C.P.L.R. 6 (8); 17 C.L.J. 384 (386)=17 Ind. Cas. 1; 8 Ind. Cas. 288 (289)=6 N.L.R. 140 (142)]

THE facts of this case are as follows:—

The plaintiff Thakur Prasad was the mortgagee of a 4 pie share in a certain village from one Chandi Prasad, under a mortgage executed in April 1885. In January 1892, Thakur Prasad obtained a decree for sale on that mortgage. On the 9th of March 1893, Chandi Prasad, the mortgagor, gave a lease of a portion of the mortgaged property to one Gaya Sahu. On the 20th of September 1893, Thakur Prasad executed his decree for sale, and, having caused the mortgaged property to be sold, purchased it himself. He was, however, unable to get possession of [350] that portion of the property which had been subsequently leased by Chandi Prasad. He accordingly brought a suit for cancellation of the lease and to obtain possession of the property, the subject of the lease.

The Court of first instance (Munsif of Gorakhpur) dismissed the suit. The plaintiff appealed, and the lower appellate Court (District Judge of Gorakhpur) dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—From a perusal of the order of the Subordinate Judge it would appear either that the learned Subordinate Judge did not comprehend all the bearings of the case then in appeal before him, or that the appeal was not properly argued before him. I note, however, that the memorandum of appeal which was before the learned Subordinate Judge contained and set forth all the pleas which have now been raised before me to-day. The admitted facts are that in April 1885, one Chandi Prasad mortgaged a four pie share in a certain village to the plaintiff; that on the 19th of January 1892, the plaintiff got a decree for sale of the mortgaged property in a suit on that mortgage; and that on the 20th September 1893, the plaintiff mortgagee purchased the same property and was put in possession by the Court. He was, however, unable to obtain possession of the whole. It appears that on the 9th March 1893, that is to say, more than a year after the plaintiff had obtained a decree for sale of the mortgaged property, Chandi Prasad leased a certain portion of that

* Second Appeal No. 1008 of 1896, from a decree of Babu Nil Madhab Roy, Officiating District Judge of Gorakhpur, dated the 12th September 1896, confirming a decree of Maulvi Ahmad Ali Khan, Munsif of Gorakhpur, dated the 31st March 1896.

property to the defendant-respondent. By the present suit the plaintiff appellant seeks to have that lease set aside and to obtain possession of the property the subject of the lease. He also asks for mesne profits. These were the reliefs asked for at the hearing of this appeal. As to the lease, it is contended that it is bad with reference to the provisions of s. 52 of the Transfer of Property Act. In my opinion that contention is sound. The lease was executed undoubtedly during the active prosecution of a contentious suit, a suit which [351] had been commenced by the plaintiff in September 1891, and in which the plaintiff in January 1892 had obtained a decree for sale of the mortgaged property, which included the land leased to the respondents. The transfer under this lease which is for a period of no less than eleven years undoubtedly must affect the rights of the auction purchaser. The auction purchaser certainly in my opinion comes within the wording of s. 52 of the Transfer of Property Act as being a party to an order which might be made in the suit. In a somewhat similar case, though no doubt, in a case arising under the Code of Civil Procedure and not under Act IV of 1882,—*Debi Prasad* v. *Baldeo* (1)—it was held that even an ordinary agricultural lease made during the pendency of an attachment came within the mischief aimed at by s. 276 of the Code of Civil Procedure. *A fortiori* it appears to me that a lease of property made by a judgment-debtor against whom a decree had been made under s. 88 of the Transfer of Property Act for sale of that property comes within the provisions of s. 52 of the latter Act. The lease executed by the judgment-debtor, Chandi Prasad, whatever be its object, cannot but have the effect of, to some extent, defeating the auction purchaser of that property. I am therefore of opinion that the appellant here is entitled to my judgment. I set aside with all costs in those Courts the decrees of both the lower Courts, and, allowing this appeal, I give a decree in the plaintiff's favour for possession of the *sir* lands mentioned in the schedule of his plaint, with the exception of Nos. 716 and 718, of which he is in possession. I further give to the plaintiff a decree for mesne profits to be ascertained in execution up to the date the plaintiff is put in possession under this decree. The plaintiff appellant will recover the costs of this appeal.

Appeal decreed.

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20 A. 352 = 18 A.W.N. (1898) 64.

[352] APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

RAM KUAR AND ANOTHER (*Opposite Parties*) *v.* SARDAR SINGH (*Applicant*).* [28th March, 1898.]

Act No. VII of 1889 (*Succession Certificate Act*), *ss.* 6 *and* 7—*Certificate to collect debts*—*Minor.*

Held, that a certificate of succession may be granted under Act No. VII of 1889, to a minor through his next friend. *Kali Coomar Chatterjee* v *Tara Prosunno Mookerjee* (2) referred to.

[R., 28 B. 344 ; 15 Ind. Cas. 408 = (1912) M.W.N. 411 (412).]

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* First Appeal, from Order No. 100 of 1897, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 5th August 1897.

(1) 18 A. 123. (2) 5 C.L.R. 517.

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APPELLATE CIVIL.

20 A. 352 = 18 A.W.N. (1898) 64.

IN this case Sardar Singh, a minor, applied through his next friend, Dip Chand, for a certificate under s. 6 of Act No. VII of 1889 to collect debts due to one Gur Prasad, his alleged adoptive father. On this application notices were duly issued to the other relations of the deceased, but on the day fixed for the hearing no one appeared and the District Judge granted a certificate, as prayed, to the applicant. At the hearing, the applicant's next friend appeared and gave evidence to the effect that the applicant was duly adopted by the wife of Gur Prasad, in pursuance of an authority given by him to her to adopt. After the certificate had been granted, the two widows of Gur Prasad, Ram Kuar and Mahtab Kuar, appealed against the order of the District Judge, on the ground that there was no legal evidence of the adoption of the applicant.

Mr. *D. N. Banerji* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the respondent.

JUDGMENT.

EDGE, C. J., and BURKITT, J.—Kunwar Sardar Singh, minor, made an application to the District Judge of Aligarh by his next friend under Act No. VII of 1889, for a certificate to collect debts alleged to have been due to his alleged adoptive father, then deceased. Notice to persons who might have been interested in opposing the application were duly served. These persons had three several opportunities of opposing the grant of such certificate. No one opposed the grant, and the District Judge made **[353]** an order granting a certificate as prayed. After the grant of the certificate had been made Musammat Ram Kuar and Musammat Mahtab Kuar, filed an appeal against the order of the District Judge, on the grounds that there was no legal evidence of permission to adopt the minor having been given by the deceased creditor to his wife, and that a certificate should not have been granted. The question which has been argued before us is—can in law a certificate under Act VII of 1889 be granted to a minor? That is the only question which has been presented to us for consideration in argument. It has been contended on behalf of the appellants that a certificate under Act No. VII of 1889 cannot be granted to a minor although he appears and applies for it through his next friend. Mr. *Dwarka Nath Banerji*, in his argument, was compelled to admit that it was not intended that a debt due in such a case to a minor should by effluxion of time become barred by limitation, and he contended that any near relation of such a minor might apply for, and obtain, a grant of a certificate to himself to collect the debts which might be due to the minor. For that purpose Mr. *Dwarka Nath Banerji* had further to contend that the grant of a certificate gave the holder of such certificate a cause of action. In our opinion the grant of a certificate neither gives a cause of action nor is it a part of the cause of action. S. 4 of Act No. VII of 1889 suggests quite the contrary. That section does not debar a person entitled from suing until such person has obtained a certificate, but merely prohibits the Court from making the decree in favour of such person until that person has produced a certificate under the Act, or one or other of the documents referred to in the section. If the granting of a certificate was part of the cause of action, it would follow that no suit would lie unless before the commencement of the suit a certificate had been obtained. Now, in our opinion, the Legislature intended under Act No. XXVII of 1860, and under Act No. VII of 1889, that a person to whom a certificate might be granted should be a person who had some title or interest in the debt to collect

[354] which a certificate is applied for, and that a mere interest in the minor or in the person entitled to sue for the debt is not sufficient to entitle a stranger, or even a relation, to a certificate. That is the conclusion which we draw from s. 3 of Act No. XXVII of 1860, from cl. (*d*), sub-s. 1 of s. 6 of Act No. VII of 1889, from cl. (*b*) of sub-s. 1 of s. 7 of the same Act, and from sub-ss. 2, 3 and 4 of s. 7 of the same Act. Now the Legislature has not prohibited, by Act No. VII of 1889, the grant of a certificate to a minor through his next friend, nor was there any such prohibition in Act No. XXVII of 1860. Where the Legislature considered that probate or administration should not be granted to a minor, it said so expressly. Such prohibition will be found in ss. 183 and 189 of Act No. X of 1865, and in s. 8 of Act No. V of 1881. As far back as 1879, the Calcutta High Court in *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (1) inferentially decided that a certificate to collect debts under Act No. XXVII of 1860 might be granted to a minor through his next friend. In our opinion the Calcutta Court was right. We dismiss this appeal with costs.

Appeal dismissed.

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20 A. 354 = 18 A.W.N. (1898) 70.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

HARJAS RAI AND ANOTHER (*Defendants*) *v.* RAMESHAR (*Plaintiff*)*

[4th April, 1898.]

Execution of decree—Sale in execution—Stay of sale upon payment into Court of decretal amount and costs—Civil Procedure Code, s. 291—Act No. IV of 1882 (Transfer of Property Act.) s. 89.

Held that s. 291 of the Code of Civil Procedure must be taken to have modified s. 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale. *Raja Ram Singhji* v. *Chunni Lal* (2) followed.

[Diss., 10 Ind. Cas. 981 = 4 S.L.R. 266 (267); **F.**, 28 A. 28 = A.W.N. (1905) 168.]

[355] THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, and Munshi *Madho Prasad*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

BURKITT, J.—On the 13th of August, 1870, one Chajju executed a mortgage of the property in suit to one Nathu Singh. A suit for sale was brought in July, 1895, and after decree an order absolute for sale was passed on the 14th of November, 1895. Under the order absolute the mortgagor's right to redeem became extinguished. That order absolute for sale is now vested by transfer in the appellant Kure. I may mention that there were three other mortgages over the same property

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* Second Appeal. No. 120 of 1897, from a decree of Pandit Raj Nath Saheb, Subordinate Judge of Moradabad, dated the 24th November 1896, confirming a decree of Munshi Shiva Prasad, Munsif of Bijnor, dated the 19th August 1896.

(1) 5 C.L.R. 517.

(2) 19 A. 205.

1898
APRIL 4.

APPELLATE CIVIL.

20 A. 354 = 18 A.W.N. (1898) 70.

held by the present plaintiff respondent Rameshar, and that Rameshar was in compliance with s. 85 of the Transfer of Property Act made a party to the suit on the mortgage of 1870. As subsequent incumbrancer, he could have redeemed within the period given by the decree under s. 88, but he failed to do so. I may also add, that no sale has yet taken place under the order absolute of November 1895. Subsequently Rameshar, the present plaintiff respondent, brought a suit for sale on the three mortgages he held, impleading under s. 85, the defendant appellant Kure as transferee of the decree enforcing the prior incumbrance, and he also impleaded Harjas Rai, who had purchased the property by private sale in May, 1893. At the same time the plaintiff respondent, inasmuch as he could not bring the property to sale without discharging the prior incumbrance held by Kure, paid into Court the amount due on Kure's incumbrance, expressing the payment to be made to the credit of Kure in discharge of his incumbrance. It is admitted by Kure's vakil that money was so paid in to his credit. The lower appellate Court found that two of the plaintiff's mortgages had been discharged and gave him a decree for sale on the third only. Kure now appeals contending that the payment into Court to his credit was improperly made, it being made in the plaintiff's suit and not in Kure's suit, and [356] also because it was made after the expiry of the two months fixed by the decree of July 1895. His contention is that the right to redeem is extinguished. Whether Kure, appellant, can now proceed to sell the property is hardly worth considering, seeing that if he were to do so, he would at once be met by the admitted fact that the debt to recover which the property could be sold under the order absolute has now been paid into Court. In the recent case of *Raja Ram Singhji* v. *Chunni Lal* (1) it was held that "s. 291 of Act No. XIV of 1882 must be taken to have modified s. 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs had been paid into the Court that ordered the sale." Here it is admitted that a sufficient amount has been paid in to satisfy the decree for sale held by the defendant appellant Kure. That being so, and in view of the ruling just cited, I cannot say that the Subordinate Judge was wrong in giving the plaintiff respondent a decree for sale of the property mortgaged to him under his mortgage of February, 1892. The appeal therefore fails on that point. Another question was raised on behalf of the appellant, Harjas Rai. He had in December 1894 deposited in Court under s. 83 of Act No. IV of 1882 the amount due to Rameshar on his mortgage of February 1892. Notices as required by law were duly served upon Rameshar, who took no notice of them. The Court for some unknown reason rejected the application which had been made to it under s. 83. Harjas Rai subsequently withdrew the money out of Court. The whole matter therefore falls to the ground. By his own stupidity Harjas Rai has lost a complete answer to Rameshar's suit, and for that he has only himself to thank. I dismiss the appeal with costs.

Appeal dismissed.

(1) 19 A. 205.

20 A. 357=18 A.W.N. (1898) 71.

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APRIL 4.

APPELLATE CIVIL.

20 A. 357=
18 A.W.N.
(1898) 71.

[357] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

PARMESHRI LAL AND OTHERS (*Judgment-debtors*) v. MOHAN LAL (*Decree-holder*).* [4th April, 1898.]

Limitation Act No. XV of 1877 *(Indian Limitation Act), sch. ii, art.* 179—*Act No. IV of* 1882 *(Transfer of Property Act), s* 87—*Execution of decree—Application for order absolute for foreclosure—Limitation.*

An application for an order under s. 87 of Act No. IV of 1882 is, like an application for an order under s. 89 of the said Act, subject to the limitation prescribed by art. 179 of the second schedule to Act No. XV of 1877. *Oudh Behari Lal* v. *Nageshar Lal* (1) and *Chunni Lal* v. *Harnam Das* (2), referred to.

[R., 24 A. 542 (545); 33 C. 867 (875, 876)=4 C.L J. 141; 6 O.C. 114 (115); Cons., 26 M. 780 (787).]

IN this case one Mohan Lal obtained a decree under s. 86 of the Transfer of Property Act on the 21st of September 1886. On the 21st of January 1895 the decree-holder applied in the Court of the Munsif of Mainpuri for an order absolute under s. 87. The Munsif dismissed this application as barred by limitation. The decree-holder appealed to the Subordinate Judge, who, relying on the cases of *Ranbir Singh* v. *Drigpal* (3) and *Tiluck Singh* v. *Parsotein Proshad* (4), held that there was no limitation prescribed for such applications, and accordingly decreed the appeal and remanded the case to the Court of the Munsif. The decree-holder appealed to the High Court.

Munshi *Gobind Prasad*, for the appellants.

Munshi *Madho Prosad*, for the respondent.

JUDGMENT.

BURKITT, J.—Under the ruling of this Court in the case of *Chunni Lal* v. *Harnam Das* (2), it was held, following the case of *Oudh Behari Lal* v. *Nageshar Lal* (1) that an application to obtain an order absolute under s. 89 of Act No. IV of 1882 is a proceeding in execution and is subject as such to all the rules relating to execution. The present application is not one under s. 89, but is one under s. 87 of the **[358]** Transfer of Property Act, its object being to have an order made debarring the judgment-debtor from all right to redeem the mortgaged property. I am unable sufficiently to distinguish proceedings under s. 89 from those under s. 87 of the Transfer of Property Act, so as to be able to say that the former are, and the latter are not, proceedings in execution. I must hold, following the ruling of this Court quoted above, that the present application is an application in execution to which the provisions of art. 179 of sch. II of the Limitation Act apply. It is admitted that a period of more than three years has elapsed between the date of the decree and the date of the application. The application was therefore time-barred when made. I allow this appeal, and, setting aside the decree of the Court below, restore the decree of the Court of first instance and dismiss the decree-holder's appeal to the lower appellate Court with costs.

Appeal decreed.

* Second Appeal No. 133 of 1897, from a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 17th November 1896, reversing an order of Maulvi Muhammad Inamul Haq, Munsif of Mainpuri, dated 8th June 1895.

(1) 13 A. 278. (2) 20 A. 302. (3) 16 A. 23.
(4) 22 C. 924.

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20 A. 358=18 A.W.N. (1898) 67.

APPELLATE CIVIL.

Before Mr. Justice Knox.

ANWAR-UL HAQ (*Plaintiff*) *v.* JWALA PRASAD (*Defendant*).*
[5th April, 1898.]

20 A. 358=18 A.W.N. (1898) 67.

Pre-emption—Mortgage—Limitation—Date of accrual of cause of action—Act No. IV of 1882 (Transfer of Property Act), ss. 86 and 87.

Held that where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under s. 86 as the date upon which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under s. 87 of the said Act. *Raghubir Singh* v. *Nandu Singh* (1); *Ali Abbas* v *Kalka Prasad* (2); and *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (3), referred to.

[F., 20 A. 375.]

THE facts of this case are fully stated in the judgment of the Court.
Pandit *Sundar Lal*, for the appellant.
Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

[359] KNOX, J.—The question which arises for determination in this second appeal is whether a right of pre-emption accrues from the date upon which a mortgagor is, under a decree given under s. 86 of the Transfer of Property Act of 1882, declared absolutely debarred of all rights to redeem the property, or from the date on which the mortgagee obtains an order absolute in terms of s. 87 of the same Act. In order that the question may be more clearly apprehended, it will be well to set out the facts out of which this question arises. Har Prasad was the owner of the property, the subject matter of this appeal. He transferred his interests under a deed of conditional sale to the father of one Mata Din. On the 11th of April 1893 Mata Din sued for foreclosure, and obtained a decree ordering Har Prasad to pay to the plaintiff or into Court the sum due on or before the 11th of October 1893, and declaring further that if the payment was not made on or before that date, Har Prasad would be absolutely debarred from all rights to redeem the property. The amount was not paid by the time fixed, and has not up to the present been paid. On 15th of March 1894, Mata Din sold his right under his decree of the 11th of April 1893 to Jwala Prasad, the present respondent, and on the 13th of April 1894 Jwala Prasad got his name entered in the village papers as mortgagee. On the 9th of March 1895, Anwar-ul Haq, the present appellant, purchased a share in the village in which the property in appeal is situated. Upon the 6th of April 1895 Jwala Prasad applied to the Court for, and obtained, an order absolute in the terms of s. 87 of the Transfer of Property Act, and on the 2nd of April 1896 Anwar-ul Haq instituted the present suit. The defence made to the suit was *inter alia* that Anwar-ul Haq was not a sharer in the village on the 11th October 1893, when the date fixed by the Court for payment of the mortgage money by Har Prasad expired; that therefore he had no right of pre-emption:

* Second Appeal No. 1014 of 1896 from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 1st October 1896, reversing a decree of Maulvi Muhammad Tajammal Husain, Munsif of Orai, dated the 9th June 1896.

(1) 11 A.W.N. (1891) 134. (2) 14 A. 405. (3) 16 C. 246.

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that on the said date the respondent's title of conditional vendee had become that of an absolute vendee and the sale had become [360] an absolute sale. The learned Judge accepted this contention: he held that the mortgagee having been all along in possession of the mortgaged property, "his title became complete when the mortgagor failed to pay before the 11th of October 1893. If the mortgagee chose to take further steps under s. 87 such steps were merely proceedings in execution with the object of clearing his title. The title itself was acquired on the 11th of October 1893." Upon this view he held that the title to pre-empt arose on the 11th of October 1893, when the appellant was not a co-sharer. The appellant adheres to the case stated in the plaint, namely, that no right of pre-emption accrued to him till the 6th of April 1895, when, as he maintains, the sale in favour of the respondent became complete in law. In support of this contention he relied on the precedent *Raghubir Singh* v. *Nandu Singh* (1). Against that the learned Advocate for the respondent referred me to a Full Bench ruling of this Court, *Ali Abbas* v. *Kalka Prasad* (2), and to certain other precedents of this Court, in which it has been laid down that applications for an order absolute under s. 87 of the Transfer of Property Act are steps in execution. Neither of the cases above cited are any safe guide in the case before me. They were both decisions governed by Regulation No. XVII of 1806. and the law applicable was that which prevailed before Act No. IV of 1882 came into force. It has been held by this Court in *Ali Abbas* v. *Kalka Prasad* that on the expiration of the year of grace provided by ss. 7 and 8 of Regulation No. XVII of 1806, if anything remained to be paid under the mortgage and the proceedings under the Regulation had been regular, the title of the conditional vendee became that of an absolute vendee and the sale became an absolute sale on the day when the year of grace expired. An important change was, however, introduced by s. 87 of Act No. IV of 1882, and it is by this section that the present appeal is governed. This section provides that if payment be not made by the mortgagor on the day fixed by the Court the plaintiff may apply [361] to the Court for an order that the defendant be debarred absolutely of all right to redeem the mortgaged property; when he has so applied the Court shall then pass such order, and on the order being passed the debt secured by the mortgage shall be deemed to be discharged. These words are without meaning, it seems to me, and the procedure provided in s. 87 is a purely superfluous procedure in the case of a mortgagee in possession, if his title has become complete and the sale an absolute sale as soon as the date fixed by the Court for payment of the mortgage money has expired. Under s. 87 a Court can upon good cause shown from time to time postpone the day appointed for payment. In other words, it can postpone the date on which the title of the mortgagee would become complete. This power was not given in Regulation No. XVIII of 1806, nor was there any provision made for an application for an order absolute like that provided for in s. 87 of Act No. IV of 1882. The Calcutta High Court has held in the case of *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (3) that a mortgagor can redeem at any time till the order absolute is made under s. 87 of the Transfer of Property Act of 1882. I need not, and do not, determine that point here; but I am satisfied that the procedure enjoined by s. 87 is not superfluous or procedure merely to clear title, and that until such an order absolute has been

(1) 11 A.W.N. (1891) 134. (2) 14 A. 405. (3) 16 C. 246.

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made a right to pre-empt does not accrue. The right to pre-empt accrues, not from the date fixed in the decree under s. 86 as the date on which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under s. 87 of the Transfer of Property Act of 1882.

I accordingly decree the appeal, set aside the judgment and decree of the lower appellate Court, and restore that of the Court of first instance. Three months from the date of this decree is allowed for the payment of the pre-emption money.

Appeal decreed.

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20 A. 362=18 A.W.N. (1898) 72.

[362] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

NARAIN SINGH AND OTHERS (*Plaintiffs*) *v.* CHATURBHUJ SINGH (*Defendant*).* [6th April, 1898.]

Act No. VII of 1870 (Court Fees Act), ss. 10 and 12—Court fee—Procedure—Second Appeal—Appeal to lower appellate Court by respondent in High Court insufficiently stamped.

Where it was discovered in second appeal in the High Court that the respondent, when appellant in the lower appellate Court, had not paid a sufficient Court-fee on his memorandum of appeal in that Court, and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency, it was *held* that the proper procedure was not to dismiss the respondent's appeal to the lower appellate Court, but to stay the issuing of the decree, if any, of the High Court, in favour of the respondent until such time as the additional Court fee due by him might be paid.

[F., 28 A. 270=2 A.L.J. 839=A.W.N. (1905) 280; 15 Ind. Cas. 463 (464)=109 P.R. 1912=136 P.W.R. 1912.]

IN this case the plaintiffs came into Court claiming, first, a declaration of their proprietary right in respect of certain land, and, secondly, cancellation of an order of a Revenue Court. They paid a Court fee of Rs. 10 on their plaint. The plaint was accepted and filed, the suit heard, the issue raised by the defendant as to insufficiency of stamp being decided against him, and a decree given in favour of the plaintiffs by the Court of first instance (Munsif of Sahaswan).

The defendant appealed, paying on his memorandum of appeal the same Court fee as had been paid on the plaint. The lower appellate Court (District Judge of Shahjahanpur) allowed the appeal and dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court. On this appeal being presented for report as to limitation and Court fee, it was reported that there was a deficiency of Rs. 10 on the plaint and a similar deficiency on the memorandum of appeal due by the plaintiffs, and a deficiency of Rs. 10 due by the defendant on his memorandum of appeal in the lower appellate Court. The deficiency due by the plaintiffs was made good, but at the time the appeal came on for hearing the deficiency due by the defendant was still unsupplied. Under these circumstances the appeal was put up for disposal.

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* Second Appeal No. 100 of 1897, from a decree of D.F. Addis, Esq., District Judge of Shahjahanpur, dated the 1st December 1896, reversing a decree of Munshi Prem Behari, Munsif of Sahaswan, dated the 19th August 1896.

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18 A.W.N.
(1898) 72.

[363] Mr. *A. H. C. Hamilton*, for the appellants.
Mr. *Karamat Husain*, for the respondent.

JUDGMENT.

BURKITT, J.—In this case it appears that the respondent here, who was the successful defendant appellant in the lower appellate Court, did not pay a sufficient amount of Court-fees on his memorandum of appeal in that Court. As far as that Court is concerned it must be assumed under the first paragraph of s. 12 of the Court Fees Act that the District Judge finally decided between the parties that the fee paid was sufficient. In this Court, however, it has been discovered that the defendant, respondent here, when appellant in the Court below did not pay a sufficient fee on his memorandum of appeal. The respondent here has been called on to pay the deficient duty, but has not done so. Mr. *Hamilton* for the appellant asks me to take action under the second clause of s. 12 and the second clause of s. 10 of the Court Fees Act and to dismiss the respondent defendant's appeal to the lower appellate Court. I am unable to see that I am authorized so to act under the second clause of s. 10. That clause provides, with reference to the valuation of the properties referred to in s. 7 paragraphs 5 and 6 of the Act, that when the Court-fees paid are insufficient under the circumstances laid down in the first clause of s. 10, the Court shall call on the plaintiff to pay the deficient Court-fees and shall stay the suit until the additional fee is paid. It further provides that if the additional fee be not paid the suit shall be dismissed. The second paragraph of s. 12 makes the procedure set forth in the second paragraph of s. 10 applicable to the case when a Court of appeal, reference or revision considers that the question decided under the first paragraph of s. 12 has been wrongly decided to the detriment of revenue. The question then arises in the present case what is the *suit* which is to be stayed until the additional fee is paid, and it is to be noted that the staying of the suit is the act which the Court has to perform before it can dismiss the suit. There is no suit before me except in the sense that all proceedings in a [364] suit up to decree are parts of the suit. What is before me is the appeal by the plaintiff against the decree of the lower appellate Court dismissing the suit. The appellant is undoubtedly no way in fault. He has paid up all the Court-fees due from him in the lower Courts and in this Court. Does then the second clause of s. 10 mean that because of the default of the respondent in the lower Court the appellant is to have his appeal in this Court stayed, and can it be held that the second clause of s. 12, read with paragraph 2 of s. 10, means that if the respondent wilfully persists in refusing to pay, the appellant, who is not in fault, is to be punished by having his appeal dismissed? I cannot believe that it was intended by the Legislature to work any such injustice. In my opinion the second clause of s. 10 read with the second clause s. 12 cannot be worked in a case like the present. If it were the appellant who was in fault and failed to pay the full Court-fee due from him in the lower Court, this Court certainly could stay the hearing of his appeal, and, if deficient fees were not paid, could dismiss his appeal, and no doubt would do so. But where the appellant is not in fault, it would be most unjust that the respondent by failing to pay the Court-fee due from him in the lower Court should have it in his power to prevent the appellant from having his appeal heard.

For these reasons I decline in this case to take action under the second clause of s. 10 and proceed to hear the appeal on the merits.

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On the merits the learned counsel who appears for the appellant says he is not in a position to press the appeal. The appeal is therefore dismissed with costs. But I direct that the decree be not prepared or signed until the respondent pays the Court-fees found due from him on his memorandum of appeal in the lower appellate Court.

Appeal dismissed.

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20 A. 365 =18 A.W.N. (1898) 73.

[365] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

DEBI DAS (*Plaintiff*) *v.* NIRPAT AND OTHERS (*Defendants*) *
[7th April, 1898.]

***Parties** to a suit—Suit for partnership debt—Representative of partner who dies pending the suit not a necessary party—Act No. IX of 1872 (Indian Contract, Act), s. 45.*

In a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not necessary to join as a plaintiff any representative of the deceased partner. *Gobind Prasad* v. *Chandar Sekhar* (1); *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (2), and *Motilal Bechardas* v. *Ghellabhai Hariram* (3) referred to.

[F., 32 A. 638 (640) =7 A.L.J. 759=6 Ind. Cas. 840; 10 P.R. 1906; **R.**, 13 C.W.N. 509=9 C.L.J. 331=1 Ind. Cas. 254 (256); 14 Ind. Cas. 221.**]**

THIS was a suit brought by one Abhe Singh and his alleged adopted son Debi Singh as partners in a trading concern to recover a sum of money said to be due on settlement of accounts between the parties. During the pendency of the suit Abhe Singh died, and the suit was continued by Debi Singh for himself and as legal representative of Abhe Singh, the Court of first instance (Munsif of Jhansi) finding on an issue framed in the suit that Debi Singh was the adopted son of Abhe Singh. The Court of first instance decreed the claim in favour of Debi Das.

On appeal by the defendants, the lower appellate Court (District Judge of Jhansi) found that it was not proved that Debi Das was the adopted son of Abhe Singh. It further found that Debi Das as surviving partner in the business was not entitled to collect debts due to the firm without obtaining a certificate of succession under Act No. VII of 1889 and that it was then too late to remedy that defect. The lower appellate Court accordingly decreed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

The respondents were not represented.

JUDGMENT.

BLAIR and BURKITT, JJ.—This suit was brought by Abhe Singh and Debi Das to recover money due to them as partners **[366]** in a trading concern upon a partnership account. Before decree Abhe Singh died, and Debi Das, who claimed to be his adopted son, was entered upon the record as the representative of the deceased plaintiff. The suit was

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* Second Appeal, No. 112 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 28th November 1895, reversing a decree of Maulvi Syed Muhammad Abbas Ali, Munsif of Jhansi, dated the 13th September 1895.

(1) 9 A. 486. (2) 18 C. 96. (3) 17 B. 6.

continued, and the Munsif gave the plaintiffs a decree. The defendants appealed, and the lower appellate Court dismissed the suit The ground of such dismissal was that Debi Das was not an adopted son; was not a representative of Abhe; and was not entitled to recover Abhe's interest in the debt without production of a certificate under s. 4 of the Succession Certificate Act, No. VII of 1889. The plaintiff Debi Das appeals upon the ground that, as the surviving partner of the firm to which the debt was due, he by himself was entitled to maintain the suit without joining any person as representative of the deceased member of the firm, and therefore without producing any certificate. The second ground of appeal is not pressed. We consider ourselves concluded by the decision of this Court in the case of *Gobind Prasad* v. *Chandar Sekhar* (1). That decision, it is true, has been dissented from in the Calcutta High Court in the case of *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (2). On the other hand, the decision of this Court has been followed and approved in *Motilal Bechardass* v. *Ghellabhai Hariram* (3). We are not aware that the case decided in this Court has been dissented from in this Court. The principle therein laid down is in accordance with the English law, and is not in our opinion in contravention of s. 45 of the Contract Act. It was quite unnecessary to bring Abhe's representative on the record. We do not consider that a decree such as may be passed in this case would be a decree against the debtor of a deceased person within the meaning of s. 4 of Act No. VII of 1889, but it would be a decree against the debtor of a partnership concern; for, in a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not, in our opinion, necessary to join as plaintiff any representative whatever of the [367] deceased partner. When the representative of Abhe desires to recover from the partnership concern such interest as Abhe possessed in the firm, if he has to do so through the medium of a Court, he will have to obtain a succession certificate before he is entitled to a decree. We set aside the decree of the Court below dismissing the suit, and, as the case was wrongly dismissed upon a preliminary point, we remand it to the lower appellate Court for trial upon the merits.

Appeal decreed and cause remanded.

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20 A. 367 = 18 A.W.N. (1898) 77.

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

BENI RAI AND OTHERS (*Defendants*) *v.* RAM LAKHAN RAI AND ANOTHER (*Plaintiffs*).* [14th April, 1898.]

Appeal to Her Majesty in Council—Civil Procedure Code, s. 596—Decree affirming the decision of the Court immediately below—Decree dismissing an appeal to the High Court for default of prosecution.

Held that a decree of the High Court dismissing an appeal for want of prosecution—the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing—was a decree affirming the

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*Privy Council Appeal No. 19 of 1897.

(1) 9 A. 486. (2) 18 C. 86. (3) 17 B. 6.

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20 A. 367 = 18 A.W.N. (1898) 77.

decision of the Court immediately below, within the meaning of s. 596 of the Code of Civil Procedure.

[R., 33 A. 154 (162) = 7 A.L.J. 1001 (1010) = 7 Ind. Cas. 926 ; 16 Ind. Cas. 486 = 23 M. L J. 219 (220) = 12 M.L.T. 260 = (1912) M.W.N. 962.]

THE facts of this case sufficiently appear from the order of the Court.

Mr. *A. E. Ryves* and Munshi *Ram Prasad*, for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondents.

ORDER.

KNOX, Acting, C.J., and BANERJI, J.—This is a petition for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is over Rs. 10,000, but there arise two questions which have to be determined before leave to appeal can be granted. The first question is, whether the decree now appealed from affirms or not the decision of the Court immediately below ; secondly, whether any substantial questions of law are shown to be involved by the petition. As regards the first question, we find on referring to the judgment of this Court that it runs as follows :—

[368] "This appeal is not supported. It is therefore dismissed." The petition of appeal sets out that the appeal came on for hearing on the 26th of April 1897, and could not be supported because the papers for the translation and printing of which the appellant had applied were not ready. A reference to the record shows that the appellants did, on the 25th of December 1895, apply for the translation and printing of the papers which they considered necessary for their purpose in order to place the appeal before this Court. They, however, took no steps to deposit the money necessary for this purpose and their application consequently abated. They took no further interest in the matter until the 12th of February 1897, when they put in a second application for translation and printing of the papers they then considered necessary. Their application was granted conditionally upon the hearing of the appeal not being delayed in consequence of the laches they had shown in taking no steps for nearly two years in order to have the necessary papers translated and printed under the rules of this Court. The appeal came on for hearing on the 25th of April 1897. The appellants apparently did not through their counsel show any sufficient cause to the Judges before whom the appeal came on for hearing which would justify those Judges in granting an adjournment or in permitting them to refer to the record in the vernacular. In consequence of this the appeal was not supported, and a decree was passed dismissing the appeal and affirming the decision of the lower Court. It has been contended before us that a mere order of dismissal does not and cannot amount to an affirmation as intended by s. 596 of the Code of Civil Procedure, and in support of this contention we were referred to the precedent *Asghar Reza* v. *Haidar Reza* (1). It is obvious that that precedent does not afford us any assistance in determining the matter now in dispute. That case was one in which the learned Judges of the High Court at Calcutta had before them for determination several issues of fact. The Court from which the appeal had been preferred had **[369]** contented itself with determining two issues only, considering

(1) 16 C. 287.

them sufficient for the disposal of the case, and had left other issues untried. The High Court found on the two issues which had been tried contrary to the findings of the Court below, but they proceeded to try further questions of fact and their decision on those questions of fact led them to dismiss the appeal. They thus came finally to the same conclusion in the suit as the Court of first instance, although they did not agree with the Judge who had tried the case on all his findings or in the reasons on which they were based. The learned Judge who gave leave to appeal to Her Majesty in Council found further that there were substantial questions of law involved which entitled the petitioners to a certificate that the case was a fit one for appeal. As regards the case before us the result of the appeal to us is that the findings of the Court below and the reasons on which they are based stand affirmed. There was no further finding of any kind by this Court. Under these circumstances we are unable to accept the contention of the learned counsel for the petitioners, and we hold that the decree of this Court did affirm the decree of the Court immediately below. The result of holding otherwise would be that an appellant, who, with the object of saving himself the expense of having the necessary papers translated for this Court, neglected to support his appeal before us, might claim leave to appeal direct to Her Majesty in Council by refraining from obtaining any determination by this Court upon the pleas raised. The appellants in fact want leave to ask Her Majesty in Council to do that which this Court might have done, but which the appellants by their own laches put it out of the power of the Court to do. The next question which arises is whether any substantial questions of law are involved in the appeal. We have gone through the various pleas raised. The only pleas that raise any question of law are the first and second pleas, and those pleas do not and will not arise where the decision on the question of fact is the same as that of the Court below. These questions **[370]** of law do not, in our opinion, arise. Consequently we find ourselves unable to grant the leave asked for, and dismiss this application with costs.

Application dismissed.

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20 A. 370 = 18 A.W.N (1898) 75.

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

BANSI LAL AND OTHERS (*Plaintiffs*) *v.* RAMJI LAL AND ANOTHER (*Defendants*).* [15th April, 1898.]

Civil Procedure Code, s. 32—Order adding defendant—Means of questioning such order—Practice—Decree in previous suit defining rights of a party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure.

Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh* v. *Chakardhari Singh* (1) referred to.

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* First Appeal, No. 54 of 1894, from a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 18th November 1895.

(1) 15 A. 119.

1898
APRIL 15.

APPELLATE CIVIL.

20 A. 370=
18 A.W.N.
(1898) 75.

Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under s. 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (1) referred to.

[R., 24 A. 242 (245); 27 C. 11 (17, 24)=3 C.W.N. 660; 7 Ind. Cas. 11 (14).]

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

KNOX, Acting C.J., and BANERJI, J.—The property claimed in the suit out of which this appeal has arisen belonged originally to one Ishk Lal. He was the son of Jai Singh, who was one of five brothers, namely, Hardayal, Sawai, Ram Nath, Chunni Lal and Jai Singh. Hardayal's son was Daulat Ram, the father of the plaintiffs appellants. The respondent Ramji Lal is the **[371]** brother of Ishk Lal. It is asserted on the one hand and denied on the other that Ramji Lal was adopted by his uncle Sawai. Ishk Lal died in 1884 leaving him surviving his widow Shama Kuar, and his two daughters Jai Dai and Dhapo. His estate came into the possession of his widow Shama Kuar, and on her death in 1886 it was taken possession of by Ramji Lal, defendant, and Daulat Ram the father of the plaintiffs. In 1889 Jai Dai for herself and as the next friend of her minor sister Dhapo brought a suit against Ramji Lal and Daulat Ram for possession of the estate of Ishk Lal on the ground that they were entitled to it in preference to those persons. On the 12th of August 1889 the parties to that suit agreed to refer their dispute to arbitration, and the Court granted permission to Jai Dai to enter into the agreement of reference to arbitration on behalf of her minor sister Dhapo. On the 29th of June 1890 the arbitrators made their award, and in accordance with that award a decree was made on the 5th of July 1890, whereby a portion of the property claimed was decreed to the two daughters of Ishk Lal. It is admitted that in pursuance of that decree possession was obtained by the daughters in respect of the property decreed to them. The present suit is for a partition of the remainder of Ishk Lal's property, and was brought against Ramji Lal alone by the plaintiffs, the sons of Daulat Ram, who has died since the decree of 1890. Ramji Lal in his defence pleaded the *jus tertii* of Musammat Dhapo, and set up a preferential title to the estate of Ishk Lal. Dhapo intervened and applied to be made a defendant under s. 32 of the Code of Civil Procedure. In spite of the objection of the plaintiffs her application was granted, and she was arrayed as a defendant to the suit. She urged in answer to the claim that she alone was entitled to the estate of Ishk Lal; that neither the plaintiffs nor anyone else had a right to that estate; that Jai Dai her sister had no right to that estate in preference to her; that the proceedings connected with the former suit and the reference to arbitration were fraudulent and were taken in collusion between Jai Dai and the father of the **[372]** plaintiffs and Ramji Lal, and that the decree in that suit was not binding on her. It was asserted by the plaintiffs that the decree was binding on Dhapo and

(1) 13 B. 137.

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that according to the custom prevailing among Saraogis, to which sect the parties to the suit belonged, a daughter could not inherit.

The lower Court has found in favour of Dhapo and dismissed the claim. The plaintiffs have preferred this appeal.

Mr. *Moti Lal* on behalf of the appellants asked our leave to urge the plea that Dhapo had been improperly made a defendant to the suit, her interest being adverse both to the plaintiffs and to the original defendant Ramji Lal. As no appeal had been preferred under s. 588 of the Code of Civil Procedure from the order adding Musammat Dhapo as a defendant to the suit, and as no plea was taken in the memorandum of appeal questioning the propriety of that order, we, following the ruling of this Court in *Tilak Raj Singh* v. *Chakardhari Singh* (1), refused to grant him the permission sought by him.

The main contention on behalf of the appellants is that the decree of 1890 is binding on Dhapo, and consequently it is no longer open to her to question the plaintiff's title as regards the property now claimed. There can be no doubt that if the decree of the 5th of July 1890 is binding on Dhapo the portion of the claim advanced on her behalf in the suit in which that decree was passed must, having regard to Explanation 3 of s. 13 of the Code of Civil Procedure, be deemed to have been dismissed, and it is no longer open to her to contend that she is entitled as against the plaintiffs to the property claimed in the former suit, but not decreed to her. If, however, she is in possession of that property, she may probably resist the claim on the ground that the plaintiffs are not entitled to recover the property without proving their own right to it. It is, however, not necessary to decide that question, as it has nowhere been suggested that she is in such possession. The plaintiffs stated in their plaint that they were in possession of the property in dispute jointly with Ramji Lal, **[373]** and although Ramji Lal in his defence pleaded the *jus tertii* of the daughters of Ishk Lal he did not assert that they were in possession of the property claimed. Dhapo in her written statement did not allege that she was in possession. That being so, if the decree in the former suit is binding on Dhapo, she cannot resist the claim of the plaintiffs. We have therefore to determine whether the decree of 1890 is binding on Dhapo. The lower Court has held that decree and the arbitration proceedings which preceded it not to be binding, on the ground that Dhapo being the unmarried daughter of Ishk Lal was entitled to his estate in preference to his married daughter Jai Dai, that Jai Dai had consequently an interest adverse to that of Dhapo and could not act as the next friend of Dhapo, and that all the proceedings connected with the suit brought by Jai Dai on behalf of Dhapo, including the arbitration proceedings, are null and void as against Dhapo. We may observe that the ruling in *Kalavati* v. *Chedi Lal* (2) on which the learned Subordinate Judge has relied has no bearing upon the question before us.

We are of opinion that so long as the decree of 1890 subsists it cannot be treated as a nullity. If it was obtained by fraud, or if for any other reason it is a decree which is prejudicial to the interests of Dhapo, she must get the decree set aside before she can avoid the operation of it. In this case the only ground on which the validity of the decree is impeached is that Jai Dai having an interest adverse to that of Dhapo could not, having regard to the provisions of s. 445 of the Code of Civil Procedure, act as the next friend of Dhapo. In the first place, we observe that she did not claim any specific share for herself ; in the next

(1) 15 A. 119.

(2) 17 A. 531.

1898
APRIL 15.

APPELLATE CIVIL.

20 A. 370=
18 A.W.N.
(1898) 75.

place, she was the *de facto* guardian of Dhapo, no other guardian being in existence. Moreover, under s. 3 of Act No. XL of 1858, which was in force when the former suit was brought, no guardian of a minor could sue on behalf of the minor without obtaining a certificate of guardianship or the leave of the Court to sue for the minor. In the present instance [374] it must be presumed that leave was granted by the Court to Jai Dai to sue on behalf of the minor (*Parmeshwar Das* v. *Bela* (1).) The further fact that the Court gave leave to Jai Dai to enter into the agreement of reference to arbitration on behalf of Dhapo also shows that the Court recognised her as a fit person to act as the next friend of Dhapo, and this notwithstanding the fact that the defendants to that suit questioned in their written statement the competency of Jai Dai to act as the next friend of Dhapo. If, as alleged in this case on behalf of Dhapo, the former proceedings were brought about by the fraud of Jai Dai, her remedy was to get the decree made in that suit set aside in the manner pointed out in *Karamali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2). In our opinion, as the decree of 1890 has not been set aside and is still a subsisting decree, it is binding on Dhapo, and it is not open to her to set up her own title as against the plaintiffs. The Court below has in our opinion erred in holding that the plaintiffs are not entitled to maintain the suit as against Dhapo. As we have said above, had Dhapo been in possession of any portion of the property now claimed, she might have put the plaintiffs to proof of their title, although she might not set up against them a title in herself, but she has not alleged that she is in possession, nor has she established her possession.

It has not been determined what the rights of the plaintiffs are as against Ramji Lal. In fact the case as between him and the plaintiffs has not been tried at all. This must now be done.

We allow this appeal, and, setting aside the decree below, we remand the case under s. 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to try it on the merits as against Ramji Lal. The plaintiffs will get their costs of this appeal. The costs hitherto incurred in the Court below will abide the event.

Appeal decreed and cause remanded.

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20 A. 375=18 A.W.N. (1898) 78.

[375] APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

RAHAM ILAHI KHAN AND OTHERS (*Plaintiffs*) *v.* GHASITA AND OTHERS (*Defendants*).* [18th April, 1898.]

Pre-emption—Mortgage by conditional sale—Limitation—Act No. XV of 1877 (Indian Limitation Act), sch. II, art. 120—Act No. IV of 1882 (Transfer of Property Act), ss. 86 and 87.

A plaintiff sued for pre-emption, his claim arising out of the foreclosure of a mortgage by conditional sale of a share in an undivided zamindari village.

* Second Appeal, No. 867 of 1894, from a decree of Syed Muhammad Sirajuddin, Additional Subordinate Judge of Meerut, dated the 20th August, 1894, confirming a decree of Babu Mohan Lal Huku, Additional Munsif of Meerut, dated the 22nd August 1893.

(1) 9 A. 508. (2) 13 B. 137.

Held (1) that the limitation applicable to the suit was that prescribed by art. 120 of sch. II of Act No. XV of 1877, and (2) that limitation began to run from the date when the mortgagee obtained an order absolute for foreclosure under s. 87 of Act No. IV of 1882. *Batul Begam* v. *Mansur Ali Khan* (1), *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (2), and *Anwarul Haq* v. *Jwala Prasad* (3) referred to.

[R., 20 A. 446; 24 A. 479 (481); 27 A. 501 (505) = A.W.N. (1905) 70 = 2 A.L.J. 180.]

1898
APRIL 18.

APPELLATE CIVIL.

20 A. 375 = 18 A.W.N. (1898) 78.

IN this case one Kamaruddin made a mortgage by way of conditional sale of a share in an undivided zamindari mahal in favour of one Sardar Khan on the 20th of September 1877. Sardar Khan brought a suit on this mortgage and obtained a decree for foreclosure under s. 86 of the Transfer of Property Act on the 12th of May 1884. The time limited by that decree for the payment of the decretal amount being six months expired on the 12th of November 1884. Payment was not made, but the mortgagee took no steps to obtain an order absolute under s. 87 till the year 1890. That order was obtained on the 19th of June 1890. On the 17th of April 1893 the suit out of which this appeal has arisen was brought for pre-emption of the mortgaged property. The Court of first instance (Additional Munsif of Meerut) dismissed the suit as barred by limitation, holding that limitation commenced to run from the date of the expiry of the time limited in the foreclosure decree for the payment of the mortgage-debt, namely, the 13th of November 1884. The plaintiffs appealed. The lower appellate Court [376] (Subordinate Judge of Meerut) for similar reasons dismissed the appeal. The plaintiffs appealed to the High Court.

Mr. *H. C. Niblett*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

KNOX, Acting C.J.—In the suit out of which this second appeal arises, a claim was made for pre-emption over a share in an undivided zamindari mahal. Both of the Courts below held that the right sued for had become barred by limitation, and the question which we have to consider is whether that claim was or was not so barred.

The facts, which are undisputed, are briefly as follows :—

One Kamaruddin made a mortgage by way of conditional sale on the 20th of September 1877, in favour of one Sardar Khan. Sardar Khan brought a suit and obtained a decree for foreclosure under s. 86 of the Transfer of Property Act. The conditional decree granted to him is dated the 12th of May 1884, and it fixed a period of six months, as required by that section, for payment. That date expired on the 12th of November 1884. Payment was not made, but the mortgagee took no steps for obtaining an order absolute under s. 87 until the 19th of June 1890. The plaint in the present suit for pre-emption bears date the 17th of April 1893. The Courts below held that the right to pre-empt accrued from the 12th of November 1884, and they accordingly held that the suit was barred. In a recent Full Bench judgment of this Court (*Batul Begam* v. *Mansur Ali Khan*) (1) has been held, affirming a previous Full Bench, that a share in an undivided zamindari mahal is not susceptible of physical possession in the sense of art. 10 of sch. II of Act No. XV of 1877, and further that the period of limitation for pre-emption in such case is governed by art. 120, which provides a period of six years. A second question, however, remains to be decided,

(1) 20 A. 315. (2) 16 C. 246. (3) 20 A. 358.

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APRIL 18.

APPELLATE CIVIL.

20 A. 375=
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(1898) 78.

and that is whether the date from which the right to pre-empt accrues runs from the conditional order made in the suit for foreclosure under [377] s. 86 or from the expiry of the six months of grace granted under the same section or again from the date of the order absolute passed under s. 87, of the same Act. In Second Appeal No. 1014 of 1896 decided by me on the 5th April 1898 (1), I held that the right to pre-empt accured, not from the date fixed in the decree under s. 86 as the date on which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtained the order absolute under s. 87 of the Transfer of Property Act, 1882. My reasons for the view I took are fully set out in that judgment, and I need say no more here than that I still adhere to the view I then took. The learned Advocate for the respondent argued that the date should be calculated from the time on which the mortgagor having failed to make payment within the time of grace would find any application made by him for further grace barred, namely, three years from the expiry of the period of grace. This point did not arise in Second Appeal No. 1014 of 1896. It has been considered by the High Court of Calcutta in the case of *Poresh Nath Mujumdar* v. *Ramjodu Mojumdar* (2). It was there held, and I agree with the view there taken, that the mortgagor could redeem at any time until the order absolute under s. 89 was made; in other words, that his right to redeem was not extinguished until such order was made. I am therefore of opinion that the view taken by the Court below was erroneous, and as that Court decided in error on a preliminary point I would set aside its decree and remand the suit to the Court of first instance under s. 562 of the Code of Civil Procedure.

BANERJI, J.—I am of the same opinion. Two questions arise in this appeal. The first is as to the period of limitation applicable to a suit of this nature; the second is as to the date from which limitation should be computed. The first question is concluded by the recent ruling of the Full Bench to which the learned Chief Justice has referred. The property being a share in [378] an undivided zamindari mahal is not capable of physical possession; therefore art. 10 of the second schedule of the Limitation Act is not applicable. There being no other specific article which can govern the suit, the only article which can apply would be art. 120, which prescribes a limitation of six years.

As regards the second question, I also agree in holding that limitation should be computed from the date on which the order absolute for foreclosure was made under s. 87 of the Transfer of Property Act. So long as the right of the mortgagor to redeem has not become extinct the mortgaged property does not vest absolutely in the conditional vendee. Section 87 provides that if payment is not made within the time fixed in the decree passed under s. 86, the plaintiff mortgagee may apply for an order that the mortgagor should be debarred absolutely of his right to redeem, and it further provides that on the passing of such order the debt secured by the mortgage shall be discharged. These provisions clearly show that so long as an order is not passed under that section the mortgagor's right to redeem and the mortgage-debt do not come to an end. Consequently it is only on the passing of an order under s. 87 that the mortgagee, conditional vendee, becomes the absolute vendee of the mortgaged property. That being so, a right to claim pre-emption in respect of a sale which has thus become absolute can only arise on the

(1) 20 A. 358.

(2) 16 C. 246.

date of the order absolute for foreclosure made under s. 87. The date from which limitation should be computed cannot be held to be the date on which the conditional vendee might have made his application for an order under s. 87, because, as I have said, until the conditional vendee obtains his order under s. 87 he continues to be the mortgagee, and it is only when he ceases to be the mortgagee and acquires the absolute right of the mortgagor that a claim for pre-emption can be preferred in respect of the transaction.

For these reasons I agree in holding that the plaintiff's claim was not barred, and that the Courts below have erred in [379] holding it to be so. I also agree in the order proposed by my learned colleague.

BY THE COURT.—The order of the Court is that the decrees of the Courts below are set aside, and the case is remanded to the Court of first instance with directions to re-admit it under its original number in the register and to proceed to determine the suit on its merits. The appellant will recover the costs of this appeal, and the costs hitherto incurred in the Courts below will abide the event.

Appeal decreed and cause remanded.

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20 A. 379 (F.B.)=18 A.W.N. (1898) 81.

FULL BENCH.

Before Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

SHIAM BEHARI LAL AND ANOTHER (*Defendants*) *v.* RUP KISHORE AND OTHERS (*Plaintiffs*).* [20th April, 1898.]

Civil Procedure Code, ss. 312 and 320—Act No. VII of 1888, ss 30 and 55—Execution of decree—Decree transferred to Collector for execution—Suit by auction-purchaser to confirm a sale which had been set aside by the Collector.

At a sale of ancestral property held by a Collector executing a decree transferred to him under s. 320 of the Code of Civil Procedure the plaintiffs, decree-holders, were the auction purchasers. On the application of the defendants, judgment-debtors, the sale was set aside by the Collector. Thereupon the plaintiffs, decree-holders, auction-purchasers, filed a suit for a declaration that the auction sale was a valid one and that the order of the Collector setting it aside was ineffectual. *Held* that such a suit was maintainable.

Shib Singh v. *Mukat Singh* (1) overruled. *Ugar Nath Tiwari* v *Bhonath Tiwari* (2) and *Diwan Singh* v. *Bharat Singh* (3) referred to.

[F., 25 A. 355 (357); R., 5 N.L.R. 121=3 Ind. Cas. 572 (573).]

THE plaintiffs in this case obtained a decree against the defendants, and in execution thereof they obtained an order for the sale of the ancestral property of the defendants. In accordance [380] with the rules prescribed by Government in respect of the sale of ancestral property, the execution of the decree was transferred to the Collector under s. 320 of the Code of Civil Procedure. The property of the defendants was put up for sale on the 20th of September 1893 and was purchased by the plaintiffs with the leave of the Court. The defendants then applied to have the sale set aside on the ground of irregularity in the publication of the sale. The Collector, by his order of the 16th of November 1893, set the

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* Second Appeal, No. 1053 of 1895, from a decree of Lala Pyare Lal, Officiating Judge of Mainpuri, dated the 20th July 1895, confirming a decree of Maulvi Mazhar Husain, Subordinate Judge of Mainpuri, dated the 25th September 1894.

(1) 18 A. 437. (2) 11 A.W.N. (1891) 41. (3) 3 A. 206.

1898
APRIL 20.
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FULL
BENCH.
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20 A. 379
(F.B.) =
18 A.W.N.
(1898) 81.

sale aside. Thereupon the plaintiffs brought the present suit for a declaration that the auction sale was a valid one and that the order of the Court setting it aside was ineffectual. The Court of first instance (Subordinate Judge of Mainpuri) decreed the claim. The defendants appealed. The lower appellate Court (District Judge of Mainpuri) dismissed the appeal. The plaintiffs appealed to the High Court, and were there permitted to take the plea which had not been taken in their memorandum of appeal, that no such suit as that brought by the plaintiffs would lie. This question wasreferred to a Bench of three Judges.

Mr. *Roshan Lal* and Munshi *Gobind Prasad*, for the appellants.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents.

The judgment of the Court (BLAIR, BANERJI and AIKMAN, JJ.) was delivered by BANERJI, J.

JUDGMENT.

The simple question referred to this Bench is whether the present suit is maintainable. The facts out of which the suit arose were these. The plaintiffs obtained a decree against the present defendants, and in execution thereof they obtained an order for the sale of the ancestral property of the defendants. In accordance with the rules prescribed by Government in respect of the sale of ancestral property, the execution of the decree was transferred to the Collector under s. 320 of the Code of Civil Procedure. The property of the defendants was put up for sale on the 20th of September 1893 and was purchased by the plaintiffs with the leave of the Court. The defendants then [381] applied to have the sale set aside on the ground of irregularity in the publication of the sale. The Collector, by his order of the 16th of November 1893, set the sale aside. Thereupon the present suit was brought by the plaintiffs for a declaration that the auction sale was a valid one and that the order of the Collector setting it aside was ineffectual. The Court of first instance decreed the claim, and the Court of first appeal affirmed the decree of the first Court. The defendants prefer this appeal and the learned counsel who appears for them obtained the leave of the divisional Court which referred the case to this Bench to argue the question whether the suit was maintainable. In support of the contention raised on behalf of the appellants is the ruling of this Court in *Shib Singh* v. *Mukat Singh* (1). On the other hand, the contrary opinion is supported by the ruling in *Ugar Nath Tiwari* v. *Bhonath Tiwari* (2). In consequence of these conflicting rulings the question whether a suit of this kind can be maintained has been referred to this Bench. The decision in the case last mentioned followed the decision of the majority of the Full Bench in the case of *Diwan Singh* v. *Bharat Singh* (3). That case was decided with reference to the provisions of s. 312 of Act No. X of 1877. Act No. XIV of 1882 has made no alteration in the wording of s. 312. There can be no doubt that the last paragraph of that section is not happily worded. An order under that section must be either an order confirming the sale or an order setting aside the sale. An order of the latter description cannot be sought to be set aside on the ground of irregularity, that is, of the existence of irregularity in publishing or conducting the sale. The suit which is forbidden by the last paragraph of the section cannot therefore be a suit to set aside any order passed under the section, but must be

(1) 18 A. 437. (2) 11 A. W. N. (1891) 41. (3) 3 A. 206.

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a suit to set aside an order passed under the first paragraph of the section only. Consequently, as held by the majority of the Full Bench in the case referred to, there is no prohibition against the [382] institution of a suit to set aside an order refusing to confirm a sale unless by subsequent legislation an alteration has been made in the law in respect of the maintenance of such a suit. We must assume that when the Legislature re-enacted in Act No. XIV of 1882 the provisions of s. 312 of Act No. X of 1877 it did not intend to make any alteration in the law as it was interpreted by the majority of the Full Bench in the case referred to. The learned Judges who decided the case of *Shib Singh* v. *Mukat Singh* (1) were of the opinion that Act No. VII of 1888, by which s. 320 of Act No. XIV of 1882 was amended, took away from the Civil Courts the right to entertain a suit for the confirmation of a sale which had been set aside by the Collector in the exercise of the powers given to him under the rules framed by the Government in pursuance of the provisions of s. 320 as amended by Act No. VII of 1888. With this opinion we are unable to agree. By s. 30 of Act No. VII of 1888 the third, fourth and fifth paragraphs of s. 320 as they now exist were added. The third paragraph empowers the Government to frame rules conferring upon the Collector or any gazetted subordinate of the Collector the powers which the Court which transferred the decree to the Collector might exercise in execution of the decree, if the execution thereof had not been transferred to the Collector. Such rules have been framed by the Government. The penultimate paragraph of that section provides that the powers conferred on the Collector, or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, by the rules so framed, cannot be exercised by the Court or by any Court exercising appellate or revisional authority in respect to the decrees or orders of that Court. The words "the Court" clearly refer to the Court alluded to in the previous portion of the section, namely, the Court to which application was made for the execution of the decree and which as such Court transmitted the decree to the Collector for execution. So that the penultimate paragraph of [383] s. 320 as amended by Act No. VII of 1888 does not take away the jurisdiction of any Court other than the Court referred to in it. If the execution of the decree had taken place in the Civil Court which transmitted it to the Collector, a suit of the nature of the present suit would, under the Full Bench ruling in *Diwan Singh* v. *Bharat Singh* (2), have been maintainable. The fact that the Collector exercises the powers which the Civil Court could have exercised but for the provisions of s. 320 and the rules framed under it cannot deprive the ordinary Civil Courts of the jurisdiction to entertain such a suit. For the above reasons our answer to the reference is that the suit is maintainable.

Both the parties consent that this appeal be decided by this Bench. As the only point which really arises in this appeal was the plea which has been disposed of by the above decision and the other pleas in the memorandum of appeal have been abandoned, the result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 18 A. 437.

(2) 3 A. 206.

1898
APRIL 21.

APPEL-
LATE
CIVIL.

20 A. 383 =
18 A.W.N.
(1898) 82.

20 A. 383 = 18 A.W.N. (1898) 82.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

GIRDHAR DAS AND OTHERS (*Decree-holders*) *v.* HAR SHANKAR PRASAD (*Judgment-debtor*).* [21st April, 1898.]

Execution of decree—Limitation—Civil Procedure Code. s. 326—Execution as to immoveable property of judgment-debtors stayed by reason of the property being in charge of the Collector.

The plaintiffs obtained in 1874 a decree for money against the defendant. In 1879, by an order under s. 326 of the Code of Civil Procedure, the immoveable property of the judgment-debtor was placed under the management of the Collector. Before this order was made, and during the period when the judgment-debtor's property was in charge of the Collector, various applications for execution were made by the decree-holders. Finally, in 1896, about [384] ten years after the last preceding application, the decree holders applied for execution of their decree shortly after the property had been released by the Collector. *Held* that as regards the immoveable property of the judgment-debtors, against which execution was sought, the application was not barred by limitation, inasmuch as the decree-holders had no remedy by execution against that property until the Collector's management had ceased.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Baldeo Ram Dave* and Babu *Baidiya Nath Das*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.—This is an appeal against an order dismissing an application for a certificate of non-satisfaction of a decree which prayed that the decree be sent to the Court of the Judge of Ghazipur for execution. The admitted facts are these. The decree was passed in 1874 and several applications for execution were made respecting it down to October 1879. In October 1879, by an order passed under s. 326 of the Code of Civil Procedure, the Collector of Ghazipur was authorised to provide for the satisfaction of decrees due and outstanding against the judgment-debtor, one Babu Har Shankar Prasad. Under the provisions of s. 326 the Collector is armed with all the powers given by ss. 320 to 325-C, both inclusive, and all the provisions of those sections apply in such a case. The appellants here applied to the Collector to have satisfaction of their decree, but the request was refused, as will be seen from the case of *Girdhar Das* v. *The Collector of Ghazipur* (1). It is quite unnecessary here to discuss the reasons why the appellants' application for satisfaction of their decree was refused by the Collector. Suffice it to say that it was refused. The appellants appear to have made some subsequent applications in 1880 and 1886, the results of which we do not know. The present application was made in July 1896, that is, not long after the Collector had completed the duties imposed on him by ss. 322 to 326. It was urged in the [385] Court below that the application was time-barred, and the learned Subordinate Judge has affirmed that contention. In our opinion the decision appealed

* First Appeal, No. 149 of 1897, from a decree of Babu Nilmadhub Rai, Subordinate Judge of Benares, dated the 27th March 1897.

(1) 16 A.W.N. (1896) 69.

against is not correct. We have no doubt that under the last clause of the first paragraph of s. 325-A no Court could have issued any process of execution on the appellant's decree against any immoveable property in the district of Ghazipur belonging to the judgment-debtor as long as it was in the hands of the Collector. It may be that execution might have issued against the person or moveable property of the judgment-debtor, but with that we have no concern now. Turning now to the last paragraph of s. 325-A we find that, so long as the Collector is able to exercise any of the powers or duties imposed on him by ss. 320 to 325-C, which in this case was the period from October 1879 to March 1896, the period during which he exercised such powers shall be excluded from the period of limitation applicable to the execution of any decree affected by the provisions of s. 325-A in respect of any remedy of which the decree-holders have thereby, that is under this section, been temporarily deprived. Now we have no doubt that the decree in question here was affected by the provisions of s. 325-A, inasmuch as the last clause of the first paragraph of s. 325-A prevented a Civil Court in execution of a decree for money from issuing any process against the judgment-debtor's immoveable property in the hands of the Collector. The decree in this case is a decree for money. It follows therefore that the decree-holders were thereby, that is by the last clause of the first paragraph of s. 325-A, temporarily deprived of remedy against the immoveable property of their judgment-debtor in the district of Ghazipur. We think therefore that in respect of the property as to which they were temporarily deprived of their remedy, the decree-holders are now entitled to execution. But we desire to make it clear that the execution can be in respect only of the property referred to in the last clause of s. 325-A, that is to say, the property as to which their remedy for execution was **[386]** temporarily withheld. We allow this appeal. We set aside the decree of the lower Court with costs, and we direct that Court to issue a certificate of non-satisfaction if the decree has not been satisfied. The appellants will have their costs in this Court.

Appeal decreed.

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20 A. 386 = 18 A.W.N. (1898) 83.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

HAMID-UD-DIN (*Judgment-debtor*) *v.* KEDAR NATH (*Decree-holder*).*
[22nd April, 1898.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *s.* 90—*Application for decree over against non-hypothecated property—Balance legally recoverable—Limitation.*

On an application under s. 90 of the Transfer of Property Act, 1882, the time to be looked at in considering whether the balance sought to be recovered is legally recoverable from the mortgagor is the date of the institution of the suit and not the date of the making of the application under s. 90. *Bageshri Dial* v. *Muhammad Naqui* (1) referred to.

[R., 30 A. 388 = 5 A.L.J. 670 = A.W.N. (1908) 161 ; 33 C. 867 (874) = 4 C.L.J. 141 ; 3 A. L.J 403 ; A.W.N. (1901) 193 ; 19 A.W.N. (1899) 72 ; 6 O.C. 30 (32).]

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* Second Appeal, No. 165 of 1896, from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 16th December 1895, reversing a decree of Babu Bhawani Chandar Chakravarti, Munsif of Sambhal, dated the 7th September 1895.

(1) 15 A. 331.

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20 A. 386 = 18 A.W.N. (1898) 83.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for a decree under s. 90 of Act No. IV of 1882. The judgment-debtor is the appellant before us, and the grounds taken by him are two:—first, that the application was barred by limitation, and secondly, that the matter is *res judicata* in consequence of the decree passed in the original suit. The suit was one for sale upon a mortgage of the 16th of September 1889. The amount secured by the mortgage was payable on demand, and the mortgage-deed was a registered instrument. The suit for sale was brought on the 29th of January 1891. The plaintiff asked for a decree not only for sale of the mortgaged property, but also against the person and the other property of the mort-[387]gagor. The Court of first instance refused to make a decree against the person of the mortgagor and aganist the other property, and limited its decree to one for sale of the mortgaged property. That decree was affirmed by the Court of first appeal, which held that the claim for a decree against the mortgagor's person and other property was premature. The mortgagee caused the mortgaged property to be sold in execution of the decree obtained by him. The proceeds of the sale having proved insufficient to pay the amount due to him, he made the present application on the 3rd of August 1895 for a decree under s. 90 of Act No. IV of 1882. It is contended that since the Court in the original suit refused to make a decree against the person of the mortgagor and against non-hypothecated property, it is not open to the decree-holder now to ask for such a decree under s. 90. We are unable to accede to this contention. We agree with the observations contained in the judgment of this Court in *Musaheb Zaman Khan* v. *Inayat Ullah* (1). In that judgment it was observed:—"In our opinion s. 13 of the Code of Civil Procedure would not apply to an application under s. 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief, had been allowed or disallowed by the Court when making the decree under s. 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under s. 88 had been exhausted." As regards the second plea, namely, that of limitation, we have to consider whether, under s. 90, the balance which must be legally recoverable should be a balance which might be legally recoverable on the date of the institution of the suit or on the date of the application for a decree under the section. We are clearly of opinion that the former is the date which must be looked to. If we were to hold otherwise, serious injustice might result. The debt might be a debt not barred by limitation and legally recoverable from the mortgagor personally on the date [388] of the institution of the suit, if the mortgagee chose to ask for a decree against his person only. If he sued for sale, the proceedings connected with the sale might be protracted, as they often are, for such a length of time that the mortgagee's personal remedy, if he were to claim such remedy after the sale, would be barred. This certainly could not have been contemplated by the Legislature. Our view is supported by the

(1) 14 A. 513.

observations contained in the ruling already quoted, and also by the judgment of our brother Burkitt in *Bageshri Dial* v. *Muhammad Naqi* (1). For these reasons we are of opinion that if the balance would have been legally recoverable from the mortgagor otherwise than out of the mortgaged property at the date of the institution of the suit, the mortgagee would be entitled to a decree under s. 90. We have next to consider whether on the 29th of January 1891, when the suit of the decree-holder was brought, the balance now sought to be realized was legally recoverable personally from the mortgagor. The lower appellate Court has found that payments were made of interest as such on the 22nd of June 1884 and the 26th of February 1886. As the period of limitation for a suit personally against the debtor was six years, by reason of the mortgage-deed being registered, these payments save the operation of limitation under s. 20 of the Indian Limitation Act, as the first payment was made within six years of the date of the bond, that being the date on which limitation began to run, and the suit was brought within six years of the date of the second payment. Moreover, the lower appellate Court has found that letters acknowledging liability were written by the debtor on the 13th of September 1885 and the 17th of June 1888; from the dates of those letters also the suit was, with reference to s. 19 of the Limitation Act, within time. For the above reasons we hold that the balance now claimed was legally recoverable, and the lower appellate Court has rightly overruled the objection of the judgment-debtor.

We dismiss this appeal with costs.

Appeal dismissed.

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20 A. 389=18 A.W.N. (1898) 84.

[389] REVISIONAL CRIMINAL.

Before Mr. Justice Dillon.

QUEEN-EMPRESS v. CHITTAR AND ANOTHER.* [25th April, 1898.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 215—*Agreeing or consenting to take illegal gratification—Nature of agreement or consent.*

In order to constitute the offence punishable under s. 215 of the Indian Penal Code, it is necessary that the person who is willing to take and the person who is willing to give the illegal gratification, must agree not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take.

[R., 1 Cr.L.J. 1116=2 L.B.R. 310]

THIS was an application for revision of an order passed by a Deputy Magistrate of the Muzaffarnagar district convicting the petitioners Chittar and Nisar of an offence punishable under s. 215 of the Indian Penal Code, and sentencing them each to eighteen months' rigorous imprisonment. The order in question was confirmed on appeal by the Sessions Judge of Meerut on the 14th of March 1898.

It appears that a bullock belonging to one Boli was stolen on the night of the 2nd of January 1898. Boli, who was a resident of the village Bhahisa, took with him certain of the residents of that village and

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* Criminal Revision, No. 154 of 1898.

(1) 15 A. 331.

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REVISIONAL CRIMINAL.
20 A. 389 = 18 A.W.N. (1898) 84.

proceeded to the adjoining village of Harya Khera, of which village Chittar was the headman and Nisar the lambardar. There a panchayat was called at which Chittar and Nisar were both present. At that meeting the petitioners demanded thirty rupees as a reward for returning the bullock. Boli declined to pay this sum, but offered fifteen rupees, which offer was refused by the petitioners, and the negotiation therefore fell through. A few days afterwards another interview took place between the parties, when the demand and offer above indicated were renewed, and with a similar result.

It was argued on these facts that there had been neither an agreement nor consent to take a gratification within the meaning [390] of s. 215 of the Indian Penal Code, nor an attempt to commit the offence defined by that section.

Mr. *W. Wallach*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

DILLON, J.—This is an application for revision of an order passed by Pandit Prem Nath, Deputy Magistrate of Muzaffarnagar, convicting the petitioners of an offence under s. 215 of the Indian Penal Code, and sentencing them to eighteen months' rigorous imprisonment each, which order was confirmed upon appeal by the Sessions Judge of Saharanpur on the 14th of March 1898.

The facts upon which the conviction was had are as follows:—A bullock belonging to Boli, the complainant in this case, was stolen on the night of the 2nd of January of this year. Boli, who was a resident of Bhahisa, took with him certain of the residents of that village and proceeded to the adjoining village of Harya Khera, of which the petitioner Chittar is the headman and the petitioner Nisar the lambardar. There a panchayat was called, at which the two accused were present. What happened at that meeting of the villagers is deposed to by the witnesses for the prosecution in this case. It is in evidence, and has been found as a fact by both the lower Courts, that the petitioners demanded thirty rupees as a reward for returning the bullock. The complainant declined to pay this sum, but offered fifteen rupees, which offer was refused by the petitioners, and the negotiation therefore fell through. A few days afterwards another interview took place between the parties, when the demand and offer above indicated were renewed, and with a similar result.

It is upon this statement of facts that the question arises whether the petitioners have committed an offence under s. 215 of the Indian Penal Code, or whether they are guilty of an attempt to commit such offence.

The provisions of the section are as follows:—"Whoever takes, or agrees or consents to take, any gratification under [391] pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description. * * * * *"

In the first place, I will consider the question whether the petitioners have committed the offence punishable under this section. Did the petitioners take, or agree or consent to take, any gratification? I think not. To my mind the words "takes, or agrees or consents to take," as used in this section imply that the person taking the gratification and the person giving it

have agreed, not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take. Of course, if a person has actually taken a gratification from another, it must be assumed that he agreed to take, and the other to give it in that particular form or shape; but where the gratification has not actually passed and there is a disagreement as to the form or shape that the gratification is to take, the idea of agreement or consent is negatived. In this view, the petitioners neither took nor agreed nor consented to take any gratification, and did not therefore bring themselves within the purview of s. 215 of the Indian Penal Code. It remains to consider whether they are guilty of an attempt to commit the offence mentioned in s. 215 of the Indian Penal Code. In my opinion, an attempt to take a gratification within the meaning of s. 215 of the Indian Penal Code necessarily includes the idea of a concurrence of wills between the giver and taker; with this much superadded thereto, that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking.

Holding, as I do, this view of the law, it follows that in my opinion the petitioners have committed neither the offence made [392] punishable by s. 215 of the Indian Penal Code nor that made punishable by s. 215 read with s. 511 of the Indian Penal Code; and it only remains to add that, acquitting them of the charge on which they have been convicted, I reverse their convictions under s. 215 of the Indian Penal Code and the sentences passed on them thereunder, and as the petitioners are on bail, I direct that their bail bonds be cancelled.

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20 A. 392 = 18 A W.N. (1898) 88.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

NAND KISHORE LAL (*Defendant*) *v.* SURAJ PRASAD (*Plaintiff*).*
[28th April, 1898.]

Act No. IV of 1882 *(Transfer of Property Act), ss.* 122 *and* 123—*Gift—Registration—Registration of deed of gift of immoveable property after the death of the donor.*

A gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor. *Hardei* v. *Ram Lal* (1) referred to.

[**F.**, 32 B. 441 = 10 Bom. L.R. 536; **Appr.**, 33 C. 584 = 4 C.L.J. 340 = 10 C.W.N. 717; **R.**, 9 A.L.J. 300 (303) = 14 Ind. Cas. 61 (62).]

THE facts of this case sufficiently appear from the judgments of the Bench.

Mr. *Abdul Raoof* and Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENTS.

BLAIR, J.—The suit out of which this second appeal arises was a suit in which the heir-at-law of Gaya Prasad claimed possession of property

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* Second Appeal No. 218 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 4th February 1896, reversing a decree of Pandit Rai Indar Narain, Subordinate Judge of Gorakhpur, dated the 12th November 1895.

(1) 11 A. 319.

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20 A. 392=
18 A.W.N.
(1898) 88.

late of Gaya Prasad. The defendant set up a deed executed by Gaya Prasad and alleged to be duly registered, which purported to be a deed of gift transferring to the defendant the property in question. The Court of first instance dismissed the plaintiff's claim, holding the deed of gift to be a valid transfer to the defendant of the property in question. The Court of first appeal reversed the decision of the Court of first instance upon **[393]** the finding that no good and valid deed of gift had ever been executed by Gaya Prasad and "completed by the donor, who died before it could be registered." That finding disposes of the appeal. The learned Judge did not enter upon the other questions raised in it. The defendant appeals to this Court upon the contention that under the circumstances of the case the deed in question is a good gift in law. The other grounds of appeal were not argued by the appellant's advocate, such arguments in his opinion being unnecessary at this stage. The provisions of the Transfer of Property Act in relation to deeds of gifts are to be found in ss. 122 and 123. S. 122 defines gift, such definition covering all gifts whether of moveable or immoveable property. S. 123 in its first clause deals with instruments by which transfer by way of gift may be made of immoveable property. There is a condition for the validity of every gift laid down in s. 122 that there must be an acceptance by the donee during the lifetime of the donor and while he is still capable of giving. It might have well been provided by the Legislature, had it so intended, that such acceptance could not be effectively given until after the deed of gift had been registered. I find no such provision in that section, and am not inclined to impose restrictions not expressly enacted by law. S. 47 of the Registration Act provides that a registered deed shall operate from the time from which it would have commenced to operate if no registration thereof were required or made, and not from the time of its registration. In this case beyond doubt registration was effected *post mortem*, and we have the authority of the Full Bench case of *Hardei* v. *Ram Lal* (1) that such registration is not open to dispute. The question whether a good and valid acceptance of a gift may be made, in the case of immoveable property, before registration, is not expressedly decided in that case, but the effect of the decision apparently was to uphold the deed of gift in the case where the acceptance had been effected previous to registration. The result is that I would set aside the decree of the learned **[394]** Judge and remand the case under s. 562 of the Code of Civil Procedure for disposal upon the merits. I would also grant the appellant costs of this appeal.

AIKMAN, J.—I also am of opinion that this appeal must be allowed, and I concur in the order proposed. The plaintiff's suit was to recover possession of the disputed property. This suit was resisted by the defendant on the strength of a deed of gift executed in his favour by Gaya Prasad, the last owner of the property. The Court of first instance found in favour of this deed of gift and dismissed the plaintiff's claim. The plaintiff appealed to the District Judge. The first ground set forth in the memorandum of appeal to the lower Court is as follows:—"It is admitted by the lower Court that the deed of gift in dispute was not registered during the life-time of the donor, therefore its registration after the death of the donor is not sufficient to transfer the property." This plea was given effect to by the learned Judge. He says:—"As a matter of fact, there was no deed of gift completed by the donor, who died before it could be registered. The document was subsequently registered by the

(1) 11 A. 319.

donor's widow, and respondent contends that this registration completed the gift. It did nothing of the sort. The registration may have been all right under s. 35 of the Registration Act, and the document as being registered is fully admissible in evidence. But registration will not make a gift. The donee cannot accept until the donor has divested himself of his title. The donor can only divest himself of his title by a registered deed, and when the donor in this case died, there was no registered deed in existence." The learned District Judge has by the above decision held that s. 123 of the Transfer of Property Act means that in order to be valid a deed of gift of immoveable property must be registered during the life-time of the donor. In my opinion there is no ground for so holding. The word "registered" is defined in s. 3 of the Transfer of Property Act, and there cannot be any doubt that the deed in question is a registered deed within the meaning of the definition. Section 4 of the same Act also provides that s. 123 **[395]** shall be read as supplemental to the Indian Registration Act of 1877. There can be no doubt then with reference to these sections that the deed of gift is a "registered instrument." The Legislature might, had it seen fit, have enacted that for the purposes of making a gift of immoveable property, the transfer must be effected by an instrument signed by or on behalf of the donor, attested by at least two witnesses, and registered in the life-time of the donor. But that is not what has been enacted. For the above reasons I am of opinion that the view taken by the District Judge is erroneous.

BY THE COURT.—The Order of the Court is that the appeal is allowed, the decree of the lower appellate Court is set aside, and the case remanded under the provisions of s. 562 of the Code of Civil Procedure for decision of the other grounds raised in the memorandum of appeal to the lower Court. The appellant will receive his costs of this appeal.

Appeal decreed and cause remanded.

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20 A. 395=18 A.W.N. (1898) 89.

MISCELLANEOUS CIVIL.

Before Mr. Justice Aikman.

MUHAMMAD SAFDAR HUSEN (*Defendant*) *v.* PURAN CHAND AND OTHERS (*Plaintiffs*).* [4th May, 1898.]

Civil Procedure Code*, s. 25—*Transfer—Application to High Court after rejection of a similar application by the District Judge—Application disallowed.

Where an application to a District Judge to transfer a suit pending in the Court of the Subordinate Judge to his own file had been granted, the High Court declined to entertain an application for transfer of the same suit from the Court of the District Judge. *Farid Ahmad* v. *Dulari Bibi* (1) referred to.

[Expl., 11 C.L.J. 218 (219)=5 Ind. Cas. 771.]

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr *Conlan* and Mr. *W. K. Porter*, for the applicant.

Pandit *Moti Lal*, for the opposite parties.

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* Miscellaneous Application, No. 94 of 1898.

(1) 6 A. 233.

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MISCELLANEOUS CIVIL.

20 A. 395 = 18 A.W.N. (1898) 89.

ORDER.

AIKMAN, J.—This is an application asking this Court to transfer a civil suit now pending in the Court of the District [396] Judge of Cawnpore to the Court of some native Subordinate Judge. The application is made by the defendant in the suit. A rule was obtained calling upon the plaintiff to show cause why the transfer asked for should not be made. The parties have appeared to-day. I have heard the arguments of counsel on each side and considered the affidavits and counter-affidavits filed by the plaintiffs and the defendant. In my opinion the rule must be discharged It appears that the suit was instituted in the Court of the Subordinate Judge of Cawnpore on the 27th of March 1897. Owing to the pressure of case work in that Court, the date fixed for the trial of the case was the 2nd of January 1899. On the ground that some of the witnesses who were to be examined were advanced in years, the plaintiffs moved the District Judge to call up the case to his own file in order that it might be taken up at an early date. The District Judge granted this application, and fixed the 30th of March 1898, as the date upon which the case was to be taken up. Before it came on hearing the rule referred to above was obtained. The learned advocate for the plaintiffs in showing cause argued on the strength of the ruling in *Farid Ahmad* v. *Dulari Bibi* (1), that this Court ought not to grant the application for transfer, as to do so would be to review an order passed by the District Judge under s. 25 of the Code of Civil Procedure, which in the case cited it was held this Court was incompetent to do. I am of opinion there is force in this contention. I am further of opinion that on the merits, and with reference to the counter-affidavit filed by the plaintiffs, sufficient cause has not been shown for removing the suit from the Court of the District Judge. If the parties think that the District Judge is not sufficiently acquainted with the character in which the disputed signatures are written, it will be open to them to call the evidence of experts. For the above reasons I discharge the rule with costs. Under rule 213 of the Rules of Court of the 18th of January 1898, I fix the advocate's fee at Rs. 64.

Rule discharged.

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20 A. 397 = 18 A.W.N. (1898) 93

[397] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

PIRBHU NARAIN SINGH (*Decree-holder*) *v.* RUP SINGH (*Judgment-debtor*).* [4th May, 1898.]

Execution of decree—Duties of executing Court—Act No. IV of 1882 (Transfer of Property Act), s. 88—Decree for sale on a mortgage wrongly allowing interest after date fixed for payment.

Where a decree for sale under the Transfer of Property Act as framed is ambiguous, the Court executing it must put its own construction on it, and if possible will construe it as a decree properly framed according to law; but where

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* First Appeal, No. 216 of 1897, from an order of Maulvi Mubammad Mazbar Husain Khan, Subordinate Judge of Mainpuri, dated the 26th June 1897.

(1) 6 A. 233.

there is no ambiguity in the decree, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong. *Amolak Ram* v. *Lachmi Narain* (1) and *Badshah Begam* v. *Hardai* (2) referred to.

[R., 21 A. 361 (F.B.); 17 C.P.L.R. 164 (166).]

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MAY 4.

APPELLATE CIVIL.

20 A. 397 = 18 A.W.N. (1898) 93.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Parbati Charan Chatterji*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.:—This is an appeal from an order of the Subordinate Judge of Mainpuri passed in execution of a decree which Maharaja Pirbhu Narain Singh had obtained against Raja Rup Singh. The suit in which the decree was passed was a suit upon a mortgage for recovery of a sum of money secured by the mortgage by sale of the property mortgaged. The decree under s. 88 of the Transfer of Property Act was passed on the 27th of May 1895 and the order absolute under s. 89 of the same Act on the 6th of March 1896. The decree was then sent for execution to the Collector, as the property ordered to be sold was ancestral property. During the course of those proceedings, the judgment-debtor applied to the Subordinate Judge, objecting to the decree being executed for the full amount stated in the order absolute. The point he took was that the decree under s. 88 did not allow interest on the mortgage debt after the 27th of November 1895. The Subordinate Judge, disregarding the order absolute which had been passed on the 6th of March 1896, allowed the objection, and, by order **[398]** dated the 27th of June 1897, directed that all interest subsequent to the 27th of November 1895 should be disallowed, and ordered the execution clerk to "prepare a correct account" of the money due on the mortgage; that is to say, the Subordinate Judge practically directed the preparation of a new order absolute, notwithstanding that no appeal had been preferred against the order absolute prepared on the 6th of March 1896. In our opinion the latter order absolute is now final and conclusive in the case. It is contended by the respondent's vakil that his client was not properly served with notice of the application on which that order was made, and that he did not come to know of it until notice was served on him under s. 248 of the Code of Civil Procedure. Whether that statement be true or not is immaterial here. If the respondent was unaware of the proceedings taken to have that decree prepared, he might perhaps have applied under s. 108 of the Code of Civil Procedure to have that order absolute set aside, or he might have asked for a review of judgment, or he might have appealed against it to a higher tribunal. He adopted neither of these courses. That order absolute, as we have said before, is now final and conclusive, and this Court sitting as an execution Court cannnt enter into the question as to whether that order absolute, which is the decree in execution before us, was or was not properly prepared. All that this Court as an execution Court can do is to see that that decree is executed as it stands. There can be no doubt that the order absolute does give the decree-holder interest after the 27th of November 1895. On this finding it is almost unnecessary for us to enter into the question as to whether the decree under s. 88 passed on the 27th of May 1895 did or did not give interest after

(1) 19 A. 174.

(2) 18 A.W.N. (1898) 17.

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APPELLATE CIVIL.

20 A. 397=18 A.W.N. (1898) 93.

the 27th of November 1895. On that point, however, we have no doubt. That decree declared that on the date first mentioned Rs. 47,410-4 will be payable to the plaintiff. Of that sum Rs. 40,000 was the principal sum secured by the mortgage, Rs. 5,412 was for interest up to the date of suit as mentioned in the plaint, and the remainder, Rs. 1,998-4 were [399] for costs of the suit. This sum of forty-seven thousand four hundred and odd rupees did not include any interest after the date of the institution of the suit. The decree then goes on to provide for interest between the institution of the suit and the 27th of November 1895, by directing the judgment-debtor to pay Rs. 47,410-4-0 with interest during the pendency of the suit on the 27th of November 1895. It then went on to direct that the defendant should pay future interest at one per cent. *per mensem*. It does not in so many words say that that interest shall run up to the date of payment, but we have no hesitation in finding that such was the meaning and intention of the decree. Therefore, in our opinion the order absolute passed on the 6th of March 1896 was right in allowing interest subsequent to the 27th of November 1895. It was contended that the Court hearing the suit had no power to award interest after the 27th of November 1895, and in support of that proposition the case of *Amolak Ram* v. *Lachmi Narain* (1) was cited. In our opinion that case does not apply here, as explained by one of us in the case of *Badshah Begam* v. *Musammat Hardai* (2). If there were any ambiguity in the decree under s. 88 and the execution Court had to construe that ambiguous decree, the execution Court would no doubt be right in assuming that the decree was one strictly within the terms of the law and that it refused *post diem* interest. Such, however, is not the case here. We are of opinion that the decree under s. 88 clearly and unambiguously allowed interest subsequent to the 27th of November 1895. For the above reasons we are of opinion that the order of the Subordinate Judge must be reversed. We therefore allow this appeal, and, setting aside the order of the Subordinate Judge, we direct that execution shall proceed as heretofore on the order absolute of March 1896, by which interest was allowed after the 27th of November 1895. The appellant will have his costs in this Court.

Appeal decreed.

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20 A. 400=18 A.W.N. (1898) 94.

[400] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

BANDHU PRASAD (*Opposite party*) *v.* DHIRAJI KUAR (*Petitioner*).* [6th May, 1898.]

Act No VIII of 1890 (*Guardian and Wards Act*), s. 34—*Joint Hindu family—Guardian and minor—Court not competent to appoint a guardian to the property of a minor who is a member of a joint Hindu family.*

It is not competent to a Court to appoint a guardian to the property of a minor, when such minor is a member of a joint Hindu family and has no other property

* First Appeal. from Order No. 6 of 1898, from an order of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 20th December 1897.

(1) 19 A. 174. (2) 18 A. W. N. (1898) 17.

than his share in the joint family estate. *Jhabbu Singh* v. *Ganga Bishen* (1) and *Gurja* v. *Moher Singh* (2) referred to.

[R., 17 Ind. Cas. 473 (474) = 23 M.L.J. 706 (708) = 12 M.L T. 585.]

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MAY 6.

APPELLATE CIVIL.

20 A. 400 = 18 A.W.N. (1898) 94.

IN this case the District Judge of Azamgarh had appointed one Bandhu Prasad as guardian of the property of a minor relative, Shimbhu Nath. Bandhu Prasad and Shimbhu Nath were members of a joint Hindu family. The mother of Shimbhu Nath applied to the Judge's Court stating that Bandhu Prasad had been dealing with the minor's property adversely to the interests of the minor, and praying that the Court would take steps for the protection of the minor. On this petition the Court after hearing the parties ordered the guardian to find security in Rs. 30,000 under s. 34 of Act No. VIII of 1890, and to pay into Court a sum of Rs. 2,904-7-1 which had come into his hands by sale of some of the minor's property. From this order Bandhu Prasad appealed to the High Court.

Pandit *Moti Lal*, for the appellant.

JUDGMENT.

BURKITT and DILLON, JJ.—The order of the District Judge in this case cannot be supported. When in the application to be appointed guardian it was stated by the intending guardian that he and the intended ward were members of a joint and undivided Hindu family, and that the ward had no property other than his interest in the joint property, it was not competent to the Court to appoint a guardian of the property of the minor, and the application as far as it affected the property should have been rejected. This rule has been laid down in the case of *Jhabbu Singh* v. *Ganga Bishen*(1). See also *Gurja* v. *Moher Singh*(2) and also certain cases of the Calcutta and Bombay High Courts cited in *Jhabbu Singh* v. *Ganga Bishen*. We set aside the order passed relating to the grant of a certificate of guardianship of the property of the minor Shambhu Nath, and we cancel the certificate in that respect. If the certificate purports to constitute the appellant guardian of the person of the minor we refrain from interfering as to that matter. We allow this appeal.

Appeal decreed.

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20 A. 401 = 18 A.W.N. (1898) 90.

[401] APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

IMDAD HASAN KHAN (*Defendant*) v. BADRI PRASAD AND ANOTHER (*Plaintiffs*).* [6th May, 1898.]

Act No. IV of 1882 (Transfer of Property Act), s. 72—Mortgagee compelled to pay Government revenue which should have been paid by the mortgagor—Remedies of the mortgagee.

Where a mortgagee has been compelled to pay Government revenue which should have been paid by the mortgagor, the mortgagee may either add the amount which he has so been made to pay to the amount of the mortgage debt under s. 72 of the Transfer of Property Act, 1882, or he may sue the mortgagor

* First Appeal, No. 46 of 1896, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 7th November 1895.

(1) 17 A. 529.

(2) 16 A.W.N. (1896) 30.

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separately to recover the amount so paid. If, however, he has sued separately and obtained a decree against his mortgagor, he cannot then add the amount due to the mortgage debt; his two remedies are not concurrent.

[R., 18 Ind. Cas. 80 ; 6 O.C. 26 (27) ; 17 P.W.R. 1908 ; D., 11 M.L.J. 196.]

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, Mr. *Roshan Lal* and Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

KNOX, AG. C. J., and BANERJI, J.—This was a suit for redemption of a mortgage made on the 29th of November, 1871, by one Makhan Singh in favour of Imdad Hasan, defendant, the appellant before us. The mortgage was usufructuary **[402]** and was redeemable in the month of Chait. The mortgagee, instead of taking actual possession of the mortgaged property, granted a lease of it to the mortgagor on the 20th of December 1871. The rent reserved by the lease was equivalent to the interest payable on the mortgage, being Rs. 371-0-0 calculated at the rate As. 11 per cent. per mensem. Both the deeds were registered on the same date, namely, the 10th of January, 1872. On the 29th of July, 1876, Imdad Hasan, the mortgagee, sub-mortgaged the property to Chaudhri Jagan Singh and Chaudhri Man Singh, and on the 3rd of August, 1876, he executed an agreement in favour of the aforesaid persons undertaking to pay Rs. 540 per annum as interest. Man Singh died, leaving Anup Singh defendant as his heir. Under a private partition between Jagan Singh and Anup Singh the sub-mortgage was allotted to the share of Anup Singh, so that Jagan Singh has no longer any interest in the mortgaged property. In 1878 Makhan Singh sold twelve biswas out of the twenty biswas mortgaged by him to one Irfan Ali. Out of the amount of consideration for the sale-deed executed in favour of Irfan Ali the amount of the mortgage referred to above was left in his hands for payment to Imdad Hasan the mortgagee, but no payment was made by him. Mohan Lal, the father of the present plaintiffs, held several simple mortgages over the same property from Makhan Singh, all of dates subsequent to that of the mortgage of the 29th of November 1871. He obtained a decree upon his mortgages in 1883 against Makhan Singh and Irfan Ali, and in execution thereof he caused the property now in suit to be sold by auction and purchased it himself in 1886 and 1887.

It is by virtue of these purchases that the plaintiffs have brought the present suit for redemption of the mortgage of 1871. By the terms of the lease granted to Makhan Singh by Imdad Hasan the former was to pay the revenue payable to Government. Default having been made in the payment of revenue, Imdad Hasan paid the same, and brought a suit against **[403]** Makhan Singh and Irfan Ali and obtained a decree on the 24th of December, 1885, for recovery of the amount so paid by sale of the mortgaged village. In execution of that decree he caused a four biswa share to be sold in 1889 and purchased it himself. Subsequently he obtained other decrees against Makhan Singh for arrears of revenue and sought to bring the mortgaged property to sale. Mohan Lal, the father of the plaintiffs, preferred objections to the sale, and those objections prevailed. Thereupon Imdad Hasan brought a suit for possession against Makhan Singh, Irfan Ali and Mohan Lal and obtained a decree for possession on the 11th of December, 1893. In 1894 the plaintiffs brought a suit for redemption of the mortgage of 1871, but that suit was dismissed on the

ground that tender of the mortgage money had not been made in accordance with the terms of the mortgage in the month of Chait. The plaintiffs then deposited in Court Rs. 4,500-0-0 the principal amount of the mortgage, and brought the present suit for redemption against Imdad Hasan, the principal mortgagee, and Anup Singh, the sub mortgagee from Imdad Hasan.

The suit was defended on two grounds: first, that the four biswa share which Imdad Hasan had purchased at auction had absolutely passed to him, and that the plaintiffs had no right to claim redemption of that share, and, secondly, that a sum of Rs. 23,340-0-0 was due upon the mortgage, and unless payment of that sum was made the plaintiffs could not redeem. It was alleged that, in addition to the principal amount of the mortgage, Rs 10,897-3-5 were due on account of revenue payable for the mortgaged village, which the mortgagor had not paid, and which the mortgagee had paid for him, and for which he had obtained decrees against the mortgagor; that a further sum of Rs 7,942-13-0 was due on account of arrears of interest payable on the mortgage for the years 1289 to 1295 Fasli, the measure of the interest being the amount of profits payable under the lease granted to the mortgagor: and that these [404] two sums together with interest, amounted to the Rs. 23,340 referred to above.

The Court below has decreed the plaintiff's claim. It was of opinion that the Government revenue had all along been paid by Makhan Singh, the mortgagor, and that the mortgagee was not entitled to any amount on account of revenue. As for the profits, it held that there was no charge on the mortgaged property for the profits, and therefore it was not incumbent on the plaintiffs, in order to redeem the mortgage, to pay the arrears of profits that might be due to the mortgagee in his capacity of lessor.

The defendant mortgagee has preferred this appeal, and two questions have been raised on his behalf. First, whether the plaintiffs are entitled to claim redemption of the four biswa share purchased by Imdad Hasan, that is to say, what is the effect of the purchase of that share by Imdad Hasan, and, secondly, whether the mortgagee is entitled as such to the revenue paid and to unpaid profits.

As regards the first point we are of opinion that the contention of the appellant must fail. The principal ground upon which it is urged that it is no longer open to the plaintiffs to claim redemption of the four biswa share is, that in the suit brought by Imdad Hasan in 1893 he claimed proprietary possession of the four biswa share and obtained a decree. It appears, however, from the judgment of the Court in that suit (appellant's second book, page 1) that the question of proprietary right in regard to the four biswas was not determined in that suit. On the contrary, as we read the judgment, the Court abstained from deciding that question. It simply held that Imdad Hasan being the mortgagee of the whole property was entitled to the possession of it, and that it was immaterial whether he had acquired any other rights in regard to any portion of that property. In this view the plaintiffs are not precluded from raising the question whether they are entitled to redeem the four biswa share purchased by Imdad Hasan. It is true that the decree in execution of which that share was sold was a decree which directed the sale of the whole of the mortgaged [405] property, but at the time when that suit was brought the mortgaged property had passsd to Mohan Lal, the father of the plaintiffs, by virtue of the auction sales held in 1886 and 1887 at which he purchased the property. He was therefore a necessary party to Imdad Hasan's suit, and, as he was not

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impleaded in that suit, his right of redemption has not become extinct. Further, the mortgages in satisfaction of which Mohan Lal purchased the property were of dates prior to that of the charge created in favour of Imdad Hasan by the decree obtained by him in 1893, in execution whereof he caused that four biswa share to be sold. On this ground also the plaintiffs have priority over Imdad Hasan, and they are in our opinion entitled to sue for the redemption of the four biswa share referred to above. For these reasons we repel the first contention raised on behalf of the appellant.

The second contention of the appellant relates, as we have said above, to (1) the amount of revenue alleged to have been paid by the mortgagee for the mortgagor, and (2) the amount of profits payable under the lease taken by the mortgagor and not paid by him. Whilst it is urged on the one hand that the mortgage-deed and the lease constitute one mortgage transaction; that the relation between the parties as regards both the instruments is that of mortgagor and mortgagee; that the mortgagee is entitled under s. 72 of Act No. IV of 1882 to add the amount of the revenue paid by him to the principal amount of the mortgage; that the amount of profits payable under the lease is in reality the amount of interest payable under the mortgage, and that redemption cannot be effected without payment of the amounts referred to above; it is contended on the other hand that the lease is a separate transaction by itself; that the rights and obligations arising under it are rights and obligations which exist between a lessee and his lessor, and that the amount which might be due to the mortgagee in this character of lessor cannot be taken into account in the present suit. The determination of the question raised on behalf of the appellant therefore turns upon the construction to be placed on the mortgage-deed and the lease. In **[406]** considering the nature of the transaction entered into by the parties under those documents what we have to look to is the intention of the parties, whether both the documents were intended to be parts of one and the same transaction or whether one was meant to have no connection with the other. After giving the two documents our best consideration we have come to the conclusion that they form one and the same transaction, namely, a usufructuary mortgage, the condition of that mortgage being the conditions contained in both the deeds. Our reason for arriving at that conclusion is that one of the two deeds cannot be considered apart from the other. In the mortgage-deed reference is made to the lease, and the latter deed refers to the former. In the mortgage-deed mention is made of the payment of interest, but the amount or rate of interest or the mode of payment is not distinctly specified or provided for. All that it says is that the mortgagee has been put into possession in this way that the mortgagor has agreed to pay him lease money under a lease "by fixing the profits at the rate of 11 annas per cent. per mensem," and that at the time of redemption no reduction of interest would be asked for. The lease, however, provides for these matters in detail. It recites first the fact of the mortgage, and then states that the amount of the mortgage, Rs. 4,500, would be paid by four instalments, each payment being endorsed on the deed. Such a statement seems to be out of place in a deed which is a lease pure and simple. The deed next provides that after deduction from the principal of the amounts paid, "profits will be reduced in proportion to the reduction in the principal." It then goes on to say that the total amount payable, calculated at the rate of eleven annas per cent. per mensem, is Rs. 371, which is to be

paid to the "mortgagee" (not lessor) "year by year, harvest by harvest, instalment by instalment, within each year," and in "case of default in payment of the profits within the year, at the expiry of an instalment, interest at the rate of one rupee per cent per mensem will be charged."

If the transaction had been one of a lease independent of the mortgage, the rent reserved by the lease would not have been [407] calculated with reference to the amount of the mortgage, and it would not have been made liable to reduction proportionately to the reductions that might take place in that amount. It may, therefore, be reasonably inferred that the lease was only a mode adopted for the payment of interest on the mortgage money. Another circumstance which in our opinion indicates the true nature of the transaction is that the lease is terminable with the mortgage and cannot be surrendered so long as the mortgage subsists. Both the documents were completed on the same day and were presented for registration on the same date, *viz.*, the 10th of January, 1872. The lease, it is true, is of a date subsequent to the date of the mortgage-deed, but the fact that reference is made to the lease in the mortgage-deed shows that the whole matter was arranged and agreed upon at the same time, and the registration of both the documents on the same date shows that they were intended to take effect from the same date. These circumstances to our minds clearly indicate that the mortgage and the lease form one transaction, namely, that of a usufructuary mortgage, the lease providing the manner in which the usufruct was to be taken in lieu of interest. The relation between the parties is therefore that of mortgagor and mortgagee, and any rights and liabilities arising under the lease must be considered as arising out of that relation.

In this view the arrears of lease money due to the mortgagee must be deemed to be arrears of interest. As under the terms of the mortgage the mortgagee is entitled to remain in possession until the principal amount and interest have been realised, he has the right to continue in possession so long as the interest payable to him is in arrear, and the plaintiffs are not entitled to redeem without payment of the arrears. The lease money, *qua* lease money, was undoubtedly not a charge on the mortgaged property; but, *qua* interest it is a charge on the property, and the mortgagee is entitled to hold the property as security, not only for his principal mortgage money, but also for interest. We are of opinion that the plaintiffs must pay to the mortgagee the [408] arrears of interest due to him in addition to the principal, and that the Court below has erred in holding the contrary.

The amount of arrears due has in our opinion been calculated upon a wrong basis. The mortgagee-appellant has claimed as arrears Rs. 540 a year, that being the amount which he agreed to pay to his sub-mortgagees. As there was no privity between the mortgagor and the sub-mortgagees, there is none between the latter and the plaintiffs who stand in the shoes of the mortgagor, Makhan Singh. The plaintiffs are therefore liable only to pay the amount which Makhan Singh agreed to pay under the instrument of the 20th of December 1871, namely, Rs. 371 per annum, and, as default was made in the payment of that amount, they are liable to pay interest on the amount in arrear at the rate of one rupee per cent. per mensem. It is not denied that the amounts payable for the years mentioned in the statement appended to the written statement of Imdad Hasan (p. 11 of the Paper-book) have not been paid. We hold that the mortgagee Imdad Hasan is entitled to arrears of interest at the rate of Rs. 371 per annum and not at the rate claimed.

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As regards the amount of Government revenue alleged to have been paid, the obligation to pay the revenue was, under the terms of the contract embodied in the instrument of the 20th of December 1871, on the mortgagor. If the mortgagor did not pay that amount and the mortgagee had to pay it in order to protect the mortgaged property, he was competent under s. 72 of Act No. IV of 1882 to add the money so paid by him to the principal money. But he was also entitled to sue the mortgagor on his covenant for the amount paid for the mortgagor. He elected to pursue the latter remedy, and what he claims now is the amount of the decrees obtained by him on various dates. We are of opinion that the mortgagee having preferred to seek one remedy is no longer entitled to the remedy given to him by s. 72 of the Transfer of Property Act, 1882. The debt has become merged in the decrees, and is only payable under the decrees. We are unable to agree with the contention of the learned advocate for the **[409]** appellant that a mortgagee may at the time of redemption exercise the right given to him by s. 72, although he has already sought and obtained another remedy in respect of the same matter, and we have not been referred to any authority which supports this contention. The ruling of their Lordships of the Privy Council in *Hewanchal Singh* v. *Jawahir Singh* (1) cited by Mr. *Moti Lal*, does not, in our opinion, help him. The judgment of their Lordships is very brief, but it seems from the facts of the case that the tender made in that case was held not to be a sufficient tender within the terms of the mortgage-deed, inasmuch as the interest for the second year had not been paid at the close of that year. In our judgment the mortgagee is not entitled to concurrent remedies. Any other conclusion may lead to anomalous results and cause serious injury to the mortgagor. As has happened in this case, the mortgagee may have assigned to strangers the decrees obtained by him against the mortgagors. There would be nothing to preclude the assignees from executing the decrees transferred to them, and, if the mortgagee may add to the principal money the amounts for which he has obtained his decrees, the mortgagors may have to pay the same amount twice over. In our opinion the claim for the revenue alleged to have been paid by the mortgagee and for which he has obtained decrees cannot be sustained, and it is not stated that any other amount is due for which he has not obtained a decree.

The result is that in our judgment the plaintiffs are entitled to obtain a decree for redemption upon payment, not only of the principal mortgage money, but also of arrears of interest for the period claimed by the appellants calculated at the rate of Rs. 371 per annum, together with interest thereon at the rate of one per cent. per mensem from the date of non-payment to the date of the institution of the suit. We vary the decree below to the extent indicated above, and we order the parties to pay and receive costs in this Court and in the Court below in proportion to their failure and success. We fix the 1st of September, 1898, as the date on or **[410]** before which the amount decreed by us should be paid, and we direct that the said amount be paid into Court. We make the order last mentioned because we deem it unnecessary to determine in this suit which of the two sets of defendants is entitled to the mortgage money. The amount decreed by us should be calculated and entered in the decree of this Court.

Decree modified.

(1) 16 C. 307.

20 A. 410=18 A.W.N. (1898) 95

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Before Mr. Justice Burkitt and Mr. Justice Dillon.

UMDA BIBI AND OTHERS (*Opposite Parties*) *v.* NAIMA BIBI (*Petitioner*).* [10th May, 1898.]

20 A. 410= 18 A.W.N. (1898) 95.

Suit in **forma pauperis—*Review of judgment*—*Court-fee*—*Act No. VII of* 1870 (*Court Fees Act*), *sch. I, cl.* (5)—*Civil Procedure Code*, *s.* 410.**

Held **that when an application for review is presented in a suit in *forma pauperis*, that application, like the plaint in the suit, is not liable to any Court-fee.**

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba* and Pandit *Madan Mohan Malaviya*, for the appellants.

Mr. *Amir-ud-din*, for the respondents.

JUDGMENT.

BURKITT and DILLON, JJ.—This is an appeal against an order of the Subordinate Judge of Gorakhpur admitting a review of judgment. The plaintiff, respondent here, had sued to recover certain property and had got permission to sue *in forma pauperis*. Some time afterwards a petition was presented purporting to be on behalf of the plaintiff, and alleging that she and the defendants had compromised the suit on certain terms, and asking that a decree should be drawn up in the terms of the compromise. The Court ordered a decree to be drawn up as prayed. Within three months the plaintiff applied to the Court, substantially, though not formally, for a review of its judgment and of the decree passed on the compromise. In this application the plaintiff alleged that she had been cheated by her own legal adviser in collusion with the defendants; that the compromise as drawn up **[411]** was not that to which she had agreed, and that she knew nothing of the compromise as presented to the Court. The usual proceedings having been taken, this application for review was admitted, and from the order admitting it the present appeal has been brought. The first contention, which has been most strenuously and ably argued by Maulvi *Ghulam Mujtaba*, was that under cl. 5, sch. I of the Court Fees Act the applicant ought to have paid on her application for review of judgment half the Court-fee which would have been leviable on the plaint and that the Court below was wrong in admitting the application until that fee had been paid. As a matter of fact the only fee paid on the application was an eight anna Court-fee. Having heard Maulvi *Ghulam Mujtaba* at great length on this point we are of opinion that the answer to his contention is to be found in s. 410 of the Code of Civil Procedure. That section is one of the sections in the chapter treating of "Suits by paupers." Its provisions are that as soon as an application to sue *in forma pauperis* has been granted "the application shall be numbered and registered and shall be deemed to be the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under Chapter V." It then goes to make an exception in favour of a pauper plaintiff by providing that "the plaintiff shall not be liable to any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or

* First Appeal, from Order No. 22 of 1898, from an order of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st January 1898.

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other proceeding connected with the suit." Now the word "suit" undoubtedly means the suit instituted on permission to sue as a pauper being given. That suit is then to proceed as an ordinary suit under the Act. One of the incidents of such a suit is that a party aggrieved by a decree or order in that suit may under certain circumstances present an application for review. The presentation of such an application is in our opinion a "proceeding connected with the suit," such as is contemplated by the final words of s. 410. We think then that when an application for review is presented in the course of the proceedings in a suit *in forma pauperis*, that application, like the plaint in the [412] suit, is not liable to any Court-fee. To hold otherwise might, in our opinion, be productive of great injustice and hardship. For instance, in the present case the pauper plaintiff in order to get her application for a review of judgment admitted would have to pay something, like Rs. 2,500 in Court fees, while her plaint is not liable to any Court fee. The second matter which was argued for the appellants in this case was that the order admitting the application for review was in contravention of the provisions of s. 626 of the Code of Civil Procedure. The only provision of s. 626 on which the learned vakil relied was the second, and as to that it is sufficient to say that he has failed to show anything which would have brought the case within that provision. For the above reasons we dismiss this appeal.

Appeal dismissed.

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20 A. 412 (P.C.)=2 C.W.N. 550=25 I.A. 146=7 Sar. P.C.J. 380.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

[On appeal from the District Court of Farrukhabad.]

SAADATMAND KHAN (*Appellant*) *v.* PHUL KUAR (*Respondent*).

[20th April and 3rd May, 1898.]

Civil Procedure Code, s. 287—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within s. 311.

The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-s. (*e*) of s. 287 of the Code of Civil Procedure.

An under-statement of the value of the property having been made in such a proclamation, which was calculated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all, and the sale having resulted in a price altogether inadequate.—*Held*, that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation; and that the special remedy, provided in s. 311, was applicable, as substantial injury had resulted.

[F., 30 C. 1; 23 M. 568; 6 C.W.N. 836; 13 C.L.J. 192=9 Ind. Cas. 698 (700); 14 C.L.J. 346=16 C.W.N. 704 (709)=11 Ind. Cas. 438; 16 C.L.J. 98=16 Ind. Cas. 974 (975); Rel., 14 C.L.J. 541 (548)=13 Ind. Cas. 337 (341); 15 C.W.N. 577 (578)=10 Ind. Cas. 475 (476); R., 32 C. 543 (549)=9 C.W.N. 487; 13 C.L.J. 312 (316)=6 Ind. Cas. 135; 14 C.L.J 35=16 C.W.N. 124 (126)=10 Ind. Cas. 371 (372); 6 C.W.N. 48 (56); 8 C.W.N. 257 (262); 6 O.C. 61 (65, 66); 11 P.L.R. 1907=132 P.R. 1906; D., 26 C. 324; 31 C. 922=8 C.W.N. 264; 1 Ind. Cas. 246.]

APPEAL from an order (30th January 1892) of the District Judge of Farrukhabad reversing an order (13th July 1891) of the Munsif of Kaimganj.

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[413] The appellant was the auction-purchaser of property sold on the 20th April 1891 in execution of a decree, dated the 8th April 1890, held by one Chunni Lal against Musammat Phul Kuar, the present respondent, in whose hands the property, which was land, had been attached; she being the heiress, and representative in estate, of her husband, deceased in 1888.

Her petition, dated the 16th May 1891, was rejected by the Munsif, but the District Judge, Mr. R. S. Aikman, reversed that order, and set aside the sale under s. 311 of the Code of Civil Procedure on the ground that the proclamation of intended sale, issued under s. 287, had so much misrepresented the actual value of the property that substantial injury to the petitioner had resulted. The District Judge's order was not appealable to the High Court, under s. 588 of the Code of Civil Procedure.

The petition alleged irregularity in the auction sale, whereby property worth Rs. 10,000 was sold for Rs. 670; that ancestral land had been sold as not ancestral; that notices had not been properly placed and that the petitioner had no knowledge of the execution proceedings. Chunni Lal, the decree-holder, was named as objector and served, but did not appear. The other objector, Saadatmand Khan, the present appellant, denied the alleged irrigularities, and the statements in the petition generally.

Among the Munsif's reasons for disallowing the petition, he was of opinion that, although the Rs. 800 stated in the sale proclamation as the value of the property was incorrectly stated, and the real value was much greater, still it was not by law obligatory that any entry of value should have been made at all. The fact of a wrong value having been mentioned in the schedule was not, in his judgment, a material irregularity upon which the sale should be set aside.

The District Judge's finding was as follows:—

"This is an appeal under the provisions of s. 588, clause (16), Civil "Procedure Code, against an order of the [414] Munsif of Kaimganj refus- "ing to set aside a sale of immoveable property.

"It is proved and admitted that an estate belonging to the appellant, "a wealthy parda-nashin lady, was sold in execution of a decree for "Rs. 652-3-9; that the value of the estate is not less than Rs. 8,000 or "Rs. 9,000, and that notwithstanding this, and the fact it has no incum- "brances on it, it was sold by auction to a mukhtar practising in the "Collector's Court for Rs. 670, or less than one-twelfth of its value.

"The first ground of the appeal is that all the proceedings were taken "behind the back of the appellant, the judgment-debtor. The decree-holder, "at whose instance the property was sold, does not appear to defend. It "is argued on behalf of the auction-purchaser that the mere fact of a decree "having been passed is sufficient notice to her. I cannot assent to this "contention. Rule V, paragraph 9, of the Civil Rules and Orders, if pro- "perly carried out, secures that due notice of an impending sale shall be "given to the judgment-debtor. In this case due notice was not given; all "that was done was to affix a notice to the wall of the house of the "judgment-debtor's deceased husband." After adverting to the evidence that the petitioner was not there at the time, and intimating that the Court below ought not to have accepted the imperfect mode of service reported by the peon, the District Judge continued:—

"It is pointed out, in the next place, that the decree-holder in his "affidavit put down the value of the property at Rs. 800, *i.e.*, about one- "tenth of the real value, and that this was the value notified in the sale- "proclamation. This, I must hold, was a gross misrepresentation on the

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"part of the decree-holder. The last clause of s. 245 of the Code of "Civil Procedure provides that in the case of a decree for money, the "'value of the property attached shall, as nearly as may be correspond "'with the amount for which the decree has been made.' I have found "that Subordinate Courts appear to be under the [415] impression that "the inquiry prescribed by Rule VI, page 9, Civil Rules and Orders, "should be confined to finding out whether the property proposed "to be sold is ancestral or not. But this is a mistake. The inquiry "should be for the purpose of ascertaining the particulars specified in s. 287 of the Code of Civil Procedure. Amongst the heads "which, according to s. 287, should be specified in the sale-proclamation 'as fairly and accurately as possible' is 'every other "'thing which the Court considers material for the purchaser to know in "'order to judge of the nature and value of the property.' Had the "inquiry held by the Munsif under Rule VI been worthy of the name, I "think he could not fail to have been struck by the very peculiar circumstance that whilst the annual land revenue of the property was put down "at Rs. 543-10-6, its estimated value was entered as only Rs. 800. "The utter absence of proportion between the amount of Government "revenue and the estimated value entered in the sale-proclamation would "of itself be enough to deter intending purchasers, and induce them to "think that there was something wrong with the title." On this, the sale was set aside.

On an application to the District Judge for a certificate under s. 598 of the Code of Civil Procedure he referred to the judgment of the Full Bench of the High Court in *Azim-ud-din* v. *Baldeo* (1), and decided that the above order was final within s. 595.

Mr. *R. C. Saunders*, for the appellant, argued that the grounds on which the District Judge had reversed the order of the first Court were insufficient. Saadatmand Khan was a purchaser, for all that appeared, in good faith, and for value, who had been no party to any misrepresentation. He was in no way responsible for what was stated in the decree-holder's affidavit as to the value of the property, that having been the cause of the subsequent official statement, which was entered [416] in the column of particulars as to the nature and value of the property in the schedule attached to the sale-proclamation. Whatever irregularity there might have been in the understatement of value, there was no direct evidence that, in consequence of that error in the statement, the property was sold for an inadequate price. Accordingly, there was no sufficient evidence of the "substantial injury" of which s. 311 required proof as occasioned by the irregularity. The sale, therefore, should not, under the circumstances, have been set aside.

Mr. *H. Cowell*, for the respondent, was not called upon.

On the 3rd May their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

The respondent is the proprietor of an estate in the mauza of Jira Rahimpur in Farrukhabad. In April 1890 one Pati Ram obtained a decree for the sum of Rs. 565-9 against her and another as heirs of a recently deceased owner who was Pati Ram's debtor. This decree was transferred to Chunni Lal. On the 10th December in the same year Chunni Lal applied for the attachment and sale of the property. It was

(1) 3 A. 554.

put up for sale on the 20th April 1891, and was bought by the appellant for the sum of Rs. 670. The property is valued at eight or nine thousand rupees.

In May 1891, within the time allowed by law, the appellant filed a petition in the Court of the Munsif of Kaimganj for the purpose of setting aside the sale under s. 311 of the Code. The Munsif held that, notwithstanding the inadequacy of price, there had been no irregularity within that section which justified him in setting the sale aside, and accordingly he dismissed the petition. On appeal the District Judge took a contrary view and decreed that the sale should be set aside. That is the decree appealed from.

The respondent alleged several irregularities in the execution proceedings, as to the existence or the effect of which the two Courts took opposite views. Their Lordships do not [417] think it necessary to mention more than one ground for impeaching the sale. It is indeed something more than the kind of irregularity which is commonly alleged, for it is a mis-statement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices, or from bidding at all.

Section 287 of the Code orders that the Court shall cause a proclamation of the intended sale to be made. The proclamation is to specify "as fairly and accurately as possible" several enumerated particulars; and, finally, "every other thing which the Court considers it material for the purchaser to know in order to judge of the nature and value of the property."

The proclamation in this case appears to have followed an affidavit of Chunni Lal, the decree-holder, in which he stated that the property is valued at about Rs. 800. It states, among other things, that the sale is for the recovery of Rs. 652-3-9 and interest, and that the particulars specified in the schedule are filled in to the best of the knowledge of the Court. The schedule contains several columns. One shows that the jama of the property is Rs. 543-10. Another is headed, according to the English translation,—"Other particulars, whatever ascertained regarding the nature and value of the property," and it contains the figures Rs. 800. This means that the value of the property to sell was estimated by the Court at Rs. 800.

The Munsif considered that this misrepresentation of value was not a material irregularity for which a sale could be set aside. His reason was, that no rule required that the value of the property should be mentioned in the proclamation; and that as the entry was uncalled for and not legally obligatory, to give a wrong value is no reason for setting aside a sale.

[418] This is a very mistaken view. It is true, as before observed, that the mis-statement is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the Court, does not prevent it from being "a material irregularity in publishing or conducting" the sale, such as to bring the case within the special remedy provided by s. 311. Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the Court considers material for the purchaser to know," and it is enacted in terms (though express enactment is hardly necessary for such an object), that those things shall be stated as fairly and accurately as possible. It

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20 A. 412 (P.C.) = 2 C.W.N. 550 = 25 I.A. 146 = 7 Sar. P.C.J. 380.

must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation. The learned District Judge holds that there was a gross misrepresentation on the part of the decree-holder, and he intimates his opinion that the Court ought to have seen from the amount of the jama that the value could not be as stated. Certainly it seems that there must have been blameable carelessness on the part of whatever officer was responsible for the terms of the proclamation.

The learned District Judge points out two circumstances calculated to enhance the amount of injury done to the debtor by such a mis-statement. One is, that s. 245 of the Code orders that the value of the property attached "shall, as nearly as may be, correspond with the amount for which the decree has been made;" so that an intending purchaser would readily accept the assurance of the Court that an estate attached for Rs. 565 was worth no more than Rs. 800. Another is, that the disproportion between the jama and the total value was calculated to excite suspicion of something wrong with the title, and so to deter biddings. Their Lordships have to express entire agreement with the learned District [419] Judge, and they humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: *Mr. H. Percy Becher.*

Solicitors for the respondent: *Messrs. Ranken, Ford, Ford and Chester.*

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20 A. 419 = 18 A.W.N. (1898) 94.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

NARAIN DAS AND ANOTHER (*Defendants*) *v.* RAM SARAN DAS (*Plaintiff*).* [10th May, 1898.]

Pre-emption—Wajib-ul-arz—Co-sharers in the Khalisa Mahal distinguished from owners of separate plots of muafi *lands in the mahal.*

The co-sharers in a mahal and the owners of separate plots of *muafi* land included in the area of the mahal have as a rule no connection with one another, and it by no means follows that the custom adopted by or existing among the members of the khalisa co-parcenary body would be applicable to the owners of the *muafi* plots. Strict evidence is always necessary to prove that the same custom is applicable to each. *Kalyan Mal* v. *Madan Mohan* (1) referred to.

[F., 22 A.W.N. (1902) 68; A.W.N. (1904) 118; 6 Ind. Cas. 167 (168); R., A.W.N. (1907) 173 = 4 A.L.J. 665; D., 3 O.C. 110 (114).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellants.

Munshi *Ram Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.—This is an appeal in a suit for pre-emption. The suit was brought by a share-holder in one of several

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* First Appeal, No. 15 of 1898, from an order of H. G Pearse, Esq., District Judge of Meerut, dated the 4th February 1898.

(1) 17 A. 447.

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MAY 10.

APPELLATE CIVIL.

20 A. 419 =
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(1898) 94.

resumed *muafi* plots situate in mauza Haper to pre-empt a sale of a portion of the same plot. The suit was resisted on the ground that no custom of pre-emption has been established in respect of the *muafi* plots. That view was accepted by the Court of first instance, which dismissed [420] the suit. The District Judge, however, on appeal held that the custom was established, and remanded the suit under s. 562 of the Code of Civil Procedure. Hence the present appeal. In addition to the large co-parcenary body of the village divided among themselves into five pattis, there are several plots or scraps of confiscated *muafi* lands, that is, lands which formerly were held revenue-free, but in modern times have been resumed and the plots included for revenue purposes in the mahal within whose area they are situated. The arrangement usual in such cases is that the revenue of the resumed *muafi* is paid through the lambardar of the khalisa mahal within which it is situated, but the co-sharers of the *mahal* and the owners of the *muafi* plots, whether they be called co-sharers or not, have as a rule no connection whatever with one another, and it by no means follows that the custom adopted by or existing among the members of the khalisa co-parcenary body would be applicable to the owners of the *maufi* plots. Strict evidence is always necessary to prove that the same custom is applicable to each. Here it is contended that the custom as to pre-emption set forth in the *wajib-ul-arz* of the khalisa mahal applies to the *muafi* plots. In that matter we are unable to agree with the decision of the Court below. We are unable to see anywhere in the *wajib-ul-arz* any provision which renders its rule as to pre-emption applicable to the *muafi*. Some arguments were founded on the second clause of the *wajib-ul-arz* in which the owners of the *muafi* and khalisa were spoken of as "co-sharers." That argument is unsound. The clause in question simply provides in a business-like way for the object intended by it, namely, the arrangement of the manner in which the Government revenue was to be paid by the co-sharers of the village and by the *maufidars*. If it had been intended that the custom or the contract of pre-emption should apply to *maufidars*, nothing could have been easier than to add a few words to the *wajib-ul-arz*. Nothing of the kind has been done. We are left to [421] formulate a custom by implication from various unconnected clauses of the *wajib-ul-arz*. We cannot find any provision in the *wajib-ul-arz* for the existence of the custom of pre-emption in the *muafi* lands. The case of *Kalyan Mal* v. *Madan Mohan* (1) was referred to in argument. Strictly speaking that case is the converse of the case before us. It was a case in which a co-sharer in the khalisa mahal sought to pre-empt land in the *muafi*, and it was held that the *wajib-ul-arz* of the khalisa mahal did not effect the *muafi*. We allow this appeal. We set aside the decision of the District Judge with costs; we dismiss the plaintiff's appeal to the District Judge, and we restore the decree of the Court of first instance.

Appeal decreed.

(1) 17 A. 447.

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MAY 11.

APPEL-
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CIVIL.

20 A. 421 =
18 A.W.N.
(1898) 98

20 A. 421 = 18 A.W.N. (1898) 98.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

ABDUL RASHID (*Plaintiff*) *v.* GAPPO LAL (*Defendant*).*
[11th May, 1898.]

Civil Procedure Code, s 276—Alienation of attached property—Alienation valid so long as it does not interfere with any claim enforceable under a subsisting attachment.

The alienation which s. 276 of the Code of Civil Procedure is intended to prevent is an alienation which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached. Where a private alienation of attached property is made under such circumstances that it in no way interferes with the rights secured by his decree to the attaching decree-holder, s. 276 is no bar to such alienation. *Narain Das* v. *Sheoambar Ahir* (1) and *Annnd Loll Doss* v. *Jullodhur Shaw* (2) referred to.

THE plaintiff in the suit out of which this appeal arises held a mortgage, dated the 21st of March 1889, over a 7 anna share out of the mortgagor's aggregate interest of 10 annas 8 pies in a certain village. The defendant held a mortgage of an earlier date on a 4 anna share out of the same 10 annas 8 **[422]** pies. The defendant obtained a decree on his mortgage on the 12th of May 1885, for sale of the 4 anna share mortgaged to him. On the 22nd of April he caused to be attached under this decree, not merely the 4 anna share mortgaged to him but the whole 10 anna 8 pie share of the mortgagor. After this attachment, but before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. On the 6th of May 1892, the plaintiff applied to the Court executing the defendant's decree to notify the incumbrance created by the plaintiff's mortgage; such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pies, was sold in execution of the defendant's decree and bought by the defendant himself. The plaintiff then sued to enforce his mortgage of the 21st of March 1889 in respect of the portion of the mortgagor's interest not covered by the defendant's mortgage. The defendant objected that the effect of s. 276 of the Code of Civil Procedure was to make the plaintiff's mortgage null and void.

The Court of first instance (Subordinate Judge of Gorakhpur) found that, inasmuch as the money borrowed on the plaintiff's mortgage had been used to pay off a third mortgage prior to that held by the defendant, the plaintiff was entitled to use that mortgage as a shield, and it accordingly decreed the plaintiff's claim in part.

The defendant appealed. The lower appellate Court (District Judge of Gorakhpur) held that it had not been proved that the money borrowed on the mortgage to the plaintiff had in fact been applied to the satisfaction of a third prior mortgage as alleged, and, reversing the decree of the Court of first instance, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

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* Second Appeal, No. 219 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 19th December 1895, reversing a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Gorakhpur, dated the 26th June 1895.

(1) 17 A.W.N. (1897) 37.

(2) 14 M.I.A. 543.

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APPELLATE CIVIL.

20 A. 421 = 18 A.W.N. (1898) 98.

JUDGMENT.

BLAIR, J.—This second appeal arises out of a suit for sale based on a mortgage, dated the 21st of March 1889. The [423] mortgagor was possessed of a 10 anna 8 pie share of the mortgaged property. The plaintiff's mortgage was for a 7 anna share out of what was the mortgagor's aggregate interest. An earlier mortgage had been effected upon a 4 anna share of this whole property, and the prior mortgagee, one Gappo Lal, defendant in this suit and respondent here, got his decree for sale on his mortgage on the 12th of May 1885. The decree was in terms limited to the 4 anna share. On the 22nd of April 1886, an attachment under this decree was effected, not of the 4 anna share which formed the subject of the decree, but of the 10 anna 8 pie share, which is the entire holding of the mortgagor. After this attachment and before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. That was the present mortgage on the 7 anna share, so that the interest affected by the two mortgages was a greater interest than the mortgagor possessed. The present plaintiff has disposed of all difficulty on that score, by asking for sale only of what remains of the mortgagor's interest over and above the 4 anna share mortgaged to Gappo Lal. On the 6th of May 1892, the plaintiff, appellant here, applied to the Court executing Gappo Lal's decree to notify the incumbrance created by the mortgage of the 21st of March 1889; and such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pies, was sold in execution of Gappo Lal's decree, to Gappo Lal himself. The plaintiff now claims to enforce the mortgage of the 21st of March 1889. He is met by the contention that s. 276 of the Code of Civil Procedure makes his mortgage null and void. That section was originally framed so as to make a mortgage effected upon attached property absolutely void. But in the Act now in force are appended the material words which seem to us unquestionably words of limitation. They are:—"shall be void as against all claims enforceable under the attachment." We are entirely unable to see that any claim could be enforceable under the attachment which was not a legal claim. This matter [424] has been been before one member of this Bench, and it has been adjudicated upon in the case of *Narain Das* v. *Sheoambar Ahir* (1), That the interpretation put upon those words is the correct interpretation, this Bench has no doubt whatever. The object of the section thus guarded and limited, was to secure that no private alienation subsequent to attachment should take effect to obstruct the legal claim of the decree-holder in whose interest and at whose instance the attachment had been made. The plaintiff at the hearing in the Court of first instance put forward a further contention which upon a finding of fact has failed. He contended that his mortgage of 1889 was effected to pay off incumbrances prior in date to that of the defendant in this suit. He failed to establish that such prior incumbrances were in fact paid off by his mortgage. He has therefore to depend solely upon the construction to be put on s. 276. In our opinion the mortgage of 1889 in no way stands in the way of the execution of Goppo Lal's decree to the extent of his legal claim. Indeed, the possession of Gappo Lal seems to us one which upon no ground of equity could be maintained. He bought subject to a notification of lien, and we cannot doubt that the existence of that lien limited the price he paid for the property. He now proposes to retain what he purchased as

(1) 17 A. W. N. (1897) 37.

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20 A. 421 = 18 A.W.N. 1898) 98.

an incumbered property, and at the price of an incumbered property, as property wholly and entirely unincumbered.

I would allow this appeal, setting aside the decree of the lower appellate Court with costs, and restore the decree of the Court of first instance, and would give the appellant his costs of this appeal.

AIKMAN, J.—I am of the same opinion, and concur in the order proposed. Even when the law stood as it did when Act No. VIII of 1859 was in force, in which Act the section which corresponds to s. 276 of the present Code of Civil Procedure, did not contain the concluding words now to be **[425]** found in the section "as against all claims enforceable under the attachment," it was held—*vide Anund Loll Doss* v. *Jullodhur Shaw* (1)—that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree. In my opinion the words "enforceable under the attachment," in s. 276, must be read as meaning legally enforceable under the attachment; and to see what was legally enforceable under the attachment we must have recourse to the decree. So long as the decree-holder gets what was decreed to him he has got no ground for complaint. No private alienation made during the continuance of the attachment can be allowed to defeat the decree-holder's right, but if those rights are not affected by the alienation there is in my view no bar to any private alienation.

The respondent Gapoo Lal had by his decree an indefeasible right to have a 4 anna share of his mortgagor's property sold in execution of his decree, but he had no right to restrain his judgment-debtor from alienating any property, other than that referred to in the decree, so long as the alienation did not prejudice any rights which had been decreed to him.

For these reasons I am of opinion that the appeal must be allowed.

BY THE COURT.—The order of the Court is, that the appeal is allowed, the decree of the lower Court set aside with costs, and the order of the Court of first instance restored. The appellant will have his costs of this appeal.

The time for payment of the mortgage money is extended to the 11th of November 1898.

Appeal decreed.

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20 A. 426 = 18 A.W.N. (1898) 102.

[426] REVISIONAL CRIMINAL.

Before Mr. Justice Dillon.

QUEEN-EMPRESS *v.* TIRBENI SAHAI.* [11th May, 1898.]

Criminal Procedure Code, s. 342—Evidence—Accused persons under trial separately for a substantive offence and for abetment of that offence competent witnesses on each other's behalf.

Prisoner *A* was tried for an offence under s. 403 of the Indian Penal Code and was convicted, but was sent to a Magistrate of higher powers than the convicting Magistrate to be sentenced. Whilst his case was pending before the second Magistrate, prisoner *B*, being on his trial separately for abetment of the offence for which *A* had been tried, applied for *A* to be summoned as a witness on his behalf. *B's* application was refused. *Held*, that s. 342 of the Code of Criminal

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* Criminal Revision No. 216 of 1898.

(1) 14 M. I. A. 543 (549).

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20 A. 426 = 18 A.W.N. (1898) 102.

Procedure was no bar under the circumstances to *A*'s giving evidence for *B*, and that *B*'s application ought to have been granted.

[R., 33 C. 1353 = 4 Cr. L.J. 145 = 10 C.W.N. 962.]

ONE Ram Narain picked up a currency note for Rs. 100, which had been dropped by a person on his way from the Currency Office, and in the presence, and, as was found by the Court, with the assistance of one Tirbeni Sahai, got the note cashed and appropriated the proceeds. Ram Narain was tried for an offence punishable under s. 403 of the Indian Penal Code and convicted, but the trying Magistrate having only third class powers, sent the case, under the provisions of s. 349 of the Code of Criminal Procedure, to the Cantonment Magistrate. While Ram Narain's case was pending before the Cantonment Magistrate Tirbeni Sahai was put upon his trial before the same Magistrate who tried Ram Narain for an offence punishable under s. 403 read with s. 109 of the Indian Penal Code. In the course of his trial he applied to have Ram Narain summoned as a witness on his behalf. The Magistrate, however, declined to summon Ram Narain, being of opinion that he was debarred from so doing by s. 342 of the Code of Criminal Procedure. Tirbeni Sahai was convicted and sentenced. He applied in revision to the High Court—his appeal to the Sessions Judge having been dismissed **[427]** on the main ground that the Magistrate was wrong in refusing his application to summon Ram Narain as a witness.

Mr. *Roshan Lal*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

DILLON, J.—This is an application for revision of an order passed by the Cantonment Magistrate of Allahabad, convicting the petitioner of an offence under s. 403 read with s. 109 of the Indian Penal Code, and sentencing him to three months' rigorous imprisonment. The conviction and sentence were affirmed by the Sessions Judge on appeal. Amongst other points taken on behalf of the petitioner, there is one which refers to the procedure of the Magistrate in refusing to summon and examine as a witness on behalf of the petitioner one Ram Narain, who had been convicted of the substantive offence under s. 403 of the Indian Penal Code by a third class Magistrate of Allahabad, but whose case had been referred by the said Magistrate for a severer sentence under s. 349 of the Code of Criminal Procedure. Ram Narain's case was pending before the Cantonment Magistrate under s. 349 of the Code of Criminal Procedure, at the time the application to summon him as a witness was made, and therefore, it cannot be said that his trial was concluded. At the same time he had not been jointly indicted with the petitioner, nor was the offence of which he had been convicted the same offence as that with which the petitioner was charged. Under these circumstances I do not think that the prohibition contained in the last clause of s. 342 of the Code of Criminal Procedure applies. On a careful perusal of that section it will be apparent that the examination of the accused person for which that section provides, is an examination touching the matter on which he is being tried, and the inference is therefore obvious that the prohibition contained in the last clause of s. 342 applies to the examination referred to in that section, and does not apply to an examination in another case in which the person who is being examined is not himself an accused person. **[428]** If the Magistrate's view were correct, it would follow that no man

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while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatever. I do not think that the Legislature intended this. In this view of the case I hold that the petitioner was entitled to have Ram Narain summoned and examined as a witness, and that he has been prejudiced by the Magistrate's refusal to summon and examine the said Ram Narain. Under these circumstances, I set aside the conviction and sentence had before the Cantonment Magistrate of Allahabad, and direct that the petitioner's case be restored to his file, and that he take it up at that stage when he called on the accused for his defence, and that then with reference to the above remarks he proceed according to law.

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20 A. 428 = 18 A.W.N. (1898) 96.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

ONKAR SINGH AND ANOTHER (*Judgment-debtor*) *v.* MOHAN KUAR (*Decree-holder*).* [12th May, 1898.]

Execution of decree—Civil Procedure Code, ss. 320, 322-A—Decree transferred for execution to Collector—Collector not authorized to hear objections to execution of decree so transferred.

Held that where a decree for money has been transferred for execution to the Collector under the provisions of s. 320 of the Code of Civil Procedure, the Collector is not authorized under s. 322-A to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.—This is a case of an execution of a decree for money. The original judgment-debtor died since the decree, and his sons have been brought on the record as his **[429]** representatives. During the course of the execution proceedings the sons, on the 29th of May, 1897, raised an objection to the execution to the effect *inter alia*, that the property had not been properly attached during the lifetime of their father, the original judgment-debtor. A date was fixed for hearing that objection, but neither the representatives of the judgment-debtor nor the execution creditor appeared. No steps whatever were taken to hear and decide the objections, and they were struck off. Shortly afterwards, the property being ancestral, the case was transferred to the Collector for execution under the rules framed in pursuance of s. 320 of the Code of Civil Procedure. The execution application was struck off the file of the Subordinate Judge on the 9th of July, 1897. On the 20th of the same month the representatives of the deceased judgment-debtor again raised the same objection before the Subordinate Judge to the execution of the decree. On these objections the Subordinate Judge recorded an order to the effect that the

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* First Appeal No. 265 of 1897, from an order of Syed Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 28th August 1897.

case had been transferred for execution to the Collector, and that the Collector would issue a notice under s. 322-A and that thereupon any person who had any objection to take in respect of the property advertised for sale could take that objection. Now in making this order the Subordinate Judge was wrong throughout, and it is so admitted by the learned advocate who appears for the decree-holder respondent. The Collector under s. 322-A is not authorized to hear any objection, by parties interested in the property advertised for sale, to the sale of that property. When a money decree is transferred to the Collector for execution by sale of certain property, that property is usually attached before the decree is sent to the Collector, and the Collector may then, under s. 322-A, call on all persons holding money claims against the judgment-debtor to come in and prove their claims, so as to enable the Collector to make arrangements to avoid if possible the sale of the attached property. It is no part of the Collector's duty under s. 322-A to decide whether the property has or has not been properly attached. That is the duty of the Court to which the application for execution is made and **[430]** which transmits the decree to the Collector. But the learned advocate for the decree-holder attempted to support the order of the Subordinate Judge on another ground referring to the proceedings taken on the objection of the 29th of May, 1897. His contention was that the representatives of the deceased judgment-debtor having taken their objection and having failed to prosecute it could not be further heard on the same ground. In our opinion this contention is not sound and is disposed of under the ruling in the case of *Dhonkal Singh* v. *Phakkar Singh* (1), in which it was distinctly laid down that where an application for execution has been simply struck off without any order adverse to the right on the merits, that application might be renewed again and again till judicially decided adversely to the applicant. The same principle applies to an objection raised by a judgment-debtor to the execution of the decree. We do not think that the fact that between the application of the 29th of May, 1897, and the 20th of July, 1897, execution was transferred to the Collector is in any way material here. We allow this appeal. We set aside the order of the Subordinate Judge, and we direct him now to take up and judicially determine the objections taken by the representatives of the deceased judgment-debtor on the 20th of July, 1897. The appellants are entitled to their costs.

Appeal decreed.

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20 A. 430 = 18 A.W.N. (1898) 100.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

PHUL CHAND (*Decree-holder*) *v.* SHANKAR SARUP AND OTHERS (*Judgment-debtors*).* [13th May, 1898.]

Civil Procedure Code, s. 583—Restitution of benefit obtained under a decree subsequently reversed on appeal—Interest allowable on amount so recovered.

Where, in consequence of a decree having been reversed on appeal, the decree-holder is entitled to recover under s. 583 of the Code of Civil Procedure, any sum

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* First Appeal No. 1 of 1898, from an order of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 25th September 1897.

(1) 15 A. 84.

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20 A. 430 = 18 A.W.N. (1898) 100.

which before such decree was reversed he had been obliged [431] to pay in execution of that decree, such decree-holder is entitled also to receive interest on the amount so recoverable. *Rodger* v *The Comptoir D'Escompte de Paris* (1), *Jaswant Singh* v. *Dip Singh* (2). *Ram Sahai* v. *The Bank of Bengal* (3), *Bhagwan Singh* v. *Ummatui Hasmain* (4), *Ayyavayyar* v. *Shastram Ayyar* (5) and *Hatti Prasad* v. *Chatarpal Dubey* (6) referred to. *Mewa Kuar* v. *Banarsi Prasad* (7) dissented from.

[Appr., 21 A. 1.]

IN this case the respondents brought a suit against the apnellant and obtained a decree from the Court of the Subordinate Judge of Meerut. The aopellant appealed from this decree to the High Court, but before his appeal was decided the respondents took out execution of their decree and realized the whole amount thereof. Subsequently the respondents' decree was set aside by the High Court, the suit being dismissed. The appellant then applied to the Court of the Subordinate Judge for a refund of the amount realized by the respondents under their decree which had been set aside by the High Court, together with interest upon the amount so realized. The Subordinate Judge allowed the application except so far as related to the claim for interest. Against this disallowance of interest the applicant appealed to the High Court.

Mr. *Abdul Raoof*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

BURKITT and DILLON, JJ.—In this case it appears that on suit by the plaintiffs respondents against the appellant a decree was given against the latter for payment of a sum of money. The defendant paid that money into Court, and it was drawn from the Court by the plaintiffs. Subsequently on appeal to this Court the decree in favour of the plaintiffs was reversed and their suit was dismissed.

The present proceeding is an application by the successful defendant appellant under s. 583 of the Code of Civil Procedure, for restitution to him, with interest, of the sum [432] paid by him into Court under the decree, and drawn out by the plaintiff's respondents.

The only question to be decided is whether the applicant is entitled to interest on his money during the time it was in the hands of the plaintiff's respondents. On that point there have been some conflicting rulings in this Court. We would refer to the cases of *Jaswant Singh* v. *Dip Singh* (2), *Ram Sahai* v. *The Bank of Bengal* (3), *Bhagwan Singh* v. *Ummatul Hasmain* (4), *Mewa Kuar* v. *Banarsi Prasad* (7) *Hatti Prasad* v. *Chattarpal Dubey* (6), and there is also the case of *Ayyavayyar* v. *Shastram Ayyar* (5). In our opinion, however, the case before us is concluded by the authority of their Lordships of the Privy Council in the case of *Rodger* v. *The Comptoir D'Escompte de Paris* (1). We especially refer to the observations of Lord Cairns made therein, which are set forth and explained at length in *Jaswant Singh* v. *Dip Singh* (2). It appears to us that the view of their Lordships in that case cannot have been brought to the notice of the Benches of this Court which held that interest could not be awarded under s. 583. In all the other cases there is a distinct mention of that case, and it is cited as the authority forawarding interest.

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(1) L.R. 3 C.P. 465. (2) 7 A. 432. (3) 8 A. 262.
(4) 18 A. 262. (5) 9 M. 506. (6) 8 A.W.N. (1888) 287.
(7) 17 A.W.N. (1897) 76.

Following the authority of their Lorships in that case, we allow this appeal. We set aside the order of the lower Court, and we direct that interest at the rate of six per cent. per annum be allowed on the sum which has been ordered to be restored to the appellant here. The appellant is entitled to his costs in this Court.

Appeal decreed.

1898 MAY 13. — APPELLATE CIVIL. — 20 A. 430 = 18 A.W.N. (1898) 100.

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20 A. 433 = 18 A.W.N. (1898) 97.

[433] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

IMTIAZ-UN-NISSA (*Applicant*) *v.* ANWAR-UL-LAH (*Opposite Party*).*

[16th May, 1898.]

Act No. VIII of 1890 *(Guardian and Wards Act), s.* 47—*Appeal—Order refusing to direct the removal of a guardian.*

Where an applicant for a certificate of guardianship applied for a twofold relief, namely, that the existing guardian might be removed and that she herself might be appointed guardian, and her application was dismissed, it was *held* that no appeal would lie from the order of dismissal, such order being an order refusing to direct the removal of a guardian. *Mohima Chunder Biswas* v. *Tarini Sunker Ghose* (1), *Pakhwanti Dai* v. *Indra Naram Singh* (2) and *In re Bai Barkha* (3) referred to.

[F., 14 Ind. Cas. 56 = 195 P.W.R. 1912.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amiruddin*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.—In this case a preliminary objection to the hearing of this appeal is raised by Maulvi *Ghulam Mujtaba* for the respondent. His objection is that though under s. 47 of the Guardian and Wards Act, No. VIII of 1890, an appeal is given by cl. (8) of that section against an order directing the removal of a guardian, no appeal is given against an order refusing to direct the removal of a guardian.

To understand this case certain facts and dates must be set out. On the 10th of April 1897, a certificate of guardianship of the person and property of the minors was granted to the respondent Muhammad Anwarullah. On the 26th of April 1897, the appellant Musammat Imtiazunissa, mother of the minors, applied to the Court, asking that she might be appointed guardian of their persons and property, and by a further application dated the 23rd June 1897, she alleged that she had no knowledge of the appointment on the 10th of April of Anwarullah, and prayed that his appointment as guardian, made on the 10th of April, might be cancelled, and she herself be appointed as guardian. The District Court in its proceedings on this application removed [434] Anwarullah, (it is said, with his consent) from the office of guardian of the persons of the minors and appointed Musammat Imtiazunnissa in his place, but refused to discharge or remove Anwarullah from the office of guardian of the property. That is the order which is now in appeal before us.

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* First appeal No. 19 of 1898, from an order of F.E. Taylor, Esqr., Additional Judge of Moradabad, dated the 27th November 1897.

(1) 19 C. 487. (2) 23 C. 201. (3) 20 B. 667.

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APPELLATE CIVIL.
20 A. 433 = 18 A.W.N. (1898) 97.

It was ingeniously argued by the learned counsel for the appellant, that the appeal was one under cl. (*a*) of s. 47, and that by it, the refusal to appoint Musammat Imtiazunnissa as guardian was called in question. That argument, however, is in our opinion, unsound. Before an order could be passed appointing Musammat Imtiazunnissa guardian of the property of the minors it would have been necessary to remove Anwarullah from that office. The appeal must be considered to be one against the Judge's order refusing to remove Anwarullah from the office of guardian of the property of the minors. Against such an order, we are of opinion, no appeal lies. In this opinion we are supported by the case of *Mohima Chunder Biswas* v. *Tarini Sunker Ghose* (1) where it is distinctly laid down that no appeal lies against an order of the District Judge refusing to remove a guardian. To the same effect is the case of *Pakhwanti Dai* v. *Indra Narain Singh* (2). That case is very much on all fours with this case, inasmuch as in it the District Judge cancelled that portion of the certificate of guardianship appointing the respondent guardian of the persons of the minors. And lastly there is the case of *In re Bai Harkha* (3) which was also a case in which, after the appointment of a guardian of the property, the mother of the minors sought to have the appointment cancelled. The District Judge refused to interfere with the appointment, and the High Court held that no appeal lay from the order of refusal. Following the above cases, with all of which we are in full accordance, we hold that in this case no appeal lies to this Court. We therefore reject the appeal with costs.

Appeal dismissed.

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20 A. 435 = 18 A.W.N. (1898) 101.

[435] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

LACHMIN KUAR AND ANOTHER (*Judgment-debtors*) *v.* DEBI PRASAD (*Decree-holder*).* [17th May, 1898].

Hindu Law—Joint Hindu family—Joint family or self-acquired property—General education acquired at the expense of the joint family funds.

Held, that the mere fact that a member of a joint Hindu family had acquired a certain general education of a not very advanced character at the expense of the joint family funds would not have the result of making all the subsequent earnings of that member joint family property, but they would remain his self-acquired property. *Pauliem Valoo Chetty* v. *Pauliem Soorayah Chetty* (4) and *Krishnaji Mahadev* v. *Moro Mahadev* (5) referred to and followed.

[R., 32 A. 305 (313) = 7 A.L.J. 216 (224) = 5 Ind. Cas. 400; 13 C.P.L.R. 115 (117); 22 A.W.N. (1902), 20; 8 Ind. Cas. 930 (934) = 4 S.L.R. 161.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondents.

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* First Appeal No. 252 of 1897 from an order of Rai Kisben Lal, Subordinate Judge of Cawnpore, dated the 29th September 1897.

(1) 19 C. 487. (2) 23 C. 201. (3) 20 B. 667.
(4) 1 M. 252. (5) 15 B. 32.

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MAY 17.
APPELLATE CIVIL.
20 A. 435 = 18 A.W.N. (1898) 101.

JUDGMENT.

BURKITT and DILLON. JJ.—This is an appeal from an order of the Subordinate Judge of Cawnpore, by which it was decided that certain moveable property was liable to attachment and sale in execution of a decree obtained by the respondent against the representatives of one Khurshed Bahadur, deceased. In a previous case in this Court it was decided that the decree could not be executed against any ancestral joint property of the family. The question now to be decided is, does the property sought to be sold come within that description, or is it to be treated as having been the self-acquired property of the debtor Khurshed Bahadur.

The following genealogical table shows the members of the family :—

[436] BHOLA NATH.

Ram Narain died Dec., 1877.	Sheo Narain died Aug., 1874. No male issue.	Jai Narain died after 1890. No male issue.
Raj Bahadur died Oct., 1870.		
Khurshed Bahadur died Feb., 1890.		
Nawal Behari *alias* Naunihal died 1876.	Chail Behari, defendant-appellant (minor).	

The property in dispute consists of a house in Cawnpore and of two villages. Admittedly that property stood recorded in the name of Sheo Narain, the second of Bhola Nath's sons. On his death it was transferred to the name of Nawal Behari, then an infant. There is some dispute as to how that transfer was made. The respondent, through his witness Jiwan Ram, set up a nuncupative will alleged to have been made by Sheo Narain. We do not believe the allegation as to the will. We do not believe that any will was formally made, even in the loose form of a nuncupative will. We believe that the evidence of Jiwan Ram has been constructed to fit and account for the fact that after Sheo Narain's death, the property in dispute was recorded in Nawal Behari's name. The latter was a great grand-nephew of Sheo Narain. During his father's life-time he had no claim whatever to succeed to Sheo Narain's estate. But we are quite prepared to believe that Sheo Narain and his brother Ram Narain (who survived him for more than three years) did arrange that the property should be transferred to Nawal Behari. Both the brothers must have been anxious to save the property from getting into the hands of Khurshed Bahadur, who had taken to a licentious, immoral and debauched course of life, as mentioned in the judgment of this Court in F. A. No. 56 of 1893, decided on the 29th January 1896. The minor boy Nawal Behari [437] unfortunately did not long survive his great-granduncle Sheo Narain, and predeceased his great grandfather Ram Narain. On the boy's death his father Khurshed Bahadur inherited the property in dispute.

The question we have to decide is—What was the nature of that property in the hands of Sheo Narain ? For the appellants it is contended that the property was a portion of the joint undivided property of a joint

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Hindu family, possessed as such of this and of other property. On the other hand, the contention for the respondent—a contention which has been affirmed by the lower Court—is that the property in dispute was the self-acquired property of Sheo Narain.

As to the early history of the family there is little, if any, room for doubt. Their ancestral house is at Belhaur, in the Cawnpore district, and that house is at present the joint and undivided property of Bhola Nath's descendants in the male line. It is perfectly clear that there has been no partition of *the ancestral house*. The three brothers went out into the world and obtained employment in the Commissariat Department, and in course of time each acquired considerable wealth. They are not shown to have had any assistance from the joint family funds excepting their support in early years and the usual rudimentary education. It is not shown that any money was raised on the ancestral house to start any of them in life. They did not work jointly, each being separately employed, and no one of them is shown to have had any concern with the savings and accumulations of either of the other two brothers, though no doubt funds may have been remitted by one or other to the others for investment. Such being the case, we have no doubt that the property in dispute was, when in the hands of Sheo Narain, his self-acquired property over which he had full powers of disposal. It was argued for the appellant that because Sheo Narain was educated when a boy at the family expense, all his subsequent earnings and accumulations remained joint family property. This contention is described by their Lordships of the Privy Council in [438] *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1), as being a "somewhat startling proposition of law," and their Lordships expressed their disapproval of some cases in the Madras High Court which went that far. All the cases on the point have been very fully considered and discussed by the Bombay High Court in the case of *Krishnaji Mahadev* v. *Moro Mahadev* (2), in which it was held with respect to a person in much the same position as Sheo Narain that as he had received only a rudimentary education from the joint family funds his earnings were self-acquired, as also was any property purchased with those earnings. The fruits of an ordinary elementary education could not, it was held, be regarded as the "gains of science" acquired at the expense of ancestral wealth.

Having fully considered the rule laid down in the cases cited above, we find ourselves entirely in accordance with it. Following that rule, we hold in the present case that the property in dispute was the self-acquired property of Sheo Narain. It follows, therefore, that both in the hands of Nawal and of Khurshed it was self-acquired property and liable as such to be seized in satisfaction of the respondent's decree. We dismiss this appeal with costs to be paid out of the proceeds of the property is dispute.

Appeal dismissed.

(1) 1 M. 252.

(2) 15 B. 32.

20 A. 438=18 A.W.N. (1898) 103.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

BANSIDHAR (*Plaintiff*) *v.* DIP SINGH AND OTHERS (*Defendants*).*

[19th May, 1898.]

Lambardar and co sharer—Powers of lambardar to deal with co-parcenary lands—Lease of such lands for ten years at an inadequate rent.

Held, that a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or the particular season may require *Jagan Nath v. Hardyal* (1) followed.

[R., 29 A. 20=3 A.L.J. 639=A.W.N. (1906) 257; 29 A. 554=4 A.L.J. 538=A.W.N. (1907) 165; D., 3 A.L.J. 655=A.W.N. (1906) 277.]

IN this case the plaintiff was owner of almost the whole of two mahals known as Bangar and Khadar in mauza Chitaura [439] Mohiuddinpur. The small residue was owned by the defendants, one of whom, Puran Singh, was the lambardar. Owing to disagreements between the plaintiff and the lambardar the plaintiff applied for partition of his shares in these mahals. Puran Singh filed objections, which were disallowed in respect of mahal Bangar, but allowed in the case of mahal Khadar. Subsequently Puran Singh executed a lease for 10 years of the munj grass produce of both mahals at an annual rent of Rs. 12. After the partition proceedings had been concluded, all but the actual putting of the parties into possession of the shares allotted to them, the plaintiff filed his suit for cancellation of the lease given by Puran Singh. The Court of first instance (Additional Munsif of Meerut) dismissed the suit. The plaintiff appealed. The Lower Appellate Court (Additional Subordinate Judge of Meerut) dismissed the appeal. The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BURKITT, J.—In this case it appears that one Puran Singh, the lambardar of a village which was under partition, and to the partition of which his objections had been disallowed on the 8th of August, 1894, granted on the 24th of December of the same year, a lease, for a period of no less than ten years, of more than 400 bighas of land producing valuable munj grass, at the utterly inadequate rent of Rs. 12 per annum. The Subordinate Judge says, and perhaps with truth, that no fraud was proved; but in my opinion we have only to look at the lease itself to see that it was given by a disappointed litigant, whose power as lambardar was soon about to cease, with the intention of damnifying his successful opponent in the partition proceedings. For that reason alone I would direct the lease to be set aside; but, further, there is distinct authority in this case, in the case of *Jagan Nath* v. *Hardyal* (1), in which it was distinctly ruled that a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or [440] particular season may require. That no doubt was a case of a perpetual lease, but the reasons for the decision apply with equal strength to the ten years' lease in the present case. I fully concur in

* Second Appeal, No. 344 of 1897, from a decree of Babu Prag Das, Additional Subordinate Judge of Meerut, dated the 26th February 1897, confirming a decree of Thakur Udit Narayan Sinha, Additional Munsif of Meerut, dated the 23rd December 1895.

(1) 17 A.W.N. (1897) 207.

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the rule of law laid down in the case just cited, and, following the principle contained in it, I set aside the decrees of the two lower Courts, and, allowing this appeal, I give a decree in favour of the plaintiff appellant. I cancel the lease dated the 24th of December, 1894, so far as it concerns an area of 144 bighas 7 biswas and 13 biswansis pukhta out of mahal Bangar of Chitaura Mohiuddinpur, and I direct that possession of that area be given to the plaintiff appellant by the dispossession of the defendant lessee. The plaintiff appellant will have his costs in this Court.

Appeal decreed.

20 A. 440 = 18 A.W.N. (1898) 108.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* NIHAL CHAND.* [26th May, 1898.]

Act No. I of 1879 (*Indian Stamp Act*), *s.* 61—*Stamp—Promissory note—Person receiving an under-stamped promissory note not liable under s.* 61.

Under s. 61 of Act No. I of 1879 the "person accepting" a promissory note not duly stamped is the person who executes such note as acceptor, not a person who merely receives the note. The mere receiver of an unstamped or insufficiently stamped promissory note is not as such liable to any penalty under this section either as principal or abettor. *Queen* v. *Gulam Husain Saheb* (1) *The Queen* v. *Nadi Chand Poddar* (2), *Empress* v. *Janki* (3), and *Empress* v. *Gopal Das* (4) referred to.

[R., U.B.R. (1904), 2nd Qr., Stamp, p. 1.]

THIS was a reference made by the Sessions Judge of Saharanpur under s. 438 of the Code of Civil Procedure. The facts of the case sufficiently appear from the judgment of the Court.

JUDGMENT.

AIKMAN, J.—This is a case reported for the orders of this Court by the learned Sessions Judge of Saharanpur. It appears [441] that two men, Makunda and Chanda, were indebted to one Nihal Chand. In payment of their debt they gave him a promissory note which was not duly stamped. Nihal Chand, it appears, sued in a Civil Court on the promissory note, and there the breach of the stamp law was discovered. The matter having been brought to the notice of the Collector, the prosecution of the makers of the note, as well as of Nihal Chand, was directed. This prosecution resulted in all three being convicted of the offence punishable under s. 61 of the Indian Stamp Act, 1879. The Magistrate sentenced Nihal Chand to a fine of Rs. 35, or in default to 15 days' rigorous imprisonment.

As the offence of which Nihal Chand was convicted is an offence punishable with fine only, the imprisonment in default ought to have been simple—see ss. 67 and 34 of the Indian Penal Code. This mistake the Magistrate himself subsequently discovered.

The learned Sessions Judge has submitted the case to this Court with a recommendation that the conviction of Nihal Chand should be set aside as illegal. In my opinion the learned Sessions Judge is right. The

* Criminal Revision, No. 227 of 1898.

(1) 7 M. 71. (2) 24 W.R. Cr. 1. (3) 7 B. 82. (4) 3 A.W.N. (1883) 145.

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20 A. 440=18 A.W.N. (1898) 108.

material part of the section under which Nihal Chand has been convicted runs as follows:—"Any person drawing, making, issuing, endorsing or transferring or signing, otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating any bill of exchange, cheque or promissory note without the same being duly stamped . . . . . shall for every such offence be punished with fine which may extend to five hundred rupees." The Magistrate has apparently looked on the word "accepting" here as equivalent to "receiving." But, as was held in *Queen* v. *Gulam Hussain Saheb* (1) "the term 'accepting' in s. 61 of the Stamp Act does not mean 'receiving,' but 'executing as an acceptor.'" In the case *The Queen* v. *Nadi Chand Poddar* (2) JACKSON, J., observed:—"If an instrument called a **[442]** promissory note or other document of that kind, and as such liable to the duty imposed by the Act, is not duly stamped, it appears to me that the person subject to penalty is the person who makes it, and not the person in whose favour it is made." That was a prosecution under s. 29 of the Stamp Act then in force, namely, Act No. XVIII of 1869, which does not differ materially from s. 61 of the present Act. It was there held that the person in whose favour a document not duly stamped is made, incurs the risk of being debarred from producing it in evidence, but does not render himself liable to penalties under the fourth chapter of the Act. It has been contended that in such cases a person who receives a document not duly stamped abets the commission of an offence under s. 61; but, as was remarked in the case *Empress* v. *Janki* (3), "it is not abetment of the execution of an unstamped document to receive it, any more than acceptance of stolen property is abetment of theft." This case was followed in this Court in *Empress* v. *Gopal Das* (4). I think the view taken by the learned Sessions Judge is right. I quash the conviction of Nihal Chand for an offence under s. 61 of Act No. I of 1879 and the sentence of fine imposed thereunder, and direct that the fine, or such portion of it as may have been paid, be refunded.

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20 A. 442=18 A.W.N. (1898) 110.

APPELLATE CIVIL.

Before Mr. Justice Blair.

FATEH CHAND AND OTHERS (*Plaintiffs*) *v.* MANSAB RAI (*Defendant*).*

[6th June, 1898.]

Civil Procedure Code, s. 53—Verification of plaint—Plaint verified when in an incomplete state—Amendment of plaint.

The substantial portion of a plaint, consisting of the statement of the claim of the plaintiffs and the prayer, was written upon two sheets of plain paper and verified by the plaintiffs. Subsequently to the affixing of the plaintiffs' **[443]** signatures a front sheet, consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties, was added, and the plaint thus composed filed in Court.

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* Second Appeal, No. 376 of 1897, from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 3rd March 1897, reversing a decree of Munshi Shiva Sahai, Munsif of Kairana, dated the 26th February 1896.

(1) 7 M. 71.
(2) 24 W.R. Cr. 1.
(3) 7 B. 82.
(4) 3 A. W. N. (1883), 145.

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20 A. 442 = 18 A.W.N. (1898) 110.

Held, that the verification was defective; but that the suit ought not to have been dismissed. The plaintiffs ought to have been allowed an opportunity of amending the plaint by making a proper verification.

[R., 15 Ind. Cas. 583 (584).]

THE material facts of this case, as stated in the judgment of the Lower Appellate Court, are as follows:—

"The plaint purports to have been verified by the plaintiff Fateh Chand at Kairana on the 16th July 1895, by the plaintiff Ranjit Singh at Gadhi Husenpur on the 13th July, and by Musammat Shibbi, next friend of Somat Prasad, minor plaintiff, on the 11th July at Saharanpur. It was presented to the Court of the Munsif of Kairana on the 17th July 1895. It purports also to bear the signatures at another place, but it is not expressed when these signatures were affixed. The plaint consists of three leaves, and the signatures and verifications are contained on the last leaf, and the plaintiffs' signatures are wanting on the first two leaves, though rule 424, clause (5), of the rules of the 4th April 1894, framed by the High Court, required the plaintiffs' signatures on each leaf. The first leaf is the stamp paper used to denote the Court-fee. It was purchased at the Kairana tahsil on the 17th July 1895. The stamp paper contains the name of the Court and the names, description and place of abode of the parties. It should also have contained a substantial portion of the statement of the claim, according to the said rules, but it does not."

The Subordinate Judge found:—"It is evident that the particulars stated on the first leaf, namely, the stamp paper, were not verified by the plaintiffs. I find that neither the verification nor the signatures of the plaintiffs apply to what is written on the first leaf, which was not in existence when they were apparently affixed. Musammat Shibbi deposed that she affixed her mark on three papers, which may mean in two places on the plaint and on the vakalatnama, dated the 7th July 1895. There is nothing to show that the plaintiffs' signatures **[444]** were affixed on the 17th July 1895, or on dates different from those of the verifications. The verification had been affixed before the 17th July 1895."

On these findings the Lower Appellate Court came to the conclusion, with reference to the case of *Kateśar Nath* v. *Aggayan* (1), that the plaint was void *ab initio* and incapable of amendment, and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Pandit *Moti Lal*, for the appellants.

Maulvi *Abdul Majid*, for the respondent.

JUDGMENT.

BLAIR, J.—The facts of this case fall within the ruling in two unreported cases of this Court. The one is the case F. A. No. 269 of 1893, (*Ganga Sahai* v. *Muhammad Ali Jan Khan*),* **[445]** decided

20 A. 444 N.

* The judgment in this case was as follows:—

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen has been dismissed by the Subordinate Judge on the ground that the plaint filed on behalf of the plaintiffs was not properly signed and verified. What took place was this:—The plaint was drawn up on two sheets of plain paper, and it was signed and verified at the foot by the plaintiffs as required by s. 51 of the Code of Civil Procedure; this was done by the plaintiffs at Bulandshahr. They sent the plaint to a pleader at Meerut for the purpose of its being filed in the Court there. The pleader instead of attaching to the plaint the stamp paper requisite for the Court fees payable on the plaint, as he should have done, took out the first sheet and transcribed the contents of it on the stamp paper. This was certainly a reprehensible proceeding on the part of the plead-

(1) 14 A. W. N. (1894) 95.

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on the 9th of December 1895, and the other is F. A. No. 149 of 1895 (*Munshi Fakir Chand* v. *Mahesh Dass*),* decided on the 1st of April 1897. No reported cases have been cited to me which are atall on all fours with the matter at issue in the present appeal. I see no reason to differ from the conclusions of the Judges who decided those two unreported appeals, and I accordingly make the same order which they did. I set aside the decree below and remand the case to the lower Court with the direction that it should re-admit the suit under its original number in the register and return the plaint to the plaintiffs for amendment according to law. This order is made under s. 562 of the Code of Civil Procedure. The Court of first instance will then proceed to decide the case on the merits.

Appeal decreed and cause remanded.

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er; he should have known that the plaint to be filed in Court was the document which the plaintiffs had signed and verified, and not a document which consisted partly of matter which had been signed and verified, and partly of matter which had been written after signature and verification. The plaint in this case as filed was therefore defective, but we are of opinion that the Subordinate Judge should have returned it to the plaintiffs for amending it by signing and verifying it as it stood; he ought not to have dismissed the suit. It was the duty of the Court to return the plaint before settlement of issues, and the mere fact that issues were settled could not deprive the plaintiffs of the opportunity which they might otherwise have had and ought to have had of curing the defect which existed in the plaint.

We set aside the decree below and remand the case to the lower Court with the direction that it should re-admit the suit under its original number in the register and return the plaint to the plaintiffs for amending it by signing and verifying it according to law.

The parties will bear their own costs of this appeal.

[N.B.—This note case has been followed in 15 Ind. Cas. 583 (584).—ED.]

20 A. 445 N.

* The judgment in this case was as follows:—

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen has been dismissed by the lower Court on the ground that the plaint was not properly verified. The verification has been held to be defective for two reasons. First, that after the whole of the plaint as it was filed in Court had been prepared the plaintiff did not verify it, but what was done was this:—The plaint was written out on four sheets of foolscap paper, and at the end was signed and verified by the plaintiff; but the pleader who filed the plaint, instead of attaching to it the stamps required for the claim, took out the first two sheets and caused their contents to be copied on the stamp papers. The second ground on which the Subordinate Judge considered the plaint to be defective is that, although the plaintiff verified the whole of the statements contained in the plaint as true to his knowledge, it appeared as to some matters that he had no personal knowledge. As regards this second ground, the conclusion of the Subordinate Judge is erroneous. The plaint on the face of it was properly verified in accordance with the provisions of the law, and for the purposes of ascertaining whether the verification was a good verification in form, the fact whether it was true was wholly immaterial. As to the first ground, as we held in First Appeal No. 269 of 1893, which was a case on all fours with the present, the Subordinate Judge should not have dismissed the suit, but should have returned the plaint to the plaintiff in order that it might be properly verified.

We allow this appeal, and, setting aside the decree below, remand the case under s. 562 of the Code of Civil Procedure, with directions to re-admit it under its original number on the register and dispose of it on the merits, after causing the plaint to be amended by being properly verified. Costs will abide the event.

[N.B.—This note-case has been followed in 15 Ind. Cas. 583 (584).—ED.]

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APPELLATE CIVIL.

20 A. 446 = 18 A.W.N. (1898) 112.

20 A. 446 = 18 A.W.N. (1898) 112.

[446] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

NIHALI (*Applicant*) *v.* MITTAR SEN AND OTHERS (*Opposite Parties*).*

[8th June, 1898.]

Act No. IV of 1882 *(Transfer of Property Act), ss.* 86 *and* 87—*Mortgage—Redemption—Redemption possible at any time prior to the passing of the order absolute under s.* 87.

A mortgagor who has obtained a decree for redemption of his mortgage can pay in the redemption money and obtain redemption at any time until an order absolute under s. 87 is made against him. *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1) and *Raham Ilahi Khan* v. *Ghasita* (2) referred to.

[F., 25 A. 231 (233); R., 24 A. 479 (481); 7 A.L.J. 953 (956) = 7 Ind. Cas. 50; 8 Ind. Cas. 592; 2 N.L.R. 137 (141, 143); U.B.R. (1897-1901), Vol. II, 582 (584).]

THIS appeal arose out of an application by the defendant, judgment-debtor, in a suit for foreclosure of a mortgage, in execution of the decree against him. The plaintiffs obtained their decree for foreclosure on the 21st of August 1894. By that decree the judgment-debtor was ordered to pay the mortgage money within three months from the date of the decree, otherwise the mortgage would be foreclosed. The judgment-debtor did not pay in the money, but appealed to the High Court. This appeal was dismissed, and the order of the lower Court affirmed on the 13th of August 1897. On the 6th of November 1897, the judgment-debtor paid the sum then due into Court with notice to the decree-holder, who refused to receive it on the grounds that the judgment-debtor's right to redeem was forfeited by his failure to comply with the order to pay within three months from the 21st of August 1894, which order was not affected by the decree of the High Court; and further, that the decree-holders had in virtue of their decree obtained possession of the property. The Court executing the decree allowed the decree-holders' contention and dismissed the application of the judgment-debtor. The judgment-debtor thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *S. S. Singh*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—We concur with the judgment and the reasons for that judgment given by the Calcutta Court in the case of *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* **[447]** (1) which has been acted upon by a Bench of this Court in the case of *Raham Ilahi Khan* v. *Ghasita* (2). In this case a decree was made under s. 86 of the Transfer of Property Act, but had not been brought to maturity by an order absolute under s. 87. The money to be paid for redemption of the mortgage was tendered and deposited in Court. In our opinion, if the sum tendered were sufficient, it ought to have been accepted and an order given for redemption. That must now be done. We allow the appeal. The appellant will have his costs.

Appeal decreed.

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* First Appeal, No. 73 of 1898, from an order of J. J. McLean, Esq., District Judge of Shahjahanpur, dated the 10th January 1898.

(1) 16 C. 246.

(2) 20 A. 375.

20 A. 447 (P.C.)=2 C.W.N. 545=25 I.A. 137=7 Sar. P.C.J. 353.

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PRESENT:

Lords Watson, Hobhouse, Morris and Davey and Sir R. Couch.
[*On appeal from the High Court for the North-Western Provinces, Allahabad.*]

20 A. 447 (P.C.)=2 C.W.N. 545=25 I.A. 137=7 Sar. P.C.J. 353.

HAKIM MUHAMMAD IKRAM-UD-DIN (*Defendant-Appellant*) *v.* NAJIBAN (*Plaintiff-Respondent*). [21st April and 14th May, 1898.]

Sale of villages by a wife to her husband.

The purchase money had not been paid on what purported to be a deed of sale of villages by a Muhammadan wife to her husband for a price which, however, the deed acknowledged to have been paid. After her death two of her relations, disputing the due execution of the sale, deed, sued the husband, who had obtained possession, claiming, in the alternative, either that they should obtain their shares in the property of the deceased, or, if the sale of the villages should be maintained, that they should receive their proportion of the price as due to the estate left by her.

The two Courts below concurred in finding that the wife, a *parda-nashin* was capable of managing her own affairs, and that she had not received the price.

The first Court inferred from the state of things that the wife had in a manner made a gift of the villages to the husband. The High Court reversed that judgment, and decided that, with regard to the probability of influence on the part of the husband, the absence of any independent advice for the wife and other circumstances, the transaction was without effect.

[448] The Judicial Committee found that there had not been a case of undue influence exercised either made by the plaint or raised by the issues; they found no evidence that the price stated was inadequate, or the sale an improvident one, or that the husband had been released from having to pay the price. From the findings on the evidence the presumption was that the wife intended to pass the property for some purpose, and that, the suggestion of a gift being excluded, the deed operated as a sale according to what it purported to be.

They did not throw any doubt on the sound doctrine, laid down in numerous cases, as to the obligations upon persons taking benefits from *parda-nashin* ladies.

To the one surviving plaintiff was awarded a moiety of the price payable by the husband, who himself inherited the balance.

[R., 34 A. 455 (P.C.)=39 I A 156=14 Bom. L.R. 1055=16 C.L.J. 613 (614)=16 C.W N. 889=23 M.L.J. 210=12 M L.T. 361=1912. M.W.N. 976=15 O.C. 271=16 Ind. Cas. 197 2 A.L.J. 436 (441).

CONSOLIDATED appeals, one by special leave, from two decrees (7th January 1891) of the High Court, in the same suit, modifying a decree (23rd January 1889) of the Subordinate Judge of Bareilly.

This suit was brought on the 7th February 1888 by Najiban and her sister, Zahur Begam. The latter died in 1888, and Najiban was entered on the record as her heir and representative before the judgment in the Court of first instance. The defendant, now appellant, was the husband of Imami Begam, sister of the two plaintiffs, who survived her and on her death claimed to share in the estate that she left.

This appeal related to twenty shares in each of two mauzas, one Jabida Chapri and the other Pachtaur, in the Bareilly district, the yearly *jama* of the one being Rs. 1,000, and of the other Rs. 200. They were the subject of a registered deed of sale dated the 9th November 1887, by which Imami Begam purported to have sold them to her husband, having transferred possession to him for Rs. 30,000 then paid as the deed said. He obtained *dakhil kharij*. As to the title of the plaintiffs to sue, there

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were concurrent findings of fact in the Courts below, and it was not now disputed that the wife, Imami Begam, and the plaintiffs, were three daughters of the same mother, Waziran, deceased. There was no appeal preferred from the decision of the High Court that they were not her legitimate daughters—facts which, according to the High Court, entitled the two plaintiffs to one **[449]** moiety between them as their combined shares in the late Imami Begam's estate, the other moiety going to the surviving husband. There were also concurrent findings below that the payment of the consideration acknowledged in the deed of the 9th November 1887 had not taken place.

The principal question on these appeals was whether the *purdanashin* wife had executed that deed with full comprehension of its effect, and free volition on her part that the transaction should be carried out, with the result of the transfer of her property to her husband.

The facts are stated in their Lordships' judgment.

The Subordinate Judge was of opinion that the effect of the sale deed, without the payment of the consideration having been made, was virtually that there was a voluntary transfer or gift of the property by the wife to the husband, which was valid, according to the Muhammadan Law. This in the Judge's view had deprived the plaintiff Najiban of all right to the villages, or to any part of the consideration for which they were ostensibly alienated; he therefore dismissed the suit. Both parties appealed to the High Court from the decision of the first Court, the plaintiff Najiban contesting the validity of the transaction of the 9th November 1887, and the defendant objecting to her claiming as a sharer in the estate inherited from her alleged sisters. The question as to the proportionate share which the daughters of one mother would take, under the circumstances, was decided by the High Court as above stated, with the result that their decision on that point was not disputed at the present hearing. On Najiban's appeal the decision of the Bench (SIR JOHN EDGE, C.J., and KNOX, J.) was given in one judgment, which dealt with both questions. They reversed the finding of the lower Court that there had been a gift to Ikram-ud-din.

After referring to the written statement of the latter and the evidence, the judgment of the Chief Justice concluded as follows:—

[450] "Under these circumstances the view I take is that, if Mus-
"sammat Imami Begam really understood what the transaction was, it
"was not the transaction which was evidenced by the sale deed, *i.e.*,
a transaction of sale; it was not the transaction which the defendant
in his pleadings and in his evidence put before the Court. Although
this lady could not fairly be described as a drunkard, she undoubtedly
"had impaired her health by drink. She was a person very liable to be
"influenced by her newly-married husband, who was many years her
"junior; and although she might have desired to confer a benefit upon
"him, either by making a free gift of those villages to him, or by trans-
"ferring them to him for an inadequate consideration, still I think we
"ought not to give Ikram-ud-din a decree in respect of these villages
"unless, having regard to the circumstances, we are satisfied that this
"old lady had independent advice, and thoroughly understood what she
"was doing on that occasion. It has not been shown to us that this
"lady had any independent advice; and under these circumstances, and
"having regard to the doubt and mystery in which Ikram-ud-din himself
"has involved the transaction of the 9th November 1887, I think we
"should hold that Ikram-ud-din has not made out a title other than

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"his title as heir of his wife Imami Begam to these villages, or any part "of them. As the surviving husband of Imami Begam he is entitled to "one-half of these villages; Najiban in her own right, and as heiress of "her sister, is entitled to the other moiety."

Mr. *H. H. Cozens-Hardy*, Q. C., and Mr. *H. Cowell*, for the appellant, argued that the two villages were not part of the divisible estate left by the wife, but had been effectively transferred to the husband, who was exclusively entitled thereby to the property. Effect should be given to the facts found, in concurrence by the Courts below, that Imami had executed the sale deed with knowledge of its effect, she being a capable woman who understood the transaction. The inference from these facts, with that of the transfer of possession was that Imami intended [451] to convey the property; proof of payment of the price was not essential in order to establish the sale. The general requirement that a *parda-nashin* lady parting with her property should have the advice of some independent person, was not disputed: but here it was contended that the principle had no application, for the sufficient reason that the evidence showed that Imami was in this instance fully competent to manage her own affairs. That the wife was desirous of favouring her husband would not of itself be any proof of the husband having influenced her unduly; of the latter there was no evidence. Reference was made to *Nedby* v. *Nedby* (1); *Ranee Khujooroonissa* v. *Mt. Roushun Jehan* (2): *Kamarunnissa Bibi* v. *Husaini Bibi* (3); *Kujabai* v. *Ismail Ahmed* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi* (5).

Mr. *J. D. Mayne*, and Mr. *G. E. A. Ross*, for the respondent, argued that the judgment of the High Court was right. That the transaction could not be supported as a gift was clear, for if the wife was intelligent enough to understand what took place on the 9th November 1887, she must have understood it to be a sale to her husband for value and no gift. As a sale, moreover, the husband relied upon the transaction. That it should now be held a gift would contravene the general principle expressed in *Eshenchunder Singh* v. *Shamachurn Bhuttoo* (6). A different case would be made from that which was then put forward if the transaction could be held to be a gift The High Court was also right in declining to give effect to the sale deed when the circumstances under which the husband sought to have it maintained were all before them. There was direct concealment in the matter of the non-payment of the money. A fiduciary relation subsisted between the parties to the deed at the time, the husband having on the 3rd of the same month accepted his wife's general power as her agent over her property. [452] The wife's ill-health, her secluded state, the entire absence of independent advice, or means for her getting it, were rightly considered, and had had the right degree of weight given to them by the High Court. Thus the claim in respect of the villages had been rightly allowed, and the judgment should be upheld. In reference to transactions entered into by a *parda-nashin* were cited.—*Geresh Chunder Lahoree* v. *Mussumat Bhuggobutty Debia* (7); *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (8); *Sudisht Lal* v. *Mussummat Sheobarat Koer* (9); *Mahomed Buksh Khan* v. *Hosseini Bibi* (10).

(1) (1852) 5 De Gex and Smale, Chy. R. 377.
(2) 3 I. A. 291 (307) = 2 C. 184.
(3) 3 A. 266.
(4) 7 B. H. C. R. 27.
(5) 15 I.A. 81 = 15 C. 684.
(6) 11 M. I. A. 7 (24).
(7) 13 M.I.A. 419 (431).
(8) 1 I.A. 192 (208).
(9) 8 I. A. 89 (43) = 7 C. 245.
(10) 15 I. A. 81 = 15 C. 684.

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Mr. *H. H. Cozens-Hardy*, Q.C., replied. Afterwards, on May 14th, their Lordships' judgment was delivered by LORD DAVEY.

JUDGMENT.

In October 1887 the present appellant was married to Mussamat Imami Begam; she was then about sixty years of age, and the appellant was some sixteen years younger. Mussamat Imami Begam had been twice previously married, and from one of her former husbands she had inherited a considerable fortune, and at the date of her marriage to the appellant was a woman of large wealth. On the other hand, the appellant appears to have been a person of very small means.

Mussamat Imami Begam executed a power-of-attorney, dated the 3rd November 1887, in favour of the appellant, by which she empowered him to collect her rents and grant receipts, and exercise other large powers over her property.

A few days afterwards Mussamat Imami Begam executed a sale deed, dated the 9th November 1887, by which she declared that she had sold two villages to the appellant for Rs. 30,000; and having received the sale consideration in full from the aforesaid vendee, had put him in proprietary possession of the property sold, like herself. Jamna Prasad, the Special Sub Registrar, in his report stated that he had attended at the house of Mus-[453]samat Imami Begam on the 11th November 1887, and that the Mussamat heard word by word the contents of the sale deed, and admitted from behind a screen the execution and completion thereof, and admitted that she had already received gold mohurs worth Rs. 20,000 and the Sub-Registrar further reported that the appellant, the vendee, paid in his presence ten bags containing Rs. 10,000 to the Mussamat, the vendor. Fifteen days afterwards she executed a power-of-attorney, dated the 24th November 1887, for the purpose of obtaining mutation of names, the execution of which was also verified by a commissioner.

Mussamat Imami Begam died in the month of January 1888, and shortly afterwards the present respondent and her sister, since deceased, alleging themselves to be the lawful sisters and co-heiresses of the Mussamat, commenced this suit against the appellant. By their plaint the plaintiffs denied the marriage between the Mussamat and the appellant, and alleged that he had taken exclusive possession of, and appropriated without any title, the bulk of her moveable and immoveable property. As to the sale deed they alleged that the Mussamat had no knowledge of that deed, nor was it read out to her, nor could she have understood it, as she was under the influence of liquor, and that in short the sale deed being spurious, forged, and without consideration was void. The prayer of the plaint was for possession of the villages (including the two in question) and other property as detailed; and that should the defendant prove the sale of the two villages to be genuine, the sale consideration thereof, instead of possession, should be awarded to the plaintiffs against the defendant, along with the moveable property, and for possession of the Mussamat's moveable property, or payment of its value. The appellant by his statement of defence denied the title of the plaintiffs, and relied on the sale deed.

The Subordinate Judge found that the respondent and her co-plaintiff were the legal heirs of Mussamat Imami Begam, and, that a marriage had taken place between the appellant and the Mussamat. The first finding was varied by the High Court, [454] who found that, although the respondent and her co-plaintiff were daughters of the same mother as

the Mussamat, they were illegitimate. The result of this was that the plaintiffs became entitled to one moiety only and the defendant (the appellant) to the other moiety of the property. These findings as varied by the High Court are not now in dispute.

The 4th and 5th issues relating to the sale deed were as follows :—

"4. Did Mussamat Imami Begam execute the sale deed, dated 9th "November 1887, conveying certain villages to the defendant, and did she "do so while she was in a sound state of mind, or when she was not in "her senses, but in a state of intoxication, without understanding what "she was doing; that is to say, whether the contents of the said docu-"ments were understood by her, or she was not capable of understanding "them?

"5. What is the actual value of the property sold? Was Rs. 30,000 "a fiction, or the actual amount of the sale consideration? Was the sum "of Rs. 10,000 alleged to have been paid in presence of the Sub-Registrar "and the commissioner actually paid, or was the transfer without con-"sideration?"

It is unnecessary to discuss at any length the evidence given on those issues, because the two Courts are in substantial agreement as to the effect of it, although they are not agreed as to the legal result or consequence. Both Courts were satisfied that the Mussamat was not intoxicated at the time of verification of the sale deed, and that she was a woman capable of managing her affairs, and that she did in fact manage them, and that she undoubtedly executed by her own hand the sale deed and power-of-attorney for the purpose of mutation of names being effected; and as to the consideration for the sale that, although the Mussamat acknowledged receipt of Rs. 20,000, it was not in fact paid, and that the bags purporting to contain rupees were produced before the Sub-Registrar, but there was no actual evidence of their contents, or where the rupees (if rupees there were) came from, or afterwards went to, and in short that no part of the **[455]** consideration was proved to have been paid by the appellant to the Mussamat.

On these findings of facts (in which their Lordships entirely agree) the Subordinate Judge held that the presumption was that out of affection the Mussamat gave the property to the appellant as a matter of favour, and through some policy called that gift a sale, and that, instead of a deed of gift, she executed a deed of sale in order to sustain the honour and respectability of the appellant, who belonged to an old respectable family of the town, to screen him from any exposure. The learned Judges in the High Court dissented from this view, and their Lordships agree with them. There is no evidence of any intention to make a gift, and there is no suggestion in the pleadings that the villages had been given to the appellant or that his wife intended to remit to him, or release him from payment of, any part of the purchase-money. The acknowledgment of the previous receipt of Rs. 20,000 would no doubt enable the vendor to transmit the property to a second purchaser, as between whom and the vendor the latter would not be entitled to deny the payment of that portion of the purchase money; but as between the vendor and vendee it had not the effect of discharging him.

But while their Lordships so far agree with the High Court, they do not altogether agree on the result, though probably the difference is more one of form than substance. The High Court seems to have thought that in the circumstances there was a presumption of undue influence on the part of the appellant, and that he ought to have shown that the old

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lady had independent advice, and thoroughly understood what she was doing, and accordingly the Court set aside the transaction altogether. Their Lordships doubt whether this was right, or altogether consistent with the previous findings by the Court. There is no case of undue influence made by the plaintiffs in their plaint, or raised in the issues on which the case was tried: and there is no evidence that Rs. 30,000 was an inadequate price, or that **[456]** the sale was an improvident one if the price had been paid. From the findings on the evidence their Lordships think it must be presumed that the Mussamat intended to pass the property for some purpose; and, as the suggestion of a gift is excluded, the deed must operate (if at all) according to what it purports to be, *viz.*, a sale. In coming to this conclusion in the case before them their Lordships do not intend to throw the slightest doubt on the sound doctrine laid down in numerous cases as to the obligations of persons taking benefits from a *parda-nashin* lady.

Their Lordships therefore will humbly advise Her Majesty that relief be given to the surviving plaintiff (the present respondent) in accordance with the fourth paragraph of the prayer of the plaint, and for that purpose the decree of the High Court be varied by inserting after the words "specified below" the words "except the two villages Jabida "Chapri, with the garden and houses, and Pachtaur, in the pargana of "Nawabganj, but including the sum of Rs. 15,000, being one moiety of "the sum of Rs. 30,000, the price of the said two villages, payable by "the defendant" and after the words "date of possession" the words "and together with interest on the said sum of Rs. 15,000 from the 9th "November 1887 up to date of payment" at the rate usually allowed by the Court, and instead of the words "the amount whereof shall be" the words "the respective amounts of such mesne profits and interest to be," and that in all other respects the said decree ought to be affirmed and the appeal dismissed.

As the appellant came before their Lordships to claim the property as a gift without any payment, and never in the course of the proceedings offered to pay or give credit for the price as part of Mussamat Imami Begam's estate, their Lordships will not advise Her Majesty to make any alteration in the disposal of the costs by the High Court, and for the same reason, and because the respondent has substantially succeeded, they do not think that the variation made by them in the decree should relieve the **[457]** appellant from the payment of the costs of these appeals, which the appellant must therefore pay.

Appeal allowed, decree varied.

Solicitors for the appellant: *Messrs. Ranken, Ford, Ford and Chester.*
Solicitors for the respondent: *Messrs. Pyke and Parrott.*

20 A. 457 = 18 A.W.N. (1898) 112.

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APPELLATE CIVIL.

20 A. 457 = 18 A.W.N. (1898) 112.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ABBASI BEGAM (*Plaintiff*) *v.* AFZAL HUSEN AND ANOTHER (*Defendants*).* [9th June, 1896.]

Muhammadan law—Pre-emption—Talab-i ishtishhad—Reference to talab-i-mawasibat necessary.

A pre-emptor claiming pre-emption under the Muhammadan law is bound at the time when he makes his *talab-i-ishtishhad* to state distinctly that he has already made *talab-i-mawasibat*. *Rajjub Ali Chopedar* v. *Chunai Churn Bhatra* (1) followed.

[F., 20 A. 499.]

IN this case the appellant, a Muhammadan lady, was plaintiff in a suit for pre-emption, in respect of a share in certain zamindari and house property. The Court of first instance (Munsif of Hawali, Bareilly) decreed the claim. The defendant vendee appealed. The lower appellate Court, (District Judge of Bareilly) decreed the appeal and dismissed the suit. The District Judge found that, while the plaintiff had, on hearing of the sale which gave rise to her claim for pre-emption, at once declared that she was the *shafi*, thereby making the *talab-i-mawasibat* properly according to Muhammadan law, she had, in making the *talab-i-ishtishhad*, which was made through an agent, omitted to refer to the fact of the *talab-i-mawasibat* having been made. The learned Judge accordingly held, that the strict formalities required by the Muhammadan law had not been complied with, and, as [458] stated above, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Mr. *Amir-ud-din*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—This is a second appeal of a plaintiff in a pre-emption suit. The lady who is the pre-emptor and appellant here has been defeated by a finding of the lower appellate Court that she has not fully satisfied the requirements of the Muhammadan law in making the *talab-i-ishtishhad*. The facts are, as found by the lower appellate Court, that the lady was inside her house when she received intelligence of the transaction which gave rise to her pre-emptive right. She at once declared that she was the *shafi*. That is beyond doubt a sufficient compliance with the requirements of the law as to the immediate demand.‡ She thereupon instructed an agent to communicate to the vendee, who was outside the house, her intention of exercising her right. The learned Judge says that certain persons appear to have accompanied the agent as witnesses. It is admitted that when the second demand was made to the vendee no words were used referring to the prior demand which had been

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* Second Appeal No. 381 of 1896 from a decree of E.J. Kitts, Esq., District Judge of Bareilly, dated the 18th February 1896, reversing a decree of Munshi Girraj Kishore Datt, Munsif of Hawali, Bareilly, dated the 4th December 1895.

† [N.B.—The date of the judgment as given in 18 A.W.N. (1898) 112 is 1898, June 9. This seems to be the correct date.—ED.]

‡ *See Ali Muhammad Khan* v. *Muhammad Said Husain* (18 A. 309)—ED.

(1) 17 C. 543.

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made inside the house. This is found by the Judge to be an insufficient compliance with the law. We think that he was right for the reasons set forth in the judgment of the Full Bench of the Calcutta Court in the case of *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra* (1). The decision of that Court is one in which we concur. We are informed that this ruling has been followed in other cases in this Court.*

We dismiss the appeal with costs.

Appeal dismissed.

20 A. 457 = 18 A.W.N. (1898) 112.

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20 A. 459 = 18 A.W.N. (1898) 117.

[459] APPELLATE CRIMINAL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Knox.

QUEEN-EMPRESS *v.* PRAG DAT AND OTHERS.†

[13th June, 1898.]

Criminal Procedure Code (1882), s. 417—*Appeal by Government from an acquittal on the same footing as an appeal from a conviction—Act No.* XLV *of* 1860, *ss.* 96 *et seq—Right of private defence.*

When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises.

In the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and a right of appeal against a conviction. *Empress* v. *Gayadin* (2), and *Queen-Empress* v. *Gobardhan* (3) referred to.

[F., 24 A. 143 (145); R., 21 A. 122 (124); 24 A.W.N. (1904) 113; 35 C. 363 = 7 C.L.J. 359 (364) = 12 C.W.N. 384 = 3 M.L.T. 385 = 7 Cr. L.J. 256; 97 P.L.R. 1904; 7 P. R. 1904 (Cr.) = 1 Cr. L.J. 1022 = 2 L.B.R. 303; U.B.R. 1905, 2nd Qr., Penal Code, p. 21; D., 10 O.C. 196 (199).]

THE facts of this case are fully stated in the judgment of the Court.

The Officiating Government Advocate (Mr. *A. E. Ryves*), with whom Messrs. *C. Dillon* and *B. E. O'Conor*, for the Crown.

Mr. *W. Wallach* and Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

KERSHAW, C.J., and KNOX, J.—This is an appeal presented by the Government Advocate from an original order of acquittal passed by the Sessions Court of Farrukhabad. That Court had before it six Chaube Brahmans, all relatives, and a Gadaraya, the servant of the Brahmans, charged with offences under ss. 148 and 302 of the Indian Penal Code, committed at Madhonagar on the 23rd of July 1897.

There can be no room for doubt that the case is one of conflict between the Thakurs and Chaube Brahmans of Madhonagar. They are at dispute over a strip of waste land. The Chaubes assert that the land appertains to a grove which is admitted to belong to them. The Thakurs, on the other hand, maintain that the disputed land is part of their cultivation, which as a fact does adjoin it.

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* *See Akbar Husain* v. *Abdul Jalil* (16 A. 383)—ED.

† Criminal Appeal No. 323 of 1898.

(1) 17 C. 543. (2) 4 A. 148. (3) 9 A. 528.

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[460] On the 23rd of July the dispute between the parties resulted in a fight, and in this fight one Ajudhia, a servant of the Thakurs, was shot dead. Laltu, the Gadaraya, is charged with having fired the gun. The prosecution says that he fired in pursuance of the common object of the Brahmans, who were attempting by show of force to enforce their alleged rights over this strip of land. Hence the charge laid under the sections above quoted against all the seven respondents. Both the Thakurs and the Brahmans have been arrested on account of this disturbance.

As usual, in cases of this kind the police have found it difficult to secure independent testimony of what did take place. Those of the villagers who were present and looking on, would probably by sympathy and bias, be so attached to one or other of the disputing parties that it would be hopeless to get disinterested and reliable evidence from them. Three witnesses have been found, a barber and a weaver of Bhawan Sarai, and a carpenter of Akramabad, both of them villages within a mile's distance from Madhonagar. It is not suggested by the defence that any one of these three is suspected of bias or partisanship. It is upon their evidence that the Sessions Court acquitted the Brahmans, and it is upon their evidence that the Government Advocate asks us to convict the Brahmans.

We have examined this evidence most minutely, and have been assisted in doing so by careful criticisms on the part of the Government Advocate and the learned counsel who appears for the accused. Undoubtedly these statements differ in points of detail, but they all agree on the following facts:—That the Thakur party consisted of from thirty to fifty men, and that one of that party had a gun and the rest were armed with lathis; that on the other side were arrayed the seven accused; one of them, Laltu, carried a gun; the others had nothing in their hands except that, according to Chedda and Buddha, they carried sticks. All agree in saying that the Thakurs gave orders for the demolition of a *thaonla*, or mud wall, probably three feet high, round a neem tree; that upon this the Chaubes interfered and begged that the matter be referred [461] to Court. Words ensued, then blows, and almost immediately Laltu fired at Ajudhia on the Thakur's side and shot him dead on the spot. Upon this all are said to have run away. The defence put forward on behalf of two of the accused is an *alibi*. The others say that they went to the assistance of Ganga Bakhsh; that they were beaten; that they had no weapons of any kind, and beat no one. Ganga Bakhsh says he was on the spot gathering flowers; found the Thakurs intent upon demolishing the *thaonla*; remonstrated, and was beaten and became unconscious. Laltu says he carried no gun on that day.

The contention of Mr. *Wallach*, who appeared for the defence, is that upon the evidence of these very three witnesses, it is established that the Chaubes were on the spot for a lawful purpose; that they continued throughout a lawful assembly, that Laltu did not come on the spot with them, but after them and quite independently. Laltu had been out shooting birds, and his act, even according to the witnesses for the Crown, was an independent act done in the lawful exercise of the right of private defence. He accordingly contends that none of the accused was guilty of any offence, and that the order of acquittal passed by the Sessions Court of Farrukhabad was the right and proper order. He further contended, on the authority of *Queen-Empress* v. *Gayadin* (1)

(1) 4 A. 148.

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and *Queen-Empress* v. *Chotu* (1) that this Court has held that the extraordinary powers conferred by s. 417 of the Criminal Procedure Code, should be most sparingly enforced, and in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. In the present case, the judgment cannot be said to be open to any of these criticisms, and is therefore not a judgment to be interferred with.

Upon turning to the judgment we find that the reasons given by the learned Sessions Judge for acquitting the accused are that **[462]** they were a lawful assembly; that Laltu fired and was justified in firing, and he had reason to apprehend that the Brahmans might otherwise be killed, and that therefore there was no riot committed; and it has not been shown that Ajudhia was shot in pursuance of any common object of the assembly of Chaubes, or that the shooting was contemplated by the Chaubes as likely.

The contention that Laltu did not form part of the assembly of Chaubes, but came up indpendently, is based by Mr. *Wallach* upon a few words which occur in the cross-examination of the witness Buddha. They are to this effect:—

"I saw Prag Dat and Becha Lal (both of them Chaubes) when they came up. Laltu came afterwards. He came from shooting somewhere from the direction of the grove south." The other two witnesses say simply that they saw the Chaubes opposed to the Thakurs, and among the Chaubes was Laltu, Gadariya. Even Buddha places Laltu among the Chaubes from the very commencement of the fight. Laltu was a servant of the Chaubes, and we are satisfied, without any question of doubt, on the evidence of all three witnesses compared together, that Laltu was there in concert and full understanding with the Chaube party. His prompt appearance on the spot, and the precision and readiness with which he, only a servant, acted in concert with his masters, satisfies us that all seven were acting with a common understanding and common intent, and that intent was to prevent the demolition of the *thaonla*, if possible without violence, if necessary by resort to violence, and to extreme violence. We cannot leave out of consideration that the dispute was practically over the removal of a mud wall which could have at any moment been reconstructed at a nominal cost, and the demolition of which would not dissipate all possibilities of recovery of possession, if recourse had been had to Courts of law. If a body of men go down to meet another body of men evidently intent upon picking a quarrel over a pice of mud wall, go down armed with a loaded gun and use that gun within a short interval of their arrival, it is for them to rebut the inference which at once **[463]** arises that their intention was by means of criminal force, or show of criminal force, to enforce their rights or supposed rights. We cannot agree with the view taken by the learned Judge, that the Chaubes were in this case entitled to defend their possession *prima facie* by force. The use of force in defence of property by private individuals is a matter defined by law. The presence of Laltu with his gun, unexplained as it is by any evidence for the defence, proves that the Chaubes were prepared to defend this mud *thaonla* even to the voluntarily causing of death; and the burden

(1) 9 A. 52.

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lay heavily upon them of proving that they acted under reasonable apprehension that death or serious hurt would be the consequence if the right of private defence were not exercised. The harm intended was so slight that persons of ordinary sense and temper would have, and should have, refrained from taking the law into their own hands.

As regard Laltu, the defence is more explicitly and directly a defence that he acted in exercise of the right of private defence. The law in India is that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon the accused, and it is directed by the Statutes that the Court shall presume the absence of such circumstances. The learned Sessions Judge has entirely overlooked this provision of the law. He has not presumed the absence of circumstances bringing the case within the general exceptions which permit the plea of the right of private defence being raised. The fact that forty or fifty persons began the attack, and that after the attack began, Laltu fired a shot which struck Ajudhia, is not enough to show that Laltu was justified in firing. Laltu had to prove that he had reason to apprehend that the Brahmans might be killed. He gave no evidence of this, or of facts from which we could hold it proved. In criminal appeal No. 280 of 1897, *Queen-Empress* v. *Rupa* decided on the 27th of March, 1897, Sir John Edge held that when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who, on the other **[464]** hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other. This appears to us to be a true and sound exposition of the law. The learned Judge, in taking the view he did, has erred both in matter of fact and matter of law, and his order must, in the interests of justice, be set aside. With reference to the contention based upon *Queen-Empress* v. *Gayadin* (1), it must not be forgotten that the learned Chief Justice and Mr. Justice Straight, in *Queen-Empress* v. *Gobardhan* (2) did not consider that they were departing from and doing violence to the principles laid down in *Queen-Empress* v. *Gayadin*, and did set aside an order of acquittal where they were satisfied that the Sessions Judge had overlooked important circumstances. Indeed it is not easy to see any distinction in the Criminal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction. In both cases the appellant has to satisfy us that there does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a Judge who has had all the evidence before him and has arrived at the determination with that great advantage in his favour.

We are satisfied upon the evidence that all the seven accused did go down to the field with the intention of enforcing their rights, or supposed rights, by show of criminal force, and, if need arose, by use of criminal force, and that they thus were members of an unlawful assembly; further that force was used by Laltu in prosecution of the common object of such assembly. All the accused are therefore guilty of the offence of rioting. In prosecution of the common object of the assembly, Laltu caused the death of Ajudhia by shooting him, and with the knowledge that what he did was so imminently dangerous that it must in all

(1) 4 A. 148.

(2) 9. A. 528.

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probability cause his death. We find Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu guilty [465] of the offence of murder committed in the course of rioting, and by virtue of s. 149, read with s. 302 of the Indian Penal Code, we direct that Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu suffer each and all of them transportation for life.

20 A. 459 = 18 A.W.N. (1898) 117.

20 A. 465 = 18 A.W.N. (1898) 131.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

UMRAO BIBI (*Defendant*) *v.* JAN ALI SHAH (*Plaintiff*).*

[14th June, 1898.]

Suit for cancellation of a deed—Muhammadan law—Plea that the deed was inoperative according to the personal law of the parties.

Held, in the case of a deed of gift between Muhammadans, that it was no ground for cancellation of the deed that, possession of the property, the subject of the deed, not having been made over to the donee, the deed might be, according to the Muhammadan law, inoperative.

[R., 3 O.C. 231 (234).]

THIS was a suit for cancellation of a deed of gift dated the 4th of January 1895, executed by the plaintiff in favour of the defendant, his niece, and assigning to the latter a one anna share in a certain village. The plaintiff alleged, that he had really intended to convey the share in dispute to his own daughter, but, that the defendant's husband had fraudulently caused the deed to be executed in favour of the defendant. The plaintiff further pleaded that possession of the property, the subject of the deed had not been made over, and that the deed was therefore void according to the Mubammadan law.

The Court of first instance (Munsif of Bansi) found against the plaintiff on the allegation of fraud, but, finding that possession had not been delivered under the deed, held that the gift, being not complete, was liable to be revoked, and accordingly decreed the plaintiff's claim.

The defendant appealed, and the lower appellate Court (District Judge of Gorakhpur) dismissed the appeal, affirming the decree of the Munsif. The defendant thereupon appealed to the High Court.

[466] Babu *Jogindro Nath Chaudhri* and Babu *Satya Chundar Mukerji*, for the appellant.

Mr. *Amiruddin*, for the respondent.

JUDGMENT.

BLAIR, J.—The plaintiff's suit was for cancellation of a deed of gift. It was based on the allegation that the execution of the deed had been obtained by fraud. There was an allegation in the plaint, apparently intended to support the plaintiff's statement that he never made such a deed, to the effect that he had never given up to the defendant possession of the property the subject of the deed of gift. The allegation of fraud has been found not to have been proved, and the plaintiff relies upon the ground that a deed of gift, made without possession being given of the subject of that deed, is void in law. The plaintiff is in this

* Second Appeal No. 416 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 5th March 1896, confirming a decree of Babu Keshab Deb, Munsif of Bansi, dated the 15th November 1895.

20 A. 465 = 18 A.W.N. (1898) 131.

dilemma. If the deed is a nullity for lack of giving over of possession, it is a document from which the plaintiff can entertain no reasonable apprehension of injury. If, on the other hand, possession was non-essential to its validity, then it would be a good deed of gift. In either the one or the other case it is not a document which a Court can be properly called upon to cancel. I would allow the appeal and dismiss the plaintiff's suit with costs.

BURKITT, J.—I am also of the same opinion, and am of opinion that the appeal must be allowed and the suit dismissed.

The plaintiff came into Court alleging an act of fraud against the defendant, in that he (the plaintiff) had been fradulently made to execute a deed of gift in favour of the defendant, who was his niece, he at the time believing that it was in favour of his own daughter. Further on, in his plaint he alleged that no transfer of possession had taken place, apparently adducing that matter in corroboration of the allegation of fraud. In the first Court the plaintiff failed to prove the allegation of fraud, and as to possession, it was found that no transfer had taken place. The Munsif thereupon records:—"I find that defendant did not take possession of the gifted property, and hence the gift not being complete is liable to be revoked. Hence I give a decree for the plaintiff for [467] cancellation of the deed." Now as to those words, it is to be remarked that the plaintiff nowhere asserted any revocation of the deed of gift; so the Munsif set up for the plaintiff a case he had not made and a case totally inconsistent with the plaintiff's case; and though the Munsif says:—"Hence I give a decree," he has not referred to any authority justifying such action. The defendant being defeated in the first Court, appealed to the District Judge, and of course based her appeal on the question decided against her by the Munsif, *i.e.*, the question of transfer of possession. On that issue the Judge in appeal concurred with the Court below, and affirmed the decree cancelling the deed. The ground on which the deed has been cancelled has been explained to us to-day by the learned counsel for the respondent to be because it violated the rule of Muhammadan law, which requires that transfer of possession shall accompany a gift of immoveable property. It may be that the deed of gift is open to that objection; it may be that it is a deed not worth the paper it is written on; it may be that no action could successfully be taken on it in any Court, and that it is perfectly ineffectual for the purpose it purports to effect; I do not decide any of those points. But, assuming that the deed is open to all those objections, assuming it is waste paper, I am of opinion that that is no reason why a Court of Justice should be called on solemnly to cancel that which had no existence in law. Had the plaintiff made out the allegation of fraud, the case would have been different. Proof of that allegation would have been ample reason for cancelling the deed, but that allegation having failed, I see no reason why the document should be set aside simply because it may turn out to be one which has not complied with the provisions of the Muhammadan law.

[By the Court:—The order of the Court is, we allow the appeal, set aside the decrees of the two lower Courts, and dismiss the suit of the plaintiff with costs in all courts.]

Appeal decreed.

N.B.—The portion in rectangular brackets forms part and parcel of the judgment. The same has been omitted in I.L.R. ED.

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20 A. 468 = 18 A.W.N. (1898) 113.

20 A. 468 = 18 A.W.N. (1898) 113.

[468] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

TOTA RAM AND OTHERS (*Defendants*) *v.* LALA (*Plaintiff*).*

[15th June, 1896.]

Act No. IV of 1882 (Transfer of Property Act), s. 135—Actionable claim—Sale of mortgagor's interest in mortgaged property.

The sale by a mortgagor of his interest in the property mortgaged is not the sale of an actionable claim within the meaning of s. 135 of the Transfer of Property Act, 1882.

THIS was a suit for redemption of a usufructuary mortgage. One Lala, the uncle of Diwan Singh, defendant, executed a usufructuary mortgage of certain property for Rs. 600 in favour of Man Singh, and put the mortgagee in possession. Man Singh sold his rights in the mortgaged property to Diwan Singh and four others, defendants, and gave the vendees possession. Lala, the mortgagor, died and was succeeded by Diwan Singh, his nephew. Diwan Singh sold his interest as a mortgagor to the plaintiff Lala. Lala, plaintiff, brought a suit for redemption, and paid the mortgage money (Rs. 600) into Court. The defendants, other than Diwan Singh, who, not impleaded at first, was added by the Court to the array of defendants, pleaded that out of a nominal sale consideration of Rs. 1,000 only Rs. 50 had in fact been paid, and they claimed the benefit of s. 135 of the Transfer of Property Act, alleging that they were entitled to defeat the plaintiff's suit on payment of the actual price paid (stated by them to be Rs. 50) and the expenses of the sale. They pleaded also a right to take the property mortgaged as pre-emptors; that there was another mortgage on the property which the plaintiff was also bound to redeem, and that the sale in favour of the plaintiff was executed without consideration.

The Court of first instance (Munsif of Khurja) gave the plaintiff a decree for redemption and possession as prayed. The defendants appealed. The Additional District Judge confirmed the decree of the Munsif and dismissed the appeal. From that decree the defendants appeal to the High Court.

[469] Pandit *Sundar Lal* (for whom Babu *Jivan Chandar Mukerji*), for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—This appeal, one ground only, the third, being urged upon us, is based on the contention that the purchase of the mortgagor's interest in land subject to mortgage is a purchase of an actionable claim within the meaning of s. 135 of the Transfer of Property Act. We are not prepared to accede to so novel a contention for which no authority is produced. In our opinion, what was effected by the purchase was the transfer of the land itself subject to the mortgage.

*Second Appeal No. 445 of 1896, from a decree of T. C. Piggot, Esq., Additional District Judge of Aligarh dated the 13th March 1896, confirming a decree of Pandit Soti Raghubans Lal, Munsif of Khurja, dated the 20th November, 1895.

[N.B.—The date of the judgment as given in 18 A.W.N. (1898) 113 is June 15, 1898. This seem to be the correct date. ED.]

It seems to us a totally different thing from, and bears in our mind no analogy whatever to, the purchase of a mortgagee's interest in a mortgage after the mortgage has become due and payable. We dismiss the appeal with costs.

Appeal dismissed.

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20 A. 468 = 18 A.W.N. (1898) 113.

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20 A. 469 = 18 A.W.N. (1898) 114.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

YUSUF ALI KHAN AND OTHERS (*Plaintiffs*) *v.* HIRA AND OTHERS (*Defendants*).* [16th June, 1898.]

Landholder and tenant—Act No. XII of 1881 *(N.W.P. Rent Act)*, s. 93 *(b)—Suit to eject a tenant. Act inconsistent with the purpose for which the land was let—Sub-lease to a theatrical company.*

An agricultural tenant, at a time when there were no crops growing on his holding, let part of it temporarily to a theatrical company for the purpose of their holding performances thereon. *Held*, that this was not an act sufficient to cause a forfeiture of the tenancy within the meaning of s. 93, clause (*b*) of Act No. XII of 1881.

THE facts of this case sufficiently appear from the judgment of the Court.

Kunwar *Parmanand*, for the appellants.

The respondents were not represented.

JUDGMENT.

BANERJI, J.—This was a suit brought under clause (*b*) of s. 93 of the Rent Act (No. XII of 1881) to eject an occupancy [470] tenant from his holding on the ground that he had committed an act detrimental to the land in his occupation and inconsistent with the purposes for which it was let. The act complained of was that in the month of October, when, according to the learned Judge of the lower appellate Court, there were no crops on the land, and none could have been grown, the defendants had let the land to a theatrical company for erecting a temporary pavilion for the purpose of their theatre. Both the Courts below have dismissed the suit, and I think rightly. The act was not detrimental to the land or inconsistent with the purpose for which it was let, within the meaning of clause (*b*). The tenant, having at a time when the land could not be sown with crops, let it to a theatrical company for the purpose of a theatre for a short period only, did not do an act detrimental to the land, and although, technically speaking, they did an act inconsistent with the purpose for which it was let, namely, cultivation, it does not seem to me that the Legislature contemplated that a tenancy would be liable to forfeiture, if the tenant did an act of this kind for a temporary purpose only, at a time when the land in the tenant's holding could not be cultivated. It is evident from the provisions of s. 149, as the learned Judge has pointed out, that the Legislature intended to give a tenant a *locus pœnitentiæ* and an opportunity to repair the damage done by him. In this case at the time when the Court of first instance made its decree, the land had been

* Second Appeal No. 473 of 1897, from a decree of C. Rustomji, Esq., District Judge of Moradabad, dated the 25th March 1897, confirming a decree of A.W. McNair, Esq., Assistant Collector of Moradabad, dated the 13th November, 1897.

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restored to its former condition and crops had been grown on it. The Courts below have, in my judgment, rightly held that the defendant's act did not entail the forfeiture of their occupancy holding. I dismiss the appeal, but without costs, as the respondents are not represented.

Appeal dismissed.

20 A. 469 = 18 A.W.N. (1898) 114.

20 A. 471 = 18 A.W.N. (1898) 116.

[471] APPELLATE CIVIL.

Before Mr. Justice Blair.

DALIP RAI (*Defendant*) *v.* DEOKI RAI (*Plaintiff*).*
DALIP RAI (*Defendant*) *v.* SUKHDEO RAI (*Plaintiff*).*
DALIP RAI (*Defendnt*) *v.* JOKHU RAI AND ANOTHER (*Plaintiffs*).*
[22nd June, 1898.]

Act No. XII of 1881 (*N. W P. Rent Act*), *s.* 95 (*n*)—*Landholder and tenant—Effect on tenant's rights of his neglecting to apply under s.* 95.

A tenant of certain *muafi* land was dispossessed by his zamindars, as he alleged wrongfully. The dispossessed tenant did not avail himself of the remedy provided by s. 95, clause (*n*) of Act No. XII of 1881; but sometime after the expiry of the period of limitation for an application under that section, he dispossessed the zamindars, who had meanwhile taken the land in suit into their own cultivation. The zamindars thereupon sued in the Civil Court for the ejectment of the former tenant as a trespasser. *Held*, that the defendant could not set up in answer to this suit his status as tenant which he had lost by not availing himself within limitation of the means provided by s. 95, clause (*n*) of Act No. XII of 1881, to contest his own ejectment.

THESE were three connected appeals arising out of the following facts:—The plaintiffs, with others, were purchasers of a village, in which was comprised certain resumed *muafi* land, which had formerly been an assignment, or *jagir*, for the support of chaukidars. Before the assignment of the village to the plaintiffs and their co-sharers, this land appears to have been settled with the defendant. The purchasers subsequently partitioned the village, and the plots of land in suit, forming a portion of the above-mentioned resumed *muafi*, fell to the shares of the respective plaintiffs.

The plaintiffs came into Court, denying that the defendant had ever been a tenant of the land in question, and alleging that they had each and all been forcibly ejected by the defendant; and they sued for recovery of possession of their respective plots by ejectment of the defendant.

The defendant pleaded *inter alia* that he was a tenant, and that the suits were not cognizable by a Civil Court. The Court [472] of first instance (Munsif of Ghazipur) gave effect to this plea and dismissed the plaintiffs' suits.

The plaintiffs appealed. The lower appellate Court (Additional Subordinate Judge of Ghazipur) found that the defendant had been a tenant up to sometime in 1892, when he had been wrongfully dispossessed by the plaintiffs; but that, inasmuch as he had not availed himself of the remedy provided by law in clause (*n*) of s. 95 of Act No. XII of 1881,

* Second Appeals Nos. 430, 431 and 432 of 1897, from decrees of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 26th April, 1897, reversing decrees of Munshi Achal Behari, Munsif of Ghazipur, dated the 20th February, 1897.

within the period limited by s. 96 of that Act, he had lost his title as well as his remedy. The Court accordingly decreed the plaintiffs' claim.

The defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

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20 A. 471 = 18 A.W.N. (1898) 116.

JUDGMENT.

BLAIR, J.—It is needless to recapitulate the admitted facts of this case. The plaintiff acquired title from a person who had resumed the land theretofore assigned for the support of chaukidars. Originally this plaintiff and the plaintiffs in the two connected cases held equal shares in the plot in question. They and the other co-sharers subsequently partitioned the land, and each became possessed in severalty of his own plot. The plaintiffs sue for possession each of his own plot on the allegation that the defendants are mere trespassers. The defendant alleges in his defence that he was, at the time of the dispossession alleged against him by the plaintiffs, the tenant of the plot in suit. Numerous collateral and subsidiary issues were raised, with which it seems unnecessary to deal in deciding these second appeals. The suits of the plaintiffs were dismissed in the Court of first instance on the finding that the defendant was a tenant. The plaintiffs appealed, and in the lower appellate Court, it was found that the defendant had been a tenant up to some time in 1892, when he was wrongfully dispossessed by the present plaintiffs; but that inasmuch as he had not availed himself of the remedy provided by law in clause (*n*) of s. 95 of Act No. XII of 1881, within the period limited by s. 96 of that Act, **[473]** he had lost his title as well as his remedy. It seems to me that that judgment is sound. S. 95 of Act No. XII of 1881 provides that the Revenue Courts only shall have jurisdiction to deal with the subjects and matters of the nature for which applications are prescribed as the proper remedy in that section. The section does not provide merely that no plaintiff may bring a suit on a subject or matter in relation to which one of such applications might be made, but that the Civil Court shall not "take cognizance of any dispute or matter" upon which an application of such a nature might have been made. The defendant here is setting up an existing tenancy in himself, which, if it did exist, would entitle him to recover possession and to continue in possession, up to and at the time when he himself forcibly dispossessed the plaintiffs. In other words, it is contended that he might lie by and neglect to take the steps provided by law within the time limited by law to recover the possession from which he had been wrongfully ousted and might by his own laches oust the jurisdiction of the Revenue Court and set up the jurisdiction of the Civil Court in relation to a matter which, if the subject of contention, could have been brought only in the Revenue Court within a period of six months. That would be the result of allowing him to set up in a Civil Court his title as a tenant in answer to a charge of trespass after the expiration of that period. It seems to me that, apart from the wording of s. 95 of the Rent Act, it was intended that the landlord should not be liable for an indefinite time to the dispossession, perhaps, of some tenants whom he had been induced to let in as tenants, and who perhaps might have incurred heavy expenses, in the belief that the excluded tenant had by declining to avail himself of the remedy provided by law manifested his intention of abandoning his tenancy. That disposes of the one question in this appeal. There is a secondary one, namely, that of *res judicata*, into which I decline to allow the appellant to enter. It

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20 A. 471=18 A.W.N. (1898) 116.

was expressly stated by the Judge in the lower appellate Court that that point and another or others were not pressed on him. It seems to me that it [474] is not open to a litigant to practically abandon a portion of his contention in one Court and then at his convenience to resuscitate it in another. The effect is that these appeals will be dismissed with costs.

Appeals dismissed.

20 A. 474=18 A.W.N. (1898) 132.

REVISIONAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

CHATARBUJ DAS (*Defendant*) *v.* GANESH RAM (*Plaintiff*).*
[27th June, 1898.]

Civil Procedure Code, s. 516 -*Award* -*Decree passed on award filed in Court without notice of its filing being sent to the parties*—*Revision.*

Held, that it was a good ground for revision of a decree based upon an award filed in Court that no notice of the filing of the award was given by the Court to the parties as required by s. 516 of the Code of Civil Procedure, even though the applicant in revision might have received information *aliunde* that the award had been filed. *Rangasami* v. *Muttusami* (1) followed.

[F., U.B.R. (1897-1901), Vol. II, 24; R., 17 Ind. Cas. 430 (431)=15 O.C. 294.]

THE plaintiff and defendant in this case having agreed to refer the matters in dispute between them to arbitration, the plaintiff applied to the Court to have the agreement of reference filed in Court. A summons was issued to the defendant, but he did not put in a defence. The case was proceeded with *ex parte*, and the agreement of reference was filed in Court, and ultimately, on the 17th February 1898, the award based on the said agreement was filed within the time limited by the Court. The defendant on the 3rd of March 1898, filed a *vakalatnamah* authorizing his pleader to object to the award, and on the 18th March objections were filed. The material objection of the defendant was that no notice of the filing of the award had been given to him by the Court as required by s. 516 of the Code of Civil Procedure. The Court (Subordinate Judge of Mainpuri) held that under the circumstances of the case such notice was not necessary, as the defendant in fact knew that the award [475] had been filed. The Court further held that the defendant's objections were barred by limitation under art. 158 of the second schedule to the Limitation Act, and accordingly disallowed the objections and ordered that a decree should be prepared in accordance with the award. Against this order the defendant applied in revision to the High Court.

Mr. *W. Wallach* and Babu *Badri Das*, for the appellant.

Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the respondent.

JUDGMENT.

KERSHAW, C. J. and BURKITT, J.—This is an application calling on this Court to exercise its revisional powers in respect of a decree passed on the 28th of March 1898, by the Subordinate Judge of Mainpuri on an award submitted by arbitrators appointed by the parties. The first ground

* Civil Revision No. 24 of 1898.

(1) 11 M. 144.

taken in the petition of revision, and the only ground argued before us, is that the learned Subordinate Judge acted with material irregularity, in the exercise of his jurisdiction, in that he passed the decree on the award without first having sent to the parties the notice required by s. 516 of the Code of Civil Procedure. It is admitted that notice was not sent; but it was contended, and it is probably true, that the applicant did know that the award had been filed. That matter, however, we regard as immaterial; it was the duty of the Court to send notice. The applicant, in our opinion, might have remained inactive in the case, and was not bound to take any steps in it until he received notice from the Court. This case is on all fours with the case of *Rangasawmi* v. *Muttusami* (1). In that case it was observed that the Court of the Munsif which passed the decree was bound to give the petitioners notice of the filing of the award, which it failed to do, and that the omission to do so was a material irregularity. The High Court further went on to hold that the Munsif should not have proceeded to pass a decree in conformity with the award without first hearing the petitioner's objections. In these observations we fully concur, and adopting the form of **[476]** the decree used by the Madras Court, we allow this application. We set aside the decree of the Subordinate Judge. We direct him to restore the suit to the file, and after considering the objections which we understand have been filed by the applicant, to pass such orders as appear to be just. The applicant will have his costs of this application.

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20 A. 476 = 18 A.W.N. (1898) 121.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

RANJIT (*Plaintiff*) *v.* RADHA RANI AND ANOTHER (*Defendants*) *

[27th June, 1898.]

Act No. XV *of* 1856 (*Re-marriage of Hindu Widows*), *s.* 2—*Hindu Law—Hindu widow—Rights of widow in deceased husband's property—Widows whose re-marriage is valid independently of the Statute.*

Held, that a Hindu widow belonging to the Kurmi caste, in which the re-marriage of widows was permitted, by custom of the caste, independently of Act No. XV of 1856, was not, by reason of her re-marriage, deprived of her right to remain in possession of her deceased husband's estate during her lifetime, and that a suit brought during her lifetime by the reversioners to the estate of her husband to obtain immediate possession of such estate could not succeed. *Har Saran Das* v. *Nandi* (2), and *Dharam Das* v. *Nand Lal Singh* (3) followed.

[**Diss.**, 8 C L J. 542; **F.**, 29 A. 122 = 3 A.L.J. 729 = A.W N. (1906) 299; **R.**, 31 A. 161 = 6 A L.J. 107 = 1 Ind. Cas. 761 (762); A.W N. (1908) 149; 38 C. 862 (871) = 13 C.L.J. 558 = 15 C.W.N. 579 (583) = 10 Ind. Cas. 69 (73); 15 C.P.L.R. 89 (91); 17 Ind. Cas. 133 (135) = 8 N. L. R. 128 (131)]

IN this case the plaintiff claimed certain immoveable property which had been owned in his lifetime by one Ganga Prasad, a somewhat remote collateral. Ganga Prasad had died in 1893, leaving him surviving his step-mother Radha Rani, who was actually in possession of the property, and a widow, Sugna. Sugna had married again after the death of Ganga

* Second Appeal, No. 546 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 20th April 1896, confirming a decree of Mr. Azizul Rahman, Subordinate Judge of Jhansi, dated the 4th March 1896.

(1) 11 M. 144. (2) 11 A. 330. (3) 9 A.W.N. (1889) 78.

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Prasad. The parties were Kurmis, amongst whom the re-marriage of widows is permitted. The plaintiff, however, alleged that the defendant Sugna had by her re-marriage lost all right to her deceased husband's property, and that, inasmuch as Radha Rani, being the step-mother of the last owner, could not be his heir, he (the plaintiff) was entitled to the property.

[477] The Court of first instance dismissed the plaintiff's suit, holding that Sugna was the real heir to the property claimed. The plaintiff appealed, and his appeal was likewise dismissed on a similar finding. The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BLAIR and AIKMAN, JJ.—This is the suit of a plaintiff, who alleges that, failing the right of a Hindu widow of the Kurmi caste who has re-married to the property of her first husband, he is the heir. He impleads the person in actual possession of the property, who is the mother-in-law of the widow, the widow herself and her second husband. The question raised is one as to which there is a clear and absolute difference of opinion between the decisions of this Court and those of the Courts at Bombay and Calcutta, though there is indeed one case which has arisen in the Bombay High Court which has been decided to the same effect as the rulings laid down by this Court. The Allahabad decisions are in the cases of *Har Saran Das* v. *Nandi* (1) and *Dhram Das* v. *Nand Lal Singh* (2). Several unreported cases have all been decided in this Court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent *cursus curiæ* in this Court. Another point was raised by the appellant to the effect that in the provisions of the *wajib-ul arz* a custom was alleged to exist to the effect that a widow among the Kurmi caste who re-marries loses thereby the right to her husband's property. It is found as a fact upon evidence by the Judge of the lower appellate Court that no such custom is proved. The appeal fails and is dismissed with costs.

Appeal dismissed.

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20 A. 478 = 18 A.W.N. (1898) 128.

[478] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

JIWAT DUBE (*Decree-holder*) *v.* KALI CHARAN RAM AND OTHERS (*Judgment-debtors*).* [28th June, 1898.]

Execution of decree—Application for execution giving wrong date of decree—Amendment allowed after limitation—Amendment relating back to former applications.

J. obtained a decree on two mortgage bonds on the 25th November 1885. That decree was set aside, but another decree was passed in his favour on the 21st of September 1886. The decree-holder made several applications to execute the decree, but in each described the decree as of the 25th November

* Second Appeal No. 577 of 1896, from a decree of Pandit Bansi Dhar, Subordinate Judge of Gorakhpur, dated the 29th April 1896, reversing a decree of Babu Dayanath, Munsif of Gorakhpur, dated the 7th May 1895.

(1) 11 A. 330. (2) 9 A.W.N. (1889) 78.

1885. On the third application the judgment-debtor objected that the application was time-barred. The application was allowed to be amended, but the amendment took place after the expiry of limitation. *Held* that the amendment would relate back to the preceding applications, and execution of the decree was not time-barred. *Ajudhia Ram* v. *Muhammad Munir* (1) followed.

[R., 37 A. 399 (406)=11 C.L J. 285=5 Ind. Cas. 532; 2 A.L J. 367 (369); 12 C.L J. 192=14 C.W.N. 971=7 Ind. Cas. 19 (21); 14 C.W.N. 481 (485)=5 Ind. Cas 579 (580).]

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APPELLATE CIVIL.

20 A. 478=18 A.W.N. (1898) 128.

IN this case Shambhu Prasad Dube and others obtained a decree against Ishar Dat and others on the 25th of November 1885. This was an *ex parte* decree, and was set aside on application by the judgment-debtors under s. 108 of the Code of Civil Procedure. The decree-holders, however, obtained another decree in the same suit on the 21st of September 1886. Three applications for execution were filed, namely, on the 21st of January 1889, on the 14th of November 1891, and on the 14th of November 1894; but in each application the decree sought to be executed was described as the decree of the 25th of November 1885. Upon the third application——but apparently not before——the judgment-debtors took objection that the decree sought to be executed, namely, the decree of the 25th of November 1885 was time-barred. The representative of the original decree-holders applied for leave to amend his application, and the amendment prayed for was made on the 23rd of March 1895. The application for execution was allowed, subject to the applicant's filing a certificate of succession within one month. From this order the judgment-debtors appealed, and the lower appellate Court **[479]** (Subordinate Judge of Gorakhpur) allowed the appeal and dismissed the application for execution. The decree-holder thereupon appealed to the High Court.

Munshi *Jwala Prasad*, for the appellant.

Mr. *H. C. Niblett*, for the respondents.

JUDGMENT.

BLAIR and AIKMAN, JJ.—This is the appeal of a decree-holder. The sole point urged upon us is one of limitation. It has been found that the application before the Court below was an application not made within three years of a previous legal application. The facts are these. An *ex parte* decree was obtained by the present decree-holder on the 25th November 1885. That decree was subsequently set aside. Another decree, however, was made in favour of the decree-holder on the 21st September 1886. That was then his only extant decree, the only one therefore capable of execution, and, we cannot doubt, the one he wished to execute. He made his first application on the 21st January 1889, within the three years' period, but, we are informed by Mr. *Niblett*, specified in his application the date November 25th, 1885, as being the date of the decree sought to be executed. Assuming that application to be a good one in point of law, the second application made on the 14th November 1891 would have been in point of time a good application. We are told, however, that the second application repeated the mistake as to the date of the decree. The third application was made on the 14th of November 1894, just therefore within time, were there no other objection. That application also described the decree as of the 25th of November 1885. The mistake in regard to the date of the decree passes through all these applications. Upon the third application the judgment-debtor took objection, that the decree sought to

(1) 13 A.W.N. (1893) 112.

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be executed, to wit, the decree of the 25th of November 1885 was time-barred. The decree-holder applied for amendment by substituting the correct date of the only extant decree held by him against the judgment-debtor. The amendment was allowed after the lapse of the three years. Mr. *Jwala Prasad* invites us to say that the lower appellate Court was wrong in ruling that the [480] decree in relation to which the application was made was no longer capable of execution. He suggests that there never could have been any doubt as to the intention of the appellant, and it appears there could never have been any doubt in the minds of the judgment-debtors, as to the decree which was intended to be executed. He suggests, therefore, that the amendment was properly and rightly made and relates back to the date of the original informal application. In support of his contention he cites the judgment of this Court in *Ajudhia Ram* v. *Muhammad Munir* (1). It is there ruled that an application having once been admitted the date of a subsequent amendment would not by reason of such amendment become the date of the application. We approve of that ruling, and therefore hold that the third application was within time. Until the date of present application we are not aware of any objection taken by the judgment-debtors to the previous applications upon the ground of the erroneous date being specified as the date of the decree.

We therefore allow this appeal, and set aside the order of the lower appellate Court upon the preliminary point, but without costs, as it has arisen through the mistake of the decree-holder. We remand the case under s. 562 of the Code of Civil Procedure for the decision of the remaining issues contained in the memorandum of appeal to the lower appellate Court.

Appeal dismissed * *and cause remanded.*

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20 A. 480 = 18 A.W.N. (1898) 129.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

SADA SHANKAR AND ANOTHER (*Defendants*) *v.* BRIJ MOHAN DAS (*Plaintiff*).† [29th June, 1898]

Act No. IX *of* 1887 (*Provincial Small Cause Courts' Act*), *s.* 23—*Civil Procedure Code*, *s.* 586—*Suit of the nature cognizable by Courts of Small Causes.*

A suit is none the less a suit cognizable by a Court of Small Causes because that Court may have exercised the discretion conferred on it by s. 23 of [481] the Provincial Small Cause Courts' Act, and returned the plaint to be presented to a Court having jurisdiction to determine a question of title raised therein. *Kali Krishna Tagore* v. *Izzat-an-nissa Khatun* (2) followed.

IN this case the plaintiff Brij Mohan Das sued one Gopal Das in the Court of Small Causes at Benares for the rent of part of a house. He alleged in his plaint that he had purchased the said house from one Kanhaiya Lal, who himself had taken it as heir to one Musammat Dhani Bai, that he had let a portion of the said house to the defendant on the 7th June 1889, but that the defendant had not paid him any portion of

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* In part.—ED.

† Second Appeal, No. 576 of 1896, from a decree of Babu Nil Madhub Rai, Subordinate Judge of Benares, dated the 2nd May 1896, confirming a decree of Maulvi Mubarak Husain, Munsif of Benares, dated the 19th September 1895.

(1) 13 A. W. N. (1893) 112.

(2) 24 C. 557.

the stipulated rent. The plaintiff accordingly claimed rent and interest for three years previous to the date of suit, amounting in all to Rs. 117-4. The defendant pleaded that the house belonged, not to the plaintiff, but to Sada Shankar and Rabi Shankar, to whom the rent claimed had been paid, and that the plaintiff had no concern whatever with the house in question. Rabi Shankar and Sada Shankar were accordingly made defendants to the suit. Subsequently the plaint was returned to the plaintiff to be presented in the proper Court. The plaint was accordingly presented in the Court of the Munsif, who heard the suit and decreed the plaintiff's claim. The defendant Sada Shankar appealed to the Subordinate Judge, who dismissed the appeal. Sada Shankar and Rabi Shankar thereupon appealed to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BLAIR and AIKMAN, JJ.—Mr. *Ghulam Mujtaba's* preliminary objection to the hearing of this appeal must prevail. A cause is none the less a cause cognizable by a Court of Small Causes, because that Court exercised the discretion conferred on it by s. 23 of the Provincial Small Cause Courts' Act No. IX of 1887, and returned the plaint to be presented to a Court having jurisdiction to determine the title. We concur with the judgment of the Calcutta Court in *Kali Krishna Tagore* v. *Izzat-an-nissa Khatun* (1). The appeal is dismissed with costs.

Appeal dismissed.

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20 A. 482 (F.B.) = 18 A.W.N. (1898) 123.

[482] FULL BENCH.

Before Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

BEHARI LAL AND OTHERS (*Defendants*) *v.* MUHAMMAD MUTTAKI (*Plaintiff*).* [30th June, 1898.]

Act No. XV *of* 1877 (*Indian Limitation Act*), *sch. ii, arts.* 134, 144—*Trust—Mortgage—Limitation—Suit by trustee to set aside mortgages of trust property made by his predecessor in office*

A *sajjada nashin* in possession of certain *waqf* property during the years 1864 to 1869 executed various mortgages of portions of the *waqf* property, professing to do so in his capacity of *sajjada nashin*. The mortgagor died in February 1891, and on the 6th of April 1891, was succeeded by his son as *sajjada nashin*. On the 25th of November 1893, the son brought a suit to recover possession of the mortgaged property, of which the mortgagees were in possession, on the ground that the mortgages were in violation of the trust and therefore invalid.

Held by the Court that the suit was barred by limitation.

Per BLAIR, J.—Whether or not art. 134 of the second schedule to the Indian Limitation Act, 1877, applies to the case is immaterial, if art. 134 does not apply

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* Second Appeal, No. 927 of 1895, from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 6th August 1895, reversing a decree, of Munshi Bakhtawar Lal, Munsif of Farrukhabad, dated the 26th September 1894.

[N.B.—In 18 A.W.N. (1898) 123 this case is cited as Second Appeal No. 927 of 1897.—ED.]

(1) 24 C. 557.

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the suit would be barred by art. 144 of the same schedule, limitation commencing to run against the trustee from the dates of the mortgagees obtaining possession under their respective mortgages. *Nilmony Singh* v. *Jagabandhu Roy* (1), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2), *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), and *Madhava* v. *Narayana* (4) referred to.

Per BANERJI, J.—The suit is barred by art. 134 of the second schedule to the Indian Limitation Act, 1877, which is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. *Gobind Nath Roy Bahadoor* v. *Ranee Luchmee Koomaree* (5), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2), *Maluji* v. *Fakir Chand* (6), and *Nilmony Singh* v. *Jagabandhu Roy* (1) referred to.

Per AIKMAN, J.—The term "purchased" as used in art. 134 of the second schedule cannot be taken as including "mortgaged," but art. 144 would apply and be a bar to the suit.

[F., 2 C.L.J. 546 (549); **Rel.**, 27 B. 363 (369)=4 Bom. L.R. 743; **R.**, 29 A. 471 (479)=4 A.L.J. 375=A.W.N. (1907) 133; 27 B. 500 (511)=5 Bom. L.R. 303; 34 B. 329 335=12 Bom. L.R. 208=5 Ind. Cas. 965; 24 M. 471 483 (**F.B.**); 18 Ind. Cas. 319 320; 8 O.C. 233 239; 9 P.R. 1904; 30 P.R. 1908=35 P.W.R. 1908=102 P.L.R. 1908; 123 P.W.R. 1908 (**F.B.**)=127 P.R. 1908.]

THE facts of the case sufficiently appear from the judgments.

Munshi *Haribans Sahai*, for the appellants.

Mr. *Amir-ud-din*, for the respondent.

JUDGMENTS.

[483] BLAIR, J.—The suit out of which this second appeal arises was brought by the plaintiff respondent as *sajjada nashin* of a certain shrine to recover possession of certain land, the property of a shrine, by dispossession of the defendants and invalidation of the mortgages made to them by the plaintiff's predecessor in office, one Bande Ali. The plaintiff also prayed for mesne profits and costs. The plaintiff in his plaint alleged the cause of action to have arisen on February 26th, 1891, the date of the death of his father, the previous *sajjada nashin*, and upon the 6th of April 1891, the date of the plaintiff's accession to that office. The only substantial point in the statement of defence which is now at issue is the plea that the suit is barred by limitation. The Court of first instance dismissed the suit applying art. 134 of the second schedule of the Limitation Act. The lower appellate Court decided that art. 134 did not apply, that the defendants' possession as mortgagees was not adverse so long as their mortgagor was alive, and that consequently the suit of the plaintiff was not barred by adverse possession. It is found that the property is *waqf* and inalienable. It is not disputed that the mortgagees took possession of several plots at the dates of the mortgages in which they were respectively hypothecated. The mortgages were seven in number and were made on the following dates:—

1. The 18th of August, 1864.
2. The 14th of August, 1865.
3. The 29th of October, 1866.
4. The 7th of October, 1867.
5. The 17th of November, 1867.
6. The 14th of August, 1869.
7. The 19th of September, 1869.

The contentions of the parties were most ably put before us by Mr. *Haribans Sahai* for the appellants and by Mr. *Amir-ud-din* for the

(1) 23 C. 536. (2) 15 B. 583. (3) 4 C. 327.
(4) 9 M. 244. (5) 11 W.R.C.R. 36. (6) 22 B. 225.

respondent. For the appellants it was contended that the case fell within the provisions either of art. 134 or of art. 144 of the Indian Limitation Act, and that under either of them the suit was time-barred. The words of those articles are respectively [484] as follows:—Article 134. "A suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration; period, 12 years; time from which period begins to run, the date of the purchase." Article 144. "A suit for possession of immoveable property or any interest therein not hereby otherwise specially provided for; period, 12 years; time from which period begins to run, when the possession of the defendant becomes adverse to the plaintiff." Now it appears to me clear that the mortgages impeached fall within the comprehensive exception provided in s. 10 of Act No. XV of 1877. The mortgagees are certainly "assigns for valuable consideration," and as such are entitled to the protection of such article of limitation as may be applicable to their case. It was part of Mr. *Haribans Sahai's* contention that the word "purchased" in art. 134, even if not co-extensive in its subject-matter with the alienations included in the assignments excepted by s. 10 of the Limitation Act, was used in that section in the technical sense of the word "purchase" which in English Law would include both a mortgage and a lease. In support of that proposition he cited the case of *Nilmony Singh* v. *Jagabandhu Roy* (1). The passage on which he relied is to be found on page 544. The opinion therein expressed is no doubt favourable to the contention of Mr. *Haribans Sahai*, but does not amount to a ruling. The case of *Yesu Kamji Kalnath* v. *Balkrishna Lakshman* (2), clearly lays down that the word "purchased" in art. 134 is used in the technical English sense and includes "mortgaged." Sir Charles Sarjent, the Chief Justice, in delivering the judgment of the Court, refers to the case of *Radanath Doss* v. *Gisborne & Co.*, to be found in (3), at page 15, in which the Privy Council, discussing s. 5 of Act XIV of 1859, say "purchaser means purchaser according to the proper meaning of the word," and puts upon that interpretation a construction limited by the peculiar circumstances of the case [485] before their Lordships. It is, however, in the view I take of the limitation applicable to the present suit, unnecessary for me to consider what the Privy Council intended to convey by the expressions above cited. If art. 134 applies, *cadit quæstio*, the period of limitation has long run out. If, however, art. 134 does not apply, we have then, in order to apply art. 144 as a bar to the plaintiff's suit, to find the time from which adverse possession commences. For that purpose it becomes necessary to consider the meaning of the word "assigns" in s. 10 of the Limitation Act. It is a word of the widest significance in respect to the nature of the transfers to which it relates. It does not in its accepted meaning import any restriction upon the *quantum* of interest transferred. The assignment of a lease or a mortgage would apparently lie within its purview, just as much as an out and out sale of immoveable property. In order to narrow its meaning it would be necessary to show that interests of a more limited kind would be outside the scope and policy of the enactment. No reason for such a restriction is apparent, and indeed it seems to me that the provisions of the Act would be practically nullified by attempting to draw any such distinction. To include in the section out and out sales and exclude leases or mortgages for enormous periods

(1) 23 C. 536. (2) 15 B. 583. (3) 14 M. I.A. 1.

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would reduce the operation of the section to a sheer futility. But if transfers for a period, however long, are held to be covered by the section, it seems impossible to draw a quantitative line, and to place transfers for some more limited period outside of it.

Whatever interpretation is put upon the word "purchase" in s. 134, this much is plain, that the effecting of such "purchase" creates *ipso facto* an actionable wrong, and confers upon every *cestui que trust* whose interests are affected an immediate right of action, which, in the case of "purchases" for value would subsist unimpaired for twelve years. It seems difficult to frame any plausible contention that under the provisions of that article no right of action would accrue during the incumbency of the alienating trustee, but would come into being only on the termination [486] of his trusteeship and would subsist for twelve years from such termination. That would place the alienee of an unauthorized trustee in a position differing materially for the worse from that of a squatter, who, without a shred of right or title, chose to take possession of a neighbour's land. The latter would acquire an unimpeachable title in twelve years, while the other would continue liable to extrusion for the period of the trustee's tenure of office plus the term of twelve years. The omission in s. 10 of Act No. XV of 1877, and also in art. 134 of the second schedule to the same Act of the words "in good faith," which found place in the corresponding provisions of Act No. IX of 1871, indicates clearly the intention of the Legislature to do away with any distinction among those who without right or title assume ownership of the property of others. *Mutatis mutandis* the same observations apply to art. 144. In that case also the construction contended for by the respondent's counsel would extend for an indefinite time the period of limitation. It appears to me that the suit contemplated by s. 10 of the Limitation Act is a suit by a *cestui que trust* to set aside an illegal alienation by his trustee, and by art. 134 the time from which limitation would begin to run is fixed as the date of the purchase. Under that article it is manifestly immaterial whether the trustee continued in his office or not. At the moment of sale the cause of action arose. It would hardly be consistent that under the comprehensive article applicable to all cases not specially provided for, *i.e.*, art. 144, the period at which adverse possession would commence should be deferred till the trustee had ceased to hold office. Apart from authority it seems impossible as a matter of principle to hold that the possession derived from a trustee who had no right to authorize such possession, would be otherwise than adverse to the *cestui que trust* from the moment of its commencement. As far as the *cestui que trust* is concerned it would be wholly immaterial whether the intruder's possession was unauthorized by any human being whomsoever, or authorized only by a person who [487] had no right to give such authority. The case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1), is in point, and in my opinion was rightly decided. To the same effect is the case of *Madhava* v. *Narayana* (2). The right of the present plaintiff to sue is a right not personal to himself, except in so far as he has an interest in common with other beneficiaries, but vests in him as the representative of the *cestui que trustent*, and it is in that capacity only that he now sues. The possession which he seeks to determine is a possession adverse to his *cestui que trustent*. I would hold therefore that limitation begins to run from the

(1) 4 C. 327.

(2) 9 M. 244.

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dates of the respective mortgages with possession, the latest of which was executed in 1869, and that the suit is therefore barred by the twelve years' rule.

BANERJI, J.—The only question which we have to determine in this appeal is whether, as contended by the defendants-appellants, the claim is barred by limitation.

The suit is by a *sajjada nashin*, or the superior of a shrine, to recover possession of property found to belong to the shrine which the plaintiff's predecessor in office mortgaged to the predecessor in title of the defendants, who are now in possession as usufructuary mortgagees. The mortgages were made between the years 1864 and 1869. The mortgagor, the last *sajjada nashin*, died on the 26th of February 1891. The plaintiff was appointed on the 6th of April of that year. The suit was instituted on the 25th of November 1893. It is contended on behalf of the plaintiff that limitation began to run from the date of his appointment to the office of *sajjada-nashin*, or, at the earliest, from the date of the death of his predecessor, and not from the dates of the mortgages. On the other hand, it is urged that the dates of the mortgages should be held to be the dates from which the operation of limitation commenced.

Mr. *Amiruddin*, the learned counsel for the respondent, has relied in support of his contention on the ruling of their [488] Lordships of the Privy Council in *Jewun Dass Sahoo* v. *Shah Kubeer-ood-deen* (1) which was followed in *Piran* v. *Abdool Karim* (2). The Lords of the Privy Council held that it was the duty of the Government under the law then in force to protect endowments, that the plaintiff in that case was the procurator of Government, and that his right to sue accrued on his being appointed *mutawalli* or manager.

I am of opinion, that since the passing of Act No. XX of 1863, the manager of a religious endowment cannot be held to be a procurator of Government, and a suit by him for the protection of endowed property cannot be regarded as a suit on behalf of Government. Act No. XX of 1863, as its preamble recites, relieved the Government "from the duties imposed on them by Regulation XIX of 1810, so far as those duties embrace .....the appropriation of endowments made for the maintenance of religious establishments.....or involve any connection with the management of such religious establishments." A suit by the manager of an endowment brought after the passing of that Act would, in my opinion, be governed by the ordinary rule of limitation applicable to all plaintiffs other than the Government, and the ruling of their Lordships of the Privy Council referred to above cannot affect such a suit. This view is supported by the decision of the Calcutta High Court in *Shaikh Laul Mahomed* v. *Lalla Brij Kishore* (3).

We have next to consider what rule of limitation will apply to the present case. The learned vakil for the appellants urges that the suit is governed by art. 134 of the second schedule of the Indian Limitation Act; that, if that article is not applicable, art. 144 would apply, and that the defendants' possession must be held to be adverse from the dates of the mortgages made in their favour.

It must be taken upon the findings of the lower appellate Court that Bande Ali, the mortgagor, was the trustee of the [489] property of the shrine, and that he was in possession as manager and trustee.

(1) 2 M.I.A. 390. (2) 19 C. 203 (218). (3) 17 W.R.C.R. 430.

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By s. 10 of Act No. XV of 1877 no suit against a trustee for trust property can be barred by lapse of time, but the section excludes from its operation suits against assigns from the trustee for valuable consideration. There is no question that a mortgageee is an assign, and it is not disputed that in this case the mortgagee took the mortgages from Bande Ali for valuable consideration. S. 10 therefore cannot be of any avail to the plaintiffs, and we must seek in the schedule the article which will govern the case. If article 134 is applicable, the claim is undoubtedly beyond time, the suit having been brought long after the lapse of twelve years from the dates of the mortgages under which the defendants are in possession. The suit referred to in the article is a suit "to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration. Now the question is—Is a mortgagee from a trustee for valuable consideration a purchaser for valuable consideration? There can be no doubt that if we were to answer the question with reference to what an English lawyer would understand by a purchaser for valuable consideration, we must answer it in the affirmative, a mortgagee being a purchaser *pro tanto* (see Watson's Compendium of Equity, Volume II, page 1184). Was the expression used by the Indian Legislature also in the same sense in art. 134? The intention of the Legislature may be gathered from the history of the legislation on the subject. S. 2 of Act No. XIV of 1859 provided that a suit against a trustee or his representative for possession of trust property would not be barred by any length of time. S. 5 of the Act excluded from the operation of that section a *bona fide* purchaser for value from a trustee. It was held by the Calcutta High Court, with reference to that section, in *Govind Nath Roy Bahadoor* v. *Ranee Luchmee Koomaree* (1), that a mortgagee is a purchaser within the meaning of the section. In Act No. IX of 1871, which took the place of **[490]** Act No. XIV of 1859, it was enacted in s. 10, which was substituted for s. 2 of the former Act, that the rule that no limitation should operate against a trustee or his representative would not apply to a purchaser in good faith for value from a trustee. In Act No. XV of 1877 this protection was granted to all "assigns for valuable consideration" and the words "in good faith" were omitted. S. 5 of Act No. XIV of 1859, in so far as it related to purchasers from trustees, was in substance re-enacted in art. 134 of sch ii of Act No. IX of 1871, and art. 134 of the present Act is also to the same effect, with this exception that it does not require that the purchaser should be a purchaser in good faith. It seems to me that when in Act No. IX of 1871, the Legislature protected from the provisions of s. 10, purchasers from trustees, it provided a limitation for suits against such purchasers in art. 134. When the same protection was extended to all assigns for value in Act No. XV of 1877 and the Legislature did not provide any specific article to govern suits against such assigns other than art. 134, it must be presumed that it intended that article to apply to suits against all assigns for value and used the words "purchased for valuable consideration" in that article in the sense in which those words are ordinarily understood by lawyers, so as to include mortgages and leases. If art. 134 does not apply to such cases, the only other article applicable would be art. 144. But there appears to

(1) 11 W.R. 36.

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be no reason why the Legislature should have provided one rule of limitation in the case of a suit against a person to whom trust property is sold for value and another in the case of a mortgagee or other assign for value from a trustee. The principle applicable to both these classes of assigns and the policy upon which they were excluded from the operations of s. 10 are apparently the same. I am accordingly of opinion that art. 134 is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. This view is supported by the ruling of the Bombay High Court (Sarjent, C. J., and Candy, J.) **[491]** in *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (1), which was followed by Farran, C. J., and Fulton, J., in *Maluji* v. *Fakir Chand* (2), and by the opinion expressed by the Calcutta High Court in *Nilmony Singh* v. *Jagabandhu Roy* (3), and we have not been referred to any case which ruled to the contrary. For the above reasons I hold that art. 134 applies in this case, and that the claim is barred by limitation.

As I am of opinion that art. 134 specially provides for a case like the present, art. 144, which governs suits for possession of immoveable property not specially provided for, is not applicable. Had that article, however, been in my opinion applicable, I should have had considerable hesitation in holding that in this case the possession of the mortgagees defendants became adverse to the beneficiaries from the date of the mortgage. Had the mortgage been made by the trustee in repudiation of the trust, and had he ignored the right of the beneficiaries and mortgaged the property as his own, the possession of the mortgagees might be regarded as adverse to the beneficiaries from the date of the mortgage, but where, as in this case, the mortgage was made by the trustee in his capacity as such and for alleged purposes of the trust, I doubt very much that the possession of the mortgagee could be held to be adverse to the beneficiary until after the death or removal of the trustee. Holding, however, the view that I do in this case it is not necessary to decide this question.

I would allow the appeal and dismiss the suit with costs.

AIKMAN, J.—I concur with my learned colleagues in thinking that this appeal must be allowed. Shortly stated, the following are the facts of the case:—There is in the Farrukhabad district a Muhammadan shrine called the Durgah of Hazrat Makhdum, for the support of which a grant of land was made in the time of the Muhammadan Emperors. Upwards of thirty years ago Bande Ali, the then curator of the shrine, mortgaged with possession a portion of this endowed property to the predecessor **[492]** in title of the defendants appellants. On the 26th February 1891 Bande Ali died, and, one the 6th of April following, his son, Muhammad Muttaki, the plaintiff-respondent, was appointed curator in his father's stead.

On the 25th of November, 1893 the plaintiff brought the suit out of which this appeal arises, not to redeem the mortgaged property, but to recover possession of it on the ground that the mortgages granted by Bande Ali were in violation of the trust and therefore invalid.

The Court of first instance dismissed the suit as barred by limitation. The lower appellate Court held that the suit was within time, and gave the plaintiff a decree. The defendants came her eins econd appeal.

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(1) 15 B. 583. (2) 22 B. 225. (3) 23 C. 536.

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The sole question we have to decide is whether the plaintiff's suit for possession is or is not beyond time.

S. 10 of the Limitation Act provides that no suit for the purpose of following trust property in the hands of a trustee or a trustee's legal representatives or assigns (not being assigns for valuable consideration) shall be barred by any length of time. It is clear from this that an assign from a trustee for valuable consideration acquires a good title by prescription. A mortgagee is an assign for valuable consideration. The defendants are therefore entitled to plead limitation, and the only point for consideration is which article of the second schedule of the Limitation Act applies.

In a somewhat similar case it was held by the Calcutta High Court that either art. 134 or art. 144 applied. If the words "purchased from" in art. 134 can be held to be equivalent to "mortgaged by," that article would exactly cover the present case. It has been held both by the Bombay and Calcutta High Courts that the word "purchased" here is used in its technical English sense, and is wide enough to cover the case of a mortgage. But we find this word used elsewhere in the same schedule, *e. g.*, art. 138, and the context shows that there it cannot be used in the wide signification which has been attributed to it in art. 134.

[493] I prefer to look upon the case as falling under art. 144, and to hold that the mortgagees have acquired by prescription as against the beneficiaries a right *pro tanto* adverse so as to entitle them to retain possession of the property until they are redeemed. The ruling relied on by the learned counsel for the respondent, *Piran* v. *Abdool Karim* (1), is in his favour, but it appears to me that the learned Judge who decided that case has overlooked the fact that the *ratio decidendi* of the Privy Council decision in *Jewan Dass Sahoo* v. *Shah Kabeer-ood-deen* (2), has disappeared with the enactment of Act No. XX of 1863.

For the above reasons I concur in the decree proposed.

BY THE COURT.—The order of the Court is that the appeal is decreed with cost. The decree of the lower appellate Court is set aside with costs, and that of the Court of first instance restored.

Appeal decreed.

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20 A. 493=18 A.W.N. (1898) 121.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MUL CHAND AND OTHERS (*Decree-holders*) *v.* RAM RATAN AND ANOTHER (*Judgment-debtors.*)*

[30th June, 1898.]

Civil Procedure Code, s. 544—Decree proceeding upon ground common to several defendants—Decree upset in appeal but restored on appeal by one only of the defendants—Execution for costs by other defendants—Appeal—Decree to be executed where there has been an appeal.

A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded to the Court of first instance under

* Second Appeal No. 551 of 1897, from a decree of W. F. Wells Esq., District Judge of Agra, dated the 22nd April 1897, reversing an order of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd January 1897.

(1) 19 C. 203.

(2) 2 M.I.A. 390.

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s. 562 of the Code of Civil Procedure. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court.

Held, that, the decree of the first Court being restored in its entirety, the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not [494] parties to the decree of the High Court. *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1), distinguished; *Shohrat Singh* v. *Bridgman* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gobind Prasad*, for the appellants.

Babu *Satish Chandra Banerji*, for the respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of an application for execution and raises a question not free from difficulty. The facts are these. The respondents brought a suit in the Court of the Subordinate Judge of Agra against several defendants, among whom were the present appellants. The suit was dismissed by the Court, and the present appellants were awarded their costs. The plaintiffs to the suit, now respondents, preferred an appeal to the District Judge. The appeal was allowed, the decree of the Court of first instance was set aside, and the case was remanded to that Court under s. 562 of the Code of Civil Procedure. The present appellants did not appeal from the order of remand, but another defendant, Puran Chand, preferred an appeal to this Court, with the result that his appeal was allowed, the order of the District Judge was set aside, and the decree of the Court of first instance was restored with costs. The present appellants thereupon applied for execution for the recovery of the costs awarded to them by the Court of first instance. To this application the respondents, original plaintiffs, took objections. The Court of first instance disallowed the objection and granted execution. The lower appellate Court has set aside that order and has dismissed the application for execution. The present appellants question the propriety of this order of the lower appellate Court.

It is contended on behalf of the appellants that as the decree of this Court restored that of the Court of first instance, and as the Courts below had proceeded upon a ground common to all the defendants, the decree of this Court inured to the benefit of all [495] the defendants, including the present appellants, under s. 544 of the Code of Civil Procedure, and entitled them to recover the costs which the Court of first instance had awarded to them. On the other hand, it is urged on behalf of the respondents that the decree in the cause which was capable of execution was the decree of the High Court, and as that decree did not in terms award the costs of the first Court to the present appellants the latter were not entitled to take out execution for those costs. This is the view which the learned Judge of the lower appellate Court has adopted, and in support of it he has relied upon the ruling of this Court in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1). All that was held in that case, so far as it has any bearing upon the present question, is that the decree of an appellate Court supersedes the decree of the first Court even where the decree merely affirms the original decree. One of the reasons for this conclusion was stated in the judgment of Edge, C.J., to be that it

(1) 11 A. 267.

(2) 4 A. 376.

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was clear from s. 579 of the Code of Civil Procedure that "in any case the decree executed, not for the costs of the appeal but for the costs of the suit, is the decree of the appellate Court, and of that Court only." In that case the Court was dealing with a decree of an appellate Court in an appeal to which all the parties to the suit were parties. In this respect it was unlike the decree now under consideration. As I understand s. 579 of the Code of Civil Procedure, when it provides that the decree of the appellate Court should state by what parties and in what proportion the costs incurred in the appeal and the costs in the suit are to be paid, it refers to the parties who are parties to the appeal and not to parties who were not arrayed either as appellants or as respondents in the appeal, but who, under s. 544 of the Code of Civil Procedure, might take the benefit of the decree. This ruling therefore does not afford any help in the decision of the question now before us. It is true that the decree which a party should execute is, as held by the Full Bench in *Shohrat Singh* v. *Bridgman* (1) the final decree obtained by him **[496]** in appeal. But in this case, as the appellants were not parties to the appeal to this Court and no decree was formally made by this Court in their favour, they were not bound to take out execution of the decree of this Court. In fact, not being parties to that decree they were not competent to apply for its execution, and even if they did apply for its execution, they could not recover anything under it, as it did not award them in terms the costs of the first Court. The learned Judge of the lower appellate Court is of opinion that the appellants should apply for an amendment of the decree of the High Court and get their costs embodied in it. As they were no parties to that decree, and as they are not the representatives of any of the parties to that decree, they are not entitled under s. 206 of the Code of Civil Procedure to apply for its amendment. This is not the case of a decree formally granted to the appellants by an appellate Court. In my opinion it is in the case of such a decree only that the decree of the appellate Court is the decree to be executed. In this case the lower appellate Court having proceeded upon a ground common to all the defendants, the High Court was competent, under s. 544 of the Code of Civil Procedure read with s. 587, to reverse the decree of the lower appellate Court in favour of all the defendants upon the appeal of any one of them. That section does not direct that in such a case the appellate Court should pass a decree in favour of the persons who are not before it in appeal, but the effect of that section is to make a decree passed in favour of one only of the defendants or plaintiffs under the circumstances mentioned in it operate in favour of all the plaintiffs or defendants, as the case may be. When, therefore, a decree is made under that section upon the appeal of one only of the defendants, and that decree restores the decree of the Court of first instance it inures to the benefit of all the defendants, although some of them were not parties to the appeal. Upon a decree of this description being passed the defendants other than those who preferred the appeal become entitled to take the benefit of the decree to this extent only that they acquire the right to enforce **[497]** the decree of the Court of first instance which has been restored by the decree of the appellate Court. In this view the present appellants were competent to apply for execution of the decree of the Court of first instance which was restored by the decree of this Court. The decree of this Court had, in my opinion, the effect of wiping away the

(1) 4 A. 376.

order of remand of the lower appellate Court and relegating the parties back to the position in which they were before the order of remand was made. The lower appellate Court therefore erred in disallowing the application of the appellants for execution. I allow the appeal, and, setting aside the decree and order of the lower appellate Court with costs, restore that of the Court of first instance. The appellants will get the costs of this appeal.

Appeal decreed.

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20 A. 493 = 18 A.W.N. (1898) 121.

20 A. 497 = 18 A.W.N. (1898) 138.

REVISIONAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

THE N.W.P. CLUB THROUGH G.B. GOYDER, HONORARY SECRETARY (*Defendant*) *v.* SADULLAH (*Plaintiff*).* [27th June, 1898.]

Club—Contract—Liability of the Secretary of a Club in respect of a contract entered into for the benefit of the members of the Club.

Held that the Secretary of a Club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the Club by his predecessor in office; nor could the members of a Club collectively be sued through their secretary as their representative.

[R., 21 A. 346.]

IN this case one Sadullah, who, on instructions from a previous secretary, had done certain work for the North-Western Provinces Club, sued the then secretary of the club for payment for labour and materials. The Court of Small Causes gave the plaintiff a decree. The defendant thereupon applied to the High Court in revision, not contesting the amount of the decree, which had been satisfied, but on the ground that the suit would not lie against the secretary in respect of a contract for the benefit of the members of the club at large, the club being an unregistered and unincorporated society.

Mr. *W. Wallach*, for the applicant.

ORDER.

KERSHAW, C.J., and BURKITT, J. — In this case an action was brought by Sadullah, the present respondent, against the [498] N.W.P. Club, through Mr. G.B. Goyder, the secretary of the said club, for work done by the plaintiff to the order of some one who at that time was occupying the position of the secretary of the said club. The plaintiff has been paid a sum which has satisfied his demand, but the defendant has made this application in revision on the ground that there was no liability on him as disclosed by the plaint, and indeed it would be highly undesirable that the secretary of a social club or one individual member of it should have an action brought against him of this kind, making him personally liable for the goods which were not delivered to him personally, but were delivered to, and became the property of, the social body of which he was the secretary. We take it the law with regard to this matter is accurately laid down in the case cited in 3 Times Law Reports at page 248, which lays down that an individual member of a club or a member of the committee of management who

* Civil Revision No. 25 of 1898.

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20 A. 497 = 18 A.W.N. (1898) 138.

has not in any way pledged his personal credit, is not liable for goods ordered for, and supplied to the club, *i.e.*, as meaning an abstract entity unknown to the law.

It has been found as a fact by the learned Judge below in this present case that at the time the order was given Mr. Goyder was not secretary of the club, and as a fact this very order was given not by him but by a prior secretary of the club.

Therefore it stands to reason that Mr. Goyder did not pledge his personal credit, and he took no part at all in the transaction. Now the action may be said by those who brought it to be an alternative action, first, against the N. W. P. Club, secondly, against Mr. Goyder, secretary of the club. We have dealt with the question as to whether Mr. Goyder is or is not personally liable. The question remains as to whether the action can rightly be said to have been brought against the N.W.P, Club, that is, what the case mentioned above calls an abstract entity unknown to the law. To hold that an action lay against it and to give judgment in such action would be to hold that an action lay against a great number of individuals who had not been cited in the action, who had no opportunity of appearing, but who [499] should have been so cited, and who should have had such opportunity given to them to appear and contest the action. On that ground the action should have been dismissed against the club.

We think that there is another ground upon which the action against the club should be dismissed, and that is, that as alleged in the plaint the contract was entered into by the club through its secretary. It is clearly shown as a fact that at the time the contract was entered into, Mr. Goyder was not secretary at all. Our order is :—We allow this application, set aside the decree of the Court below, and we dismiss the plaintiff's suit.

Application allowed.

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20 A. 499 = 18 A.W.N. (1898) 132.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

ABID HUSEN (*Defendant*) *v.* BASHIR AHMAD (*Plaintiff*).*

[1st July, 1898.]

Pre-emption—Muhammadan law—Talab-i-ishtishhad—Reference necessary to the previous talab-i-mawasibat.

When in asserting a claim for pre-emption the making of the *talab-i-ishtishhad* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra* (1), *Akbar Husain* v. *Abdul Jalil* (2), and *Abbasi Begam* v. *Afzal Husen* (3), followed; *Nundo Pershad Thakur* v. *Gopal Thakur* (4), dissented from.

[R., 27 A. 160 = A.W.N. (1904) 201 = 1 A.L.J. 569.]

THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal No. 566 of 1897 from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated 1st June 1897, reversing a decree of Babu Nihala Chandra, Munsif of Amroha, dated the 2nd December 1896.

(1) 17 C. 543. (2) 16 A. 383. (3) 20 A. 457. (4) 10 C. 1008.

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APPELLATE CIVIL.

20 A. 499 = 18 A.W.N. (1898) 132.

Maulvi *Ghulam Mujtaba*, for the appellant.
Mr. *Amiruddin*, for the respondent.

JUDGMENT.

AIKMAN, J.—This is an appeal by the defendant vendee in a suit for pre-emption which was based on the Muhammadan law. [500] The Court of first instance found that the plaintiff pre-emptor had failed to prove that he had performed the necessary ceremony *talab-i-mawasibat* or making immediate assertion of his rights as soon as he heard of the sale. That Court further found that the plaintiff when making the *talab-i-ishtishhad*, or demand with invocation of witnesses did not say that he had made the immediate demand. On these grounds the plaintiff's suit was dismissed. The plaintiff appealed. The learned Subordinate Judge found that the plaintiff had proved that he had made an immediate demand. This demand was not made in the presence either of the seller or of the purchaser or on the premises, and therefore the demand with invocation of witnesses was necessary. The learned Subordinate Judge found that, as the same witnesses were present at the time when the immediate demand was made and at the time when the *talab-i-ishtishhad* was made, it was unnecessary for the pre-emptor to repeat the immediate demand. He therefore reversed the decision of the Munsif and gave the plaintiff a decree. I may point out that, as there were various other pleas raised by the defendant vendee, it was improper for the lower appellate Court to decree the plaintiff's suit merely on the ground that the defendant's plea as to non-fulfilment of the necessary requirements of Muhammadan law had failed. The defendant comes here in second appeal.

In my opinion the appeal must succeed. In the case of *Nundo Pershad Thakur* v. *Gopal Thakur* (1), it was held by GARTH, C.J., and BEVERLEY, J., that when a person seeking pre-emption had performed the *talab-i-mawasibat* in the presence of witnesses and as soon as possible on the same day in the presence of the same witnesses demanded his right from the vendor and purchaser, it was unnecessary that he should again state when making his demand that he had declared his right as soon as he heard of the sale, that is, that it was unnecessary for him to make any reference to his immediate demand. The present case is on all fours with that case. But that case was dissented from and overruled by a Full Bench of the Calcutta Court in *Rujjub Ali Chopedar* v. *Chundi Churn* [501] *Bhadra* (2), which latter case has been followed by this Court in *Akbar Husain* v. *Abdul Jalil* (3), and in a recent case *Abbasi Begam* v. *Afzal Husen* (4). That these latter rulings are correct is, in my opinion, clear from the definition of *talab-i-ishtishhad* given on p. 489 of Baillie's Digest of Muhammadan Law (2nd edition). "By *talab-i-ishtishhad*," says that learned author, "is meant a person calling upon witnesses to attest his *talab-i-mawasibat* or immediate demand." It appears to me impossible to invoke witnesses to attest the fact that an immediate demand has been made without making some reference to that immediate demand.

The learned counsel for the respondent argues that the *talab-i-ishtishhad* is merely a rule of evidence according to the Muhammadan law and is no longer of any validity. Be that as it may, I am bound to follow the decisions of this Court to which I have referred.

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(1) 10 C. 1008. (2) 17 C. 543. (3) 16 A. 383. (4) 20 A. 457.

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For the above reasons I allow this appeal, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance. The appellant will have his costs of this appeal.

Appeal decreed.

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20 A. 501 = 18 A.W.N. (1898) 141.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* JASODA NAND.* [5th July, 1898.]

Criminal Procedure Code, ss. 133, 135 and 136—Act No. XLV of 1860 (Indian Penal Code), s. 188—Power of Magistrate to order repair of a house not adjoining a public road.

Section 133 of the Code of Criminal Procedure does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house. By "persons living or carrying on business in the neighbourhood," injury to whom the power to pass orders under s. 133 is intended to prevent, are meant, not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous [502] condition, but unascertained members of public whose ordinary avocations may take them to the neighbourhood of such building. *Queen-Empress* v. *Narayana* (1) and *Queen-Empress* v. *Bishambar Lal* (2) distinguished.

THIS was a reference made by the Sessions Judge of Allahabad under s. 438 of the Code of Criminal Procedure and arising out of the following circumstances. One Jasoda Nand was the owner of a house in Allahabad, No. 15, Cawnpore Road. This house stood in a compound of its own at some little distance from the public road, and was inhabited by several families, and the servants' houses in the compound were also inhabited by a number of persons. An order was made by a Magistrate under s. 133 of the Code of Criminal Procedure requiring Jasoda Nand to make certain repairs to the said house. The order was served on Jasoda Nand, but he did not take either of the courses open to him under s. 135 of the Code. He did not perform the act directed by the Magistrate, nor did he either appear to show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under s. 136 of the Code of Criminal Procedure, and, as Jasoda Nand still did not comply with the order, he was put upon his trial under s. 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge who, being of opinion that the conviction could not be maintained, referred the case to the High Court.

Mr. *Sorabji*, in support of the reference.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

JUDGMENT.

BLAIR and AIKMAN, JJ.—Jasoda Nand has been convicted of an offence made punishable under s. 188 of the Indian Penal Code. That section is couched in the following words:—"Whoever, knowing that by an order promulgated by a public servant lawfully empowered to

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* Criminal Reference No. 311 of 1898.

(1) 12 M. 475.

(2) 13 A. 577.

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promulgate such order, he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management, [503] disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, be punished" under the latter portion of the section. Jasoda Nand is the occupant of the house No. 15, Cawnpore Road. The house, it appears, stands in its own compound some little distance from the public road and is inhabited by a number of families, and the servants' houses in the compound are also inhabited by a number of persons. An order was made under s. 133 of Act No. X of 1882, upon information, by a Magistrate, called in that section a conditional order, requiring Jasoda Nand to effect certain repairs in the house No. 15, Cawnpore Road. The order was served upon Jasoda Nand, and he did not adopt either of the courses admissible under s. 135 of the Act. He did not perform the act directed by the Magistrate: he did not appear in accordance with the order to show cause against the same, or to apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under s. 136. Jasoda Nand was then put upon his trial for the offence specified in s. 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge of Allahabad, who, being of opinion that the conviction could not be maintained, reported the case to this Court.

Mr. *Ryves*, the Government Advocate, has appeared to support the conviction, and Mr. *Sorabji* to dispute its propriety. Mr. *Ryves* in his first contention submitted to the Court that it cannot go behind the order absolute made under s. 136 of Act No. X of 1882. In support of his contention he has cited to us the case of *Queen-Empress* v. *Narayana* (1) and the case of *Queen-Empress* v. *Bishambar Lal* (2). In the case reported in the Madras High Court the subject of the order was an open tank or well. The well or tank was in a public street, and the safety of the public required that it should be fenced. The subject-matter of that order then fell well within the jurisdiction of the Magistrate, and within [504] the powers conferred upon him by s. 133 of the Criminal Procedure Code and the succeeding sections. The ground upon which the conviction was impeached in that case was not that the order made was one of such a nature that the Magistrate was not empowered by the section of the Criminal Procedure Code to make it: the only ground of contention was that the person upon whom the order was served was not the person who was responsible for the existing state of things, or who ought to have been made the subject of such order. The Court held, that the person convicted could not go behind that order: it held so having expressly noted that the order was one well within the power of the Magistrate who made it. That finding appears to us not inconsistent with the provisions of s. 136 of the Code of Criminal Procedure. The case cited in 13 Allahabad is in substance identical with the Madras case. There is no doubt that the order was an order made in respect of one of the invasions of the public right set forth in s. 133. The contention was that such order was made against the wrong person. Following the ruling reported in 12 Madras, it was held that it was not competent for the person convicted to question the order made against him.

We cannot, however, acquiesce in the expressions, needlessly large for the decision of the case then before the Court which find place in the

(1) 12 M. 475.

(2) 13 A. 577.

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judgment. It appears to us, applying to s. 188 of the Indian Penal Code that strict construction applicable to penal provisions, that it is essential in order to justify a conviction to show that the order has been promulgated by a public servant lawfully empowered to promulgate such order. Now in this case and from that point of view we have to consider whether the public servant making the order in question was lawfully empowered to promulgate that order. Chapter X of the Code of Criminal Procedure, in which appear the provisions relating to such orders, is headed "Public Nuisances," and it enumerates certain forms of invasions of public rights which would be regarded by the law of England [505] as falling under the definition of *commune nocumentum*. It provides, first, for the removal of any unlawful obstruction from any way, river or channel which may be lawfully used by the public; secondly, for the prohibition of any trade or of the keeping of any goods or merchandise by reason of their being injurious to the health or physical comfort of the community; thirdly, for the prevention of the construction of any building or the disposal of any substance as likely to occasion conflagration or explosion. The fourth clause is the one under which the order in question purports to have been made. It deals with the case in which "any building is in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by," in consequence of which its removal, repair or support is necessary. The last case provided for is where any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public. It appears manifest to us that, apart from the heading, which may possibly form no part of the enactment, the scope of this section is plainly limited to injuries arising or likely to arise to members of the general unascertained mass of the public. The persons who under the clause require protection are "persons living or carrying on business in the neighbourhood, or passing by." It appears to us that it would be straining the meaning of the words to hold that the clause applies to persons living actually in the alleged dangerous building or in the servants' houses in the compound belonging to it. It seems also to us, that it would be an unnatural use of the words "passing by" to include in it persons going to or from the house or about it for their private business or pleasure, or in the exercise of their private and not of their public rights. In our opinion the words used are not sufficiently comprehensive to include the case of the person who has been convicted, or to justify or make legal the order of the Magistrate in relation to the building in Jasoda's occupation. It may well be, as the [506] Magistrate in his explanation argues, that s. 44 would have justified some such order as the order made in this case; but the scope of that section is different from, and far larger than, that of s. 133.

We hold then that the order made in this case by the Magistrate was not an order which the Magistrate was lawfully empowered to promulgate within the meaning of s. 188. We therefore set aside this conviction and order the fine, if paid to be refunded.

20 A. 506=18 A.W.N. (1898) 139.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

HAR PRASAD AND ANOTHER (*Opposite Parties*) *v.* SHEO RAM AND ANOTHER (*Applicants*).* [7th July, 1898.]

Civil Procedure Code, s. 244—Execution of decree—Mortgage—Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution.

Certain mortgagees held a mortgage which, in its inception was a simple mortgage, but which was to become a usufructuary mortgage upon non payment of the mortgage debt by a certain date. The mortgage debt was not paid within the time limited. The mortgagees sued on the covenant in their bond and obtained a decree for possession, declaring them entitled to remain in possession until the mortgage debt was satisfied from the usufruct. Some time after the mortgagees had got possession under this decree, the mortgagors applied, ostensibly under s. 244 of the Code of Civil Procedure, for recovery of possession of the mortgaged property and for payment of a large sum of money, which they alleged the mortgagees had collected as profits in excess of what was due under the mortgage.

Held, that such an application would not lie. If the allegations of the mortgagors were true, their proper remedy was by suit for redemption and not by application in the execution department. *Ravji Shivram* v. *Kaluram* (1). *Ram Chandra Ballal* v. *Baba Esgonda* (2), and *Narsinha Manohar* v. *Bhagvantrav* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

[507] Babu *Durga Charan Banerji*, for the appellants.

Babu *Satya Chandar Mukerji*, for the respondents.

JUDGMENT.

BURKITT, J. (BLAIR, J., concurring).—This is an appeal against an order of the District Judge of Jhansi, passed under s. 244 of the Code of Civil Procedure, directing that possession of certain mortgaged property be restored by the appellants mortgagees to the applicants in execution (the mortgagors), and also directing that the appellants pay to their mortgagors a sum of Rs. 4,575, being the surplus received by the appellants as mortgagees over and above the amount due on their mortgage.

The preliminary history of this case is, that in February 1892, Sheo Ram and others, respondents to this appeal, mortgaged certain immoveable property to Har Prasad and others, appellants here. The mortgage was a simple one; but there was a stipulation that if the money due on it were not paid by a certain date the mortgagees would be entitled to be put into possession of the property. The money was not paid. The mortgagees thereupon instituted a suit for possession of the property and obtained a decree in their favour in June 1893, directing them to be put in possession of the property, to hold possession until the amount due on the bond with interest had been satisfied from the usufruct. The mortgagees took out execution of that decree and obtained possession under it in August 1893. Nothing more was done in the matter of executing the decree till March 1897.

In that month the mortgagors, the judgment-debtors under the decree, made an application (which they described as being an application under s. 244 of the Code of Civil Procedure) to the District Judge. In that

* First Appeal, No. 52 of 1898, from an order of F. W. Fox, Esq., District Judge of Jhansi, dated the 24th December 1897.

(1) 12 B.H.C.R. 160. (2) 12 B.H.C.R. 163. (3) 14 B. 327.

1898 JULY 7. — APPELLATE CIVIL. — 20 A. 506 = 18 A.W N. (1898) 189.

application they recited the passing of the decree mentioned above, and the possession over the mortgaged property obtained by the mortgagees in execution thereof. They then set forth that the amount due under the decree had been much more than satisfied by the usufruct of the property while in the possession of the mortgagees, and they asked the Court to direct the property to be restored to them, and to compel the mortgagees to refund to them some Rs. 12,876 which, they [508] alleged, the mortgagees had received over and above the amount due on their decree.

In reply to this petition the present appellants naturally raised the plea that the matter of the petition was one which could not be decided in execution proceedings on an application under s. 244 of the Code of Civil Procedure.

The learned District Judge framed an issue for trial on that plea, but somehow failed to come to any finding on it. Had he considered the question, he probably would have been spared the trouble of making the "examination of long and complicated accounts" mentioned in his order of July 2nd, 1897. He, however, left the preliminary question undecided, and having examined the accounts, he passed an order that possession should be restored to the applicants, and that the appellants here should pay them a large sum of money.

Hence this appeal, in which it is contended that the matter dealt with by the lower Court was not a question which could be entertained under s. 244 of the Code of Civil Procedure. It was argued for the appellants that the proper course for the applicants was to have instituted a regular suit for redemption of the mortgage, and that they were not entitled to obtain a redemption decree under the disguise of an application in execution under s. 244 of the Code. The appellants urged that the execution of the decree obtained by them for the possession of the mortgaged property was fully completed when, on their application for execution of that decree, the ywere placed in possession under it in August 1893, and that thenceforth the position occupied by them and the applicants respondents was that of mortgagees in possession and mortgagors, and not merely that of decree-holders and judgment-debtors amenable to the jurisdiction given by s. 244 of the Code of Civil Procedure. The applicants indeed must, we think, be held to have admitted some of the propositions stated above, for in their application under s. 244 they state in the first paragraph that the decree obtained by the applicants was a decree for possession as mortgagees, entitling them to remain in [509] possession till the amount due to them on the mortgage had been paid off by the usufruct.

For the respondents it was contended that the case comes under cl. (*c*) of s. 244, because the Court which passed the decree specified in its decree the amount due on the mortgage and gave the mortgagees a decree for possession until that amount was repaid. The argument is that an execution Court is empowered under that clause to take accounts and ascertain whether the amount decreed had or had not been paid off. In that contention we are unable to concur. We are of opinion that the limitation as to the period of enjoyment was inserted in the decree to indicate the title by which the mortgagees retained possession, and for no other purpose, and we are unhesitatingly of opinion that all proceedings relating to the execution of the decree came to an end, and that the decree was fully executed when the appellants were put in possession (as mortgagees) of the property by virtue of the decree. Nothing more remained to be done under it, the decree having been fully satisfied. We fail to

see how the matter of this application to the learned Judge can be said to be a question relating to the execution, discharge or satisfaction of the decree. That decree had been fully executed and satisfied; nor can the word "discharge" be applicable to such a case as this in which the decree has been executed and satisfied. In the opinion expressed above we are supported by several decisions of the High Court of Bombay. The first of those cases to which we would allude is that of *Ravji Shivram* v. *Kaluram* (1), a decision of a Full Bench of that Court. That case is conversely on all fours with the present case. On a suit by a mortgagee, the mortgage money being unpaid, he obtained a decree for possession of the mortgaged property "for the amount claimed," which, the High Court observed, was "the ordinary decree to put an unpaid mortgagee in possession, which he might retain till he was paid in full." Subsequently the mortgagor instituted a suit for redemption. In reply to the claim it was contended for the **[510]** mortgagee that the mortgagor was seeking a wrong remedy, and that his "only proper mode of recovering possession is by an application in the possession suit for further execution of the decree" in that suit.

This case is then, it will be observed, exactly the converse of the present case. It was held by the Full Bench, overruling the mortgagee's contention, that when the mortgagee was put in possession of the mortgaged premises, the decree for possession was fully executed, the suit in which that decree was made being really nothing more than a suit in the nature of an ejectment, by an unpaid mortgagee, of the mortgagor from the mortgaged premises, and the Court went on to say that a "proceeding for redemption of those premises is not a question" relating to the discharge or satisfaction of the decree, nor "a question relating to the execution of the decree, which we hold to have been fully executed when the heir of the mortgagee was put into possession under the decree."

The Full Bench accordingly held that the proper mode for the mortgagor to redeem the lands and recover possession was *not* by an application to the Court which passed the decree for further execution thereof by taking the account, etc.

This case (decided in 1873) was, no doubt, one under the old Codes of 1859 and 1861. We cannot, however, see any material difference (as far as the question here is concerned) between the corresponding sections of the present and of the former Code. The ruling just cited was followed and approved of in *Ram Chandra Ballal* v. *Baba Esgonda* (2) and in *Narsinha Manohar* v. *Bhagvantrav* (3), the latter of which cases was decided long after the present Code of Civil Procedure had come into force.

Concurring to the fullest extent in the rule laid down in those cases, we are of opinion that the application made by the respondents to the District Judge was one which could not be entertained under s. 244 of the Code of Civil Procedure, and that it should have been rejected.

[511] There is another aspect of this case which should be referred to. It might be most disastrous (as noted in the case of *Ravji Shivram* v. *Kaluram* cited above) to persons in the position of the respondents, if it were to be held that their proper course to obtain redemption of the mortgaged property in cases like the present was by presenting an application for further execution of the decree for possession, which had been

(1) 12 .BH.C.R. 160. (2) 12,B.H.C.R. 163. (3) 14 B. 327.

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passed against them. In that case their application would come under the rules governing proceedings in execution of a decree One of those rules is that contained in art. 179 of the second schedule to the Limitation Act of 1877, which limits the time for applying for execution of a decree to three years from certain dates, one of which is the date on which the last application has been made to the proper Court for execution, or to take some step-in-aid of execution on the decree. Now, in the present case no application of any kind was made in the matter of the execution of this decree from the time when the applicants made the application for execution on which they were into possession in August 1873, up to March 1897, a period of much more than three years. Therefore, if the application was properly presented as an application for further execution, it was clearly time-barred when presented and could not be entertained.

We would add that the respondents did not ask to be allowed to have their application converted into a plaint in a redemption of mortgage suit on payment of the court-fees payable on a plaint in such a suit.

For the above reasons we allow this appeal, set aside the order of the lower Court and direct that the respondents' application be dismissed with costs in both Courts.

Appeal decreed.

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20 A. 512 = 18 A.W.N. (1898) 133.

[512] APPELLATE CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Banerji.

CHATTAR MAL (*Decree-holder*) *v.* THAKURI AND ANOTHER (*Judgment-debtor*).* [7th July, 1898.]

Act No. IV of 1882 (Transfer of Property Act), s. 90—Mortgage—Personal covenant to pay—Application to sell non hypothecated property—"Balance legally recoverable"—Cause of action—Limitation.

A mortgage bond securing a debt payable on demand provided that for the payment of the amount of mortgage-debt the immoveable property mentioned in it should be held as collateral security and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property" *Held*, that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt, but that the cause of action for both remedies was one and the same and accured when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold and an application for a decree under s. 90 of the Transfer of Property Act was not maintainable: *Musaheb Zaman Khan* v. *Inayat-ul-lah* (1), *in re McHenry*: *McDermott* v. *Boyd* (2) and *Miller* v. *Runga Nath Moulick* (3) referred to.

[R., 33 C. 867 (873) = 4 C.L.J. 141; 15 C.P.L.R. 29 (31); 6 O.C. 30 (32); 4 L.B.R. 89 (93) = 14 Bur. L.R. 161.]

IN this case the appellant held a mortgage over certain property of the respondents under a bond dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand.

* Second Appeal, No. 503 of 1896, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 14th May 1896, confirming an order of Babu Bipin Bihari Mukerji, Subordinate Judge of Aligarh, dated the 27th November 1895.

(1) 14 A. 513. (2) (1894) L.R. 3 Ch. 290. (3) 12 C. 389.

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The bond provided that for payment of the amount the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." On the 22nd of June 1891, the mortgagee brought a suit for sale upon his bond. He obtained a decree under s. 88 of the Transfer of Property Act on the 6th of August 1891. Under that decree the mortgaged property was brought to sale on the 23rd of **[513]** June 1893. The proceeds of the sale being insufficient to satisfy the mortgage-debt, which by that time had reached the sum of Rs. 3,239, the mortgagee decree-holder applied on the 2nd of February 1895 for a decree under s. 90 of the Transfer of Property Act.

The Court of first instance (Subordinate Judge of Aligarh) held that the decree-holder's application for a decree under s. 90 was time-barred, and dimissed it. The decree-holder appealed, and his appeal was dismissed upon the same ground by the Lower Appellate Court (District Judge of Aligarh). The decree-holder thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondents.

JUDGMENT.

KERSHAW, C.J., and BANERJI, J.—This is an appeal from the decree and order of the Court below refusing to grant to the appellant a decree under s. 90 of the Transfer of Property Act. The appellant held a mortgage over certain property belonging to the respondents under a bond, dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand. The bond provided that for the payment of the amount the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." On the 22nd of June 1891, the mortgagee brought a suit for sale upon that bond. He obtained a decree under s. 88 of the Transfer of Property Act on the 6th of August 1891. Under s. 89 of that Act he obtained an order for the sale of the mortgaged property, and on the 23rd of June 1893, the said property was sold. The proceeds of the sale not being sufficient for the discharge of the mortgage-debt, which had swelled to the large sum of Rs. 3,239, the present application was made on the 2nd of February 1895, for a decree under s. 90. That section empowers a Court to grant to a **[514]** mortgagee a decree for the recovery of the balance due to him after the sale of the mortgaged property from the mortgagor and his other property, provided that the balance is legally recoverable otherwise than out of the mortgaged property. The Courts below have held that on the date on which the plaintiff brought his suit upon his mortgage, his claim for a personal decree against the mortgagor was time-barred, and therefore the balance of the amount of the mortgage was not legally recoverable on the date of the application for a decree under s. 90. The correctness of this decision has been challenged in this appeal. It is urged that under the terms of the bond in this case the mortgagee was not entitled to realize the balance personally from his debtors until after the hypothecated property had been sold, and as his application for a

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decree under s. 90 was made within three years from the date of the sale of the mortgaged property, it ought to have been granted.

The question we have to determine is whether, on the date of the application for a decree under s. 90, the balance of the amount due on the mortgage was legally recoverable from the debtors otherwise than out of the mortgaged property. If, under the terms of the bond, the mortgaged property was the only security for the debt and the mortgagors did not incur any personal liability, the balance is not recoverable otherwise than out of the mortgaged property. But if there is nothing in the mortgage bond to the contrary, the presumption will be that the mortgagor has undertaken a personal liability to pay the mortgage-debt. In the latter case if a claim for a personal decree against the mortgagor would have been time-barred on the date of the mortgagee's suit, the balance would not be legally recoverable otherwise than out of the mortgaged property, within the meaning of s. 90. This was held in *Musaheb Zaman Khan* v. *Inayat-ul-lah* (1). The decision of this appeal, therefore, turns upon the question whether, if the appellant mortgagee had on the date of the institution of his suit asked for a personal remedy **[515]** against the mortgagors, his claim for that remedy would have been barred by limitation.

In this case the mortgagors in distinct terms undertook a personal liability to pay the mortgage-debt. The bond gives the mortgagee two remedies for a breach of the conditions thereof, namely, first, a right to proceed against the immoveable property hypothecated in the bond; and, secondly, in the event of the proceeds of the sale of that property proving insufficient, a right to proceed against the debtors personally. The debt, however, is one and the same, and the personal liability of the debtors co-exists with the liability of the property. It is upon the occurrence of a breach in the conditions of the bond that the cause of action of the mortgagee for the remedies given to him under the bond arose. It was a single cause of action, and upon the accrual of it the mortgagee became entitled to seek all his remedies. The covenant in the bond that the mortgagors would be personally liable for the balance which might remain due after the sale of the mortgaged property did not give the mortgagee a right to bring a separate suit for a decree personally against the mortgagors after the sale of the property. The truth is, as observed by HERSCHELL, L. C., in *in re McHenry*: *McDermott* v. *Boyd* (2), "the right of the creditor in law would have been precisely the same as if those words had not been inserted." His Lordship added:—"I cannot say that that right of realization gave a separate and independent cause of action, so that the statutory period did not begin to run until that date." The ruling in that case is, in our opinion, conclusive of the question. A similar view was held by the Calcutta High Court in *Miller* v. *Runga Nath Moulick* (3). In this case the appellant's cause of action arose when his debtors made default in payment of the debt. He was bound to come into Court within the period of limitation prescribed for his suit computed from the date of the accrual of his cause of action. The limitation for the claim for sale being sixty years, his suit for sale was within time, but the period of limitation for a suit upon the **[516]** personal covenant being six years only, a claim upon that covenant would have been time-barred on the date on which the suit was brought, more than six years having elapsed on that date from the date of the

(1) 14 A. 513. (2) (1894) L.R. 3 Ch. 290. (3) 12 C. 389.

accrual of the cause of action. That being so, the Courts below have, in our opinion, rightly held that the amount which the appellant seeks to recover by a decree under s. 90 is not legally recoverable from the mortgagors within the meaning of that section, and this appeal must fail. We dismiss it with costs.

Appeal dismissed.

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20 A. 512 = 18 A.W.N. (1898) 133.

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20 A. 516 = 18 A.W.N. (1898) 134.

APPELLATE CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Banerji.

PULANDAR SINGH (*Plaintiff*) *v.* JWALA SINGH AND OTHERS (*Defendants*).* [8th July, 1898.]

Civil Procedure Code, s. 13, expl. II—Res judicata—*Matter which might have been a ground of defence in a former suit.*

A defendant in a suit for the recovery of possession of immoveable property pleaded only a right to the proprietary possession of the property in suit in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently, the plaintiff sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption. *Held*, that the suit must fail, inasmuch as the plaintiff's claim was one which he might have made when defendant in the former suit as an alternative to his defence of title. *Srimut Rajah Moottoo Vijaya, &c.* v. *Katama Natchiar* (1), *Kameswar Pershad* v. *Raj Kumari Ruttan Koer* (2), and *Baldeo Sahai* v. *Bateshar Singh* (3) referred to.

[**Overruled**, 26 A. 61 (F.B.); **Not F.**, 1 A.L.J. 426; **R.**, 65 P.L.R. 1908 = 55 P.R. 1907 = 96 P.W.R. (1907).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

KERSHAW, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was one for pre-emption brought by the present appellant in respect of a sale made by one Musammat Subta on the 11th of May, 1894. The suit has been dismissed as barred by the [517] rule of *res judicata*. It is contended before us that this ruling of the Courts below is erroneous. We are unable to accede to this contention.

The facts out of which the plea of *res judicata* arose were these:—The share now sold is a part of a 5-biswa share which belonged to the father of Musammat Subta. After the death of both her parents she sold the share now in question to the vendees respondents. The whole property, however, consisting of 5-biswas, was in the possession of the present appellant. The vendees and Musammat Subta therefore brought a suit for possession against the present appellant. That suit was resisted on the sole ground that the present appellant was the owner of the property. The Court decided against him and made a decree in favour of the then plaintiffs. The Courts below have held that the present plaintiff ought to have

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* Second Appeal No. 522 of 1896, from a decree of W. F. W. Wells, Esq., District Judge of Shahjahanpur, dated the 16th April 1896, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 7th December 1895.

(1) 11 M. I.A. 50. (2) 20 C. 79. (3) 1 A. 75.

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put forward his right of pre-emption in respect of the property now in suit as an answer to the claim of the vendees in the former suit, and that as he did not do so the present claim is barred by the rule of *res judicata*, having regard to explanation II of s. 13 of Act No. XIV of 1882.

It has been urged before us that the present plaintiff might no doubt have defeated the claim of the then plaintiffs by setting up his right of pre-emption, but he was not bound to do so, and therefore this is not a case to which explanation II of s. 13 applies. In our opinion, this contention is untenable. The present plaintiff being in possession of the property, it was his duty to resist the claim of those who sought to oust him upon all possible grounds. In *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Taver* v. *Katama Natchiar, Zemindar of Shivagunga* (1) it was observed by the Privy Council (at p. 73), that "when a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will, but instead of doing so **[518]** when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed." These observations apply with full force to the present case. It is true that if the present plaintiff had raised in the former suit, the defence that he had a right of pre-emption, that defence would have been only inthe alternative, but such a defence is one which a party who resists a claim ought to bring forward for the purpose of defeating the claim. In the case of *Kameswar Pershad* v. *Raj Kumari Ruttan Koer* (2), their Lordships of the Privy Council explained what the word "ought" in explanation II of s. 13 means. In that case, their Lordships said:—"Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' might become important." It is urged that the defence on the ground of pre-emption, if raised, would have been so dissimilar to the other defence, namely, on the ground of proprietary title, that confusion would have arisen, and consequently according to their Lordships of the Privy Council, the defence on the ground of pre-emption ought not to have been raised in the former suit. In our opinion, however, the two defences would only have been alternative ways of seeking to defeat the claim of the plaintiff. This view is supported by the ruling of this Court in *Imam Khan* v. *Ayub Khan* (3). We are therefore of opinion that as the present plaintiff did not in the former suit set up his right of pre-emption in answer to the claim advanced in that suit, he is precluded by the provisions of s. 13 of the Code of Civil Procedure from maintaining the present suit. The ruling of this Court in *Baldeo Sahai* v. *Bateshar Singh* (4) is directly in point. For the above reasons, we hold that the Courts below were right. We dismiss this appeal with costs.

Appeal dismissed.

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(1) 11 M.I.A. 50. (2) 20 C. 79. (3) 19 A. 517. (4) 1 A. 75.

20 A. 519=18 A.W.N. (1898) 135.

[519] APPELLATE CIVIL.

Before Mr. Justice Aikman.

JAI KISHEN AND OTHERS (*Plaintiffs*) *v.* RAM LAL (*Defendant*)*
[9th July, 1898.]

Act No. XV of 1877 (*Indian Limitation Act*), *sch. ii, art.* 32—*Suit for removal of trees from tenant's holding—Limitation—Jurisdiction—Civil and Revenue Courts Act No. XII of* 1881 (*N.-W.P. Rent Act*), *s.* 93.

Held, that a suit by zamindars for the removal of trees planted by a tenant on his cultivatory holding was governed by the limitation prescribed in art. 32 of sch. ii of the Indian Limitation Act, 1877. *Gangadhar* v. *Zahurriya* (1), and *Musharaf Ali* v. *Iftkhar Husain* (2) referred to.

Held, also that such a suit was not cognizable by a Civil Court. *Deodat Tiwari* v. *Gopi Misr* (3).

[R., 23 A. 486 (490); 8 A.L.J. 914 (917)=12 Ind.Cas. 108.]

THE plaintiffs came into Court alleging that the defendant being their tenant of certain fields, which were leased to him for agricultural purposes, had, without obtaining their permission, planted trees on the said fields, instead of using them for the purpose for which they were let, and the plaintiffs prayed for the removal of the trees.

In the first Court the defendants raised several issues, but the case was decided upon one only, namely, whether the predecessor in title of the plaintiffs had given permission to the defendant to plant the trees in question. Finding this issue against the defendant the Court (Munsif of Agra) gave a decree in favour of the plaintiffs.

On appeal by the defendant the Lower Appellate Court (Small Cause Court Judge of Agra acting as Subordinate Judge) decreed the appeal and dismissed the plaintiffs' suit on the finding that it was barred by limitation undr art. 32 of the second schedule to the Indian Limitation Act, 1877; the trees in dispute having, according to the evidence of Jai Kishen, one of the plaintiffs, been planted more than two years before suit.

The plaintiffs thereupon appealed to the High Court.

[520] Babu *Jogindro Nath Chaudhri*, for the appellants.

The respondent was not represented.

JUDGMENT.

AIKMAN, J.—The plaintiffs, who are appellants here, brought a suit for the removal of certain trees which had been planted by the defendant on the land which he held from the plaintiffs for cultivation. The suit was brought upwards of two years after the trees were planted. The Lower Appellate Court has dismissed the suit as barred by limitation, applying art. 32 of the second schedule to the Indian Limitation Act, 1877. In appeal, it is contended that the suit is governed by art. 144 of the second schedule to the Limitation Act. That article has clearly no application to this suit, which is not a suit for possession. In the case of *Gangadhar* v. *Zahurriya* (1), art. 32 was held to be applicable to

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* Second Appeal, No. 593 of 1897, from a decree of Syed Akbar Husain, Subordinate Judge of Agra, dated the 28th April 1897, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 1st January 1897.

(1) 8 A. 446. (2) 10 A. 634. (3) 2 A.W.N. (1882) 102.

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a suit like the present. That was a ruling of TYRRELL and MAHMOOD, J.J., and that ruling was concurred in by STRAIGHT, J., in *Musharaf Ali* v. *Iftkhar Husain* (1). The appeal therefore cannot be sustained. I may add that, in my opinion, the cognizance of the suit by the Civil Court was barred by the provisions of s. 93 of Act No. XII of 1881, and in this opinion, I am fortified by the decision in *Deodat Tiwari* v. *Gopi Misr*(2). I dismiss this appeal, but without costs, as the respondent is not represented.

Appeal dismissed.

20 A. 519=18 A.W.N. (1898) 135.

20 A. 520=18 A.W.N. (1898) 136.

APPELLATE CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Banerji.

KALIANI (*Defendant*) *v.* DASSU PANDE AND OTHERS (*Plaintiffs*).*

[15th July, 1898.]

Jurisdiction—Civil and Revenue Courts—Suit in ejectment against a trespasser—Res judicata—*Entries in revenue records.*

Although a Civil Court cannot give a decree declaring or deciding the status of an agricultural tenant, yet where a plaintiff, having no remedy in the Revenue Courts, sues, on the allegation that he is a tenant entitled to possession, to eject a trespasser, it is competent to a Civil Court to grant a decree for possession on the ground that the plaintiff is a tenant, the class of his tenancy being left to the Revenue Courts to determine.

[521] *Held* also, that an entry in a revenue record which is based solely on the fact of possession cannot operate as *res judicata* on a question of title subsequently raised in a Civil suit. *Ajudhia Rai* v. *Parmeshar Rai* (3), and *Dukhna Kunwar* v. *Unkar Pande* (4), referred to.

[R., 23 A. 360 (362, 363); 23 A. 481 (483, 484).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellant.

Mr. *J. Simeon*, for the respondents.

JUDGMENT.

KERSHAW, C.J., and BANERJI, J.—This is an appeal from an order of remand under s. 562 of the Code of Civil Procedure. This is one of those cases in which the question of the conflict of the jurisdiction of Civil and Revenue Courts arises. The plaintiffs, who are respondents here, brought their suit for a declaration that they were occupancy tenants of the land in suit and for recovery of possession of that land. They alleged that the defendant had no right to it and that she was a trespasser. It appears that the name of the defendant was entered in the revenue papers as the tenant of this land. The plaintiffs made an application for amendment of that entry on the ground that they were entitled to the holding. That application was dismissed by the Revenue Court, and thereupon the present suit was brought. The Court of first instance dismissed the suit on the ground that it was one cognizable by a Court of Revenue, and it relied for that opinion on the ruling of the Full Bench in

* First Appeal from Order No. 46 of 1898, from an order of H.D. Griffin, Esq., District Judge of Azamgarh, dated the 4th April 1898.

(1) 10 A. 634.
(2) 2 A.W.N. (1882) 102.
(3) 18 A. 340.
(4) 19 A. 452.

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Ajudhia Rai v. *Parmeshar Rai* (1). The plaintiffs appealed to the District Judge. He held that in so far as the plaintiffs sought to obtain a declaration that they were the occupancy tenants of the land in suit, the suit was not cognizable by a Civil Court and that the claim had been rightly dismissed; but as regards the claim for possession, he held, relying on the ruling of this Court in *Dukhna Kunwar* v. *Unkar Pande* (2), that it was cognizable by the Civil Court. He accordingly made an order under s. 562 of the Code of Civil Procedure remanding the case to the Court of first instance for trial on the merits.

[522] In our judgment this case is almost on all fours with the ruling on which the learned Judge of the Court below has relied and we fail to see in what respect this case may be distinguished from the one in which that ruling was passed. As observed in that case, the plaintiffs could not obtain any relief by resorting to the Court of Revenue. By asking that Court to determine the class of their tenancy under s. 10 of Act No. XII of 1881 and obtaining a decision under clause (*a*) of s. 95 of that Act, they could not recover possession of the holding. As they did not allege that the zamindar had dispossessed them, and as the defendant did not claim to have been put into possession by the zamindar, they could not make an application under clause (*n*) of that section. They are thus clearly without remedy, unless that remedy could be given them by a Civil Court. In the ruling to which we have referred it was held that, although the Civil Court could not grant a decree declaring or deciding the status of an agricultural tenant, the only Court in which a person claiming to be such a tenant could sue to recover possession from an alleged trespasser was the Civil Court. With that opinion we fully agree. This case was not one in which it was necessary that the question of the status of the plaintiffs' tenancy *qua* status had to be determined; if the plaintiffs were tenants of any description and if the defendant was a trespasser, the plaintiffs were entitled to succeed. In this respect this case does not fall within the purview of the Full Bench ruling in *Ajudhia Rai* v. *Parmeshar Rai* (1), and we think that the conclusion at which the learned Judge of the Court below has arrived is a right conclusion.

It was further contended before us on behalf of the appellant that, by reason of the order of the Revenue Court refusing to amend the entry in the revenue papers, the matter had become *res judicata*. We are unable to accede to this contention. The order of the Revenue Court was made under s. 102 of Act No. XIX of 1873. That section provides that in disputed cases the Collector of the District or Assistant Collector shall make **[523]** such inquiry as may be necessary to ascertain the truth and cause the record to be amended accordingly. This section in our judgment does not confer upon the Collector of the District or Assistant Collector any greater powers than what a Settlement Officer would have under s. 64 of that Act. By s. 63 the Settlement Officer is to specify in the record of rights all particulars relating to tenants of every description. By s. 64 all entries in the record made under s. 63 shall be founded on the basis of actual possession, and all disputes regarding such entries shall be investigated and decided on that basis. The inquiry referred to in s. 102 is, in our opinion, the inquiry which in the case of disputes a Settlement Officer is competent to make under s. 64 on the basis of actual possession. That section further provides that persons not in possession, but claiming a right to be so, shall be referred to the proper Court. The

(1) 18 A. 340.

(2) 19 A. 452.

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proper Court mentioned in the section evidently must be, as observed in *Dukhna Kunwar* v. *Unkar Pande* (1), a Court other than the Court of the Settlement Officer, and where the Revenue Court would not have jurisdiction to afford relief it must be the Civil Court. An adjudication on the basis of possession, which an adjudication under s. 102 must necessarily be, cannot, in our opinion, operate as *res judicata* on a question of title. In our judgment this appeal is untenable. We dismiss it with costs.

Appeal dismissed.

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20 A. 523 (F.B.)=18 A.W.N. (1898) 157.

FULL BENCH.

Before Sir Louis Kershaw, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

MAQBUL FATIMA (*Judgment-debtor*) *v.* LALTA PRASAD AND ANOTHER (*Decree-holders*).* [20th July, 1898.]

Execution of decree—Construction of decree—Act No. IV *of* 1882 (*Transfer of Property Act*), *s.* 88—*Civil Procedure Code, ss.* 219, 206—*Costs—Decree apparently awarding costs twice.*

A decree drawn up under s. 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but, [524] in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered, that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court."

Held, that this latter clause was merely a formal compliance with the provisions of the Code of Civil Procedure, and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. *Chiranji* v. *Moti Ram* (2) on this point over-ruled.

[F., 35 C. 431=8 C.L.J. 152=12 C.W.N. 364; R., 30 M. 464=17 M.L.J. 317=2 M.L.T. 359; 13 C.W.N. 742=4 Ind. Cas. 545; 16 C.W.N. 731=15 Ind. Cas. 23 (24); 8 Ind. Cas. 32 (33); 19 Ind. Cas. 384 (385); 11 O.C. 377.]

IN this case the respondents decree-holders had obtained a decree under s. 88 of the Transfer of Property Act, 1882, on the 27th August 1894, which decree was confirmed by the High Court on appeal on the 22nd of April 1897. The decree thus confirmed was, as to the main portion of it, drawn up in strict accordance with the terms of s. 88 of the Transfer of Property Act; but, in addition to the matters provided for by that section, contained a further order to the effect that "defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8-0, the amount of costs incurred by them in this Court." The decree-holders caused the mortgaged property to be sold by auction, and, the proceeds of the sale being insufficient for the realization of the whole of the decretal amount they subsequently applied for a decree under s. 90 of the Transfer of Property Act, 1882, that application was dismissed. The decree-holder subsequently applied for execution of their decree as to costs by realization of the costs awarded to them from the person of the judgment-debtor. The Court of first instance (Subordinate Judge of Bareilly) disallowed the judgment-debtor's objections and made an order granting execution for

* First Appeal No. 251 of 1897, from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 7th August 1897.

(1) 19 A. 452.

(2) 18 A.W.N. (1898) 33.

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the costs of both Courts against the judgment-debtor personally. Against this order the judgment-debtor appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant. The decree-holders' claim to recover their costs from the judgment-debtor personally is concluded by the order of the Subordinate Judge on their application for a decree under s. 90 of Transfer of Property Act. The decree-holders in that application **[525]** asked for a personal decree as to costs and it was refused them; they cannot therefore now get a personal decree for costs.

Further the award of Rs. 876-8-0 as costs by the decree of the High Court, which is now the only decree in the suit, was made "as awarded in the decree of the lower appellate Court," that is to say, the costs were made a portion of the mortgage money as required by s. 88 of the Transfer of Property Act.

The decree, moreover, as drawn up is ambiguous, and, that being so, it must be construed, if possible, as a decree in accordance with law. As the judgment directs a decree to be drawn up in accordance with the terms of s. 88 of the Transfer of Property Act the decree must be construed as a good decree under that section and as awarding costs in the matter prescribed thereby, namely, payable out of the mortgaged property and not by the judgment-debtor personally.

Mr. *D. N. Banerji* (with whom Mr. *W. K. Porter*) for the respondents. The sole question is whether the Court executing the decree can go behind it. The language of this decree is plain, and whether rightly or wrongly the decree has awarded costs separately. There is nothing in the law to show that the Court cannot award costs separately, *i.e.*, without including them in the mortgage money, and in any case the Court has done so. The judgment-debtor never appealed from the decree of the first Court on the point of costs, and the High Court has now no power to prevent execution of that decree according to its terms which are not ambiguous.

JUDGMENT.

The judgment of the majority of the Court (KERSHAW, C. J., BLAIR, BANERJI and AIKMAN, JJ.) was delivered by BANERJI, J.:—

This appeal arises out of an application for the execution of a decree presented in the Court of the Subordinate Judge of Bareilly by the respondents decree-holders. They brought a suit for sale on a mortgage, and a decree was made in their favour under s. 88 of the Transfer of Property Act on the 27th of August 1894. An appeal was preferred from that decree to this Court, which was dismissed on the 22nd of **[526]** April 1897. The decree-holders caused the mortgaged property to be sold by auction, and the proceeds of the sale being insufficient for the realization of the whole of the decretal amount, they subsequently applied for a decree under s. 90 of the above-mentioned Act. That application was dismissed. Their present application, which has given rise to this appeal, was one for the realization of the costs awarded to them by the decree of the Court of first instance and of the appellate Court from the person of the judgment-debtor. As regards the costs of the appellate Court, there is no controversy in this appeal. As for the costs of the Court of first instance, it is contended on behalf of the judgment-debtor appellant that, under the terms of the decree passed in favour of the respondents, they are not entitled to realize the costs of that Court otherwise than out of the mortgaged property. The Court below has overruled that objection, and it has been repeated in the appeal before us. No doubt a Court executing a decree is bound to give effect to the decree as it finds it. We have therefore to see

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whether in this case the decree awards to the decree-holders the costs of the suit against the defendant personally. The decree, as we have said above, is one under s. 88 of the Transfer of Property Act. Under the terms of that section, read with s. 86, the decree should order, that an account be taken of what would be due to the mortgagee for principal and interest on the mortgage and for his costs of suit, if any, awarded to him, on the date to be fixed in the decree, and in the event of failure of payment of such amount of principal, interest and costs, that the mortgaged property should be sold. A decree drawn strictly in accordance with the provisions of s. 88 cannot direct the costs of the suit to be recovered otherwise than out of the mortgaged property. The first portion of the decree in this case was in strict compliance with the requirements of s. 88 of the Transfer of Property Act. It declared that on the 27th of February 1895, Rs. 11,866-8 was to be payable to the plaintiffs, *viz.*, Rs. 10,990 on account of principal and interest, and Rs 876-8 on account of costs. The decree, however, **[527]** contains a further direction in the following terms:—"It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." It is contended that the second direction in the decree to which we have referred is independent of the order contained in the first portion of the decree as to the inclusion of costs in the amount on failure to pay which the mortgaged property could be sold, and it is urged that under this last clause the mortgagees plaintiffs are entitled to recover the costs over again from the defendants personally. We are unable to accede to this contention. We do not think that we should be justified in construing this decree in a manner which would make it an inequitable decree, which the decree in this case must be if, as is contended, it directs the same amount of costs to be paid twice over. In our opinion there is no ambiguity in the decree, and the second provision in it as to payment of costs is only a repetition of what is already contained in the first portion of the decree about the realization of costs out of the mortgaged property. Section 219 of the Code of Civil Procedure provides that the judgment shall direct by whom the costs of each party are to be paid, and by s. 206 it is directed that the decree shall state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid. In our opinion the clause in the decree relied on by the decree-holders is only a formal compliance with the provisions of the Code of Civil Procedure. It was never intended to be a direction for the recovery of costs personally from the debtor. In this view we are unable to agree with the observations contained in the judgment of this Court in *Chiranji* v. *Moti Ram* (1). Even if there were any ambiguity in the decree, it would be the duty of the Court to construe the decree by the light of the judgment. The judgment in this case does not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the **[528]** sale of the mortgaged property, and the judgment directed that a decree should be prepared according to s. 88 of the Transfer of Property Act. In our opinion the judgment, so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs. We may observe that the decree of the appellate Court does not in any way affect the question before us, as it provides that the costs

(1) 18 A.W.N. (1898) 33.

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of the Court of first instance should be paid in the manner awarded in the decretal order of the said Court. We are in full accord with the opinion expressed by our brother Burkitt in his judgment in First Appeal No. 54 of 1894, decided on the 10th of August 1894, which dealt with a decree couched in similar terms. For the above reasons we are of opinion that the decree-holders are not entitled to realize the costs awarded by the decree of the Court of first instance from the judgment-debtor personally, and we hold that this appeal must prevail.

BURKITT, J.—This case was referred to a Full Bench at my request, because, being one of the Judges responsible for the judgment in the case of *Chiranji* v. *Moti Ram* (1) I felt dissatisfied as to the correctness of the rule therein laid down. I now desire to say that I fully concur in the judgment which has just been delivered. On consideration I am of opinion that in that case we were wrong in holding that the lower appellate Court took a portion of the main decree of the Court of first instance out of its proper position, and in a way constituted it a subsidiary decree for costs capable of execution against the persons of the mortgagors. I think we were wrong on that point, and that all that was intended to be done was to fill up as a matter of routine certain columns in the printed form of decree, and not in any way to modify the meaning or effect of the actual decree.

BY THE COURT.—The order of the Court is, that this appeal be allowed, and that the order of the Court below be varied to this extent that the application of the decree-holders for the [529] recovery of the costs of the Court of first instance is dismissed. The appellant will get her costs of this appeal.

Appeal decreed.

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20 A. 529 = 18 A.W.N. (1898), 152.

REVISIONAL CRIMINAL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS v. BRIJ NARAIN MAN.* [22nd July, 1898.]

Criminal Procedure Code, s. 339—Pardon—Tender of pardon by Magistrate inquiring into a Criminal case—Pardon withdrawn after some of the witnesses for the prosecution had been examined—Effect of withdrawal of pardon at that stage.

A Magistrate inquiring into a charge of dacoity tendered a pardon to one of the accused persons. The pardon was accepted, and the person to whom it was tendered was examined as a witness for the prosecution. Subsequently, and after certain other witnesses for the prosecution had been examined, the Magistrate, being of opinion that the person to whom pardon had been tendered had not made a full disclosure of the facts of the case, withdrew the pardon, put the person to whom it had been tendered back in the dock, and ultimately committed him along with the other accused to the Court of Session. *Held*, that the commitment of the person whose pardon had been withdrawn must be quashed, inasmuch as he had had no opportunity of cross-examining the witnesses for the prosecution who were examined before his pardon was withdrawn: but that it was not necessary that, if a fresh commitment could be made in time, his trial before the Court of Sessions should be postponed until the trial of his co-accused had been completed. *Queen-Empress* v. *Sudra* (2) and *Queen-Empress* v. *Mulua* (3) referred to.

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* Criminal Revision No. 345 of 1898.

(1) 18 A.W.N. (1898) 33. (2) 14 A. 336. (3) 14 A. 502.

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20 A. 529 = 18 A.W.N (1898) 152.

[F., 29 A. 24=3 A.L.J. 615=A.W.N. (1906) 258; R., 24 M. 321 (324); 5 A.L.J. 691=A.W.N. (1908) 259=8 Cr.L.J. 445 (446); 3 Ind. Cas. 922=10 Cr.L.J. 418=5 N. L.R. 134 (135); U.B.R. (1907) 4th Qr., Cr. P.C., p. 7 (8)=14 Bur. L.R. 306=7 Cr. L.J. 245.]

THE facts of this case sufficiently appear from the order of the Court.

Mr. *S. S. Singh* and Pandit *Madan Mohan Malaviya*, for the applicant.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

ORDER.

KERSHAW, C. J., and AIKMAN, J.—This is an application asking this Court to quash a commitment. The applicant Brij Narain Man was implicated in a dacoity: a pardon was tendered **[530]** to him by the Magistrate under the provisions of s. 337 of the Code of Criminal Procedure, and by him accepted. He was in the course of the inquiry examined as a witness. The Magistrate came to the conclusion that Brij Narain Man was wilfully concealing material circumstances relating to the case, in particular, that he designedly in his statement omitted mention of his father and of his brother, who, according to the evidence, were also implicated in the crime. The Magistrate accordingly withdrew the offer of pardon, and, treating Brij Narain Man as an accused person, in the result committed him along with the other accused persons to the Court of Session for trial under s. 395 of the Indian Penal Code. The learned counsel who has appeared in support of the application puts forward two grounds as grounds which would justify us in quashing the commitment of his client. One of these is, that the withdrawal of the tender of pardon by the committing Magistrate is improper. This was explained to us as meaning that there was nothing to show that the statement made by Brij Narain Man when examined as a witness was other than a true and full disclosure of the circumstances within his knowledge relating to the offence and the persons concerned in the committal of the offence. The question whether or not the applicant made a full and true disclosure of all he knew regarding the dacoity is clearly a question of fact. Now, according to s. 215 of the Code of Criminal Procedure, a commitment once made by a competent Magistrate can be quashed by this Court only, and only on a point of law. This ground therefore would not justify us in interfering with the commitment. The other ground urged is, that it was illegal for the Magistrate to take the applicant from the witness-box and commit him for trial along with the other accused. Reliance is placed on the decision of this Court in *Queen Empress* v. *Sudra* (1), and the case of *Queen-Empress* v. *Mulua* (2). The latter case was a case in which during the course of a trial a Sessions Judge, being of **[531]** opinion that an accused person to whom a tender of pardon had been made, and who had accepted that pardon and had given evidence at the trial, was giving false evidence, forthwith put him as an accused person into the dock and proceeded at once with his trial. The former case was one on all fours with this, *i.e.*, it was one in which the approver's pardon was withdrawn by the committing Magistrate and he was committed to the Sessions. We are of opinion that upon the second ground the commitment must be quashed, and for this reason. An

(1) 14 A. 336. (2) 14 A. 502.

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20 A. 529 = 18 A.W.N. (1898) 152.

order committing a person to take his trial at the Court of Session is an order which is passed to his prejudice, and the evidence upon which such an order is made must be the evidence of witnesses whom the accused person has had an opportunity of cross-examining. If he has not had that opportunity, it cannot but be said that he has been prejudiced. Now the order withdrawing the pardon of the applicant and directing that he should be treated as an accused person was made after some, at least, of the evidence in the inquiry preliminary to commitment had been taken, and as regards this evidence it is admitted that the applicant had no opportunity of cross-examining. For this reason we quash the commitment of Brij Narain Man Tewari to the Court of Sessions on the charge under s. 395 of Indian Penal Code, leaving the Magistrate to take such further proceeding against the applicant as he may deem necessary and as may be warranted by law. The learned counsel for the applicant has asked us to lay down that in the event of his client being after a fresh inquiry committed to the Court of Session and this commitment being made before the trial of the other accused has come on, he shall not be tried along with them. It is no doubt true that in the case *Queen-Empress* v. *Sudra* (1), the learned Judge who decided the case remarked as follows :— "It is, in my opinion, the intention of law that a person to whom a tender of pardon has been made in connection with the offence should not be tried for an alleged breach of the conditions upon which the pardon **[532]** was tendered until the original case has been fully heard and determined." We fully agree with the law as laid down in *Queen-Empress* v. *Mulua* (2) namely, that the trial of an approver whose pardon is withdrawn at the trial should not be merely a continuation of the trial at which he gave false evidence, but a trial, so far as he is concerned, *de novo*. We are unable to follow the learned Judge who decided the case *Queen-Empress* v. *Sudra* in the opinion expressed in the passage quoted above. We are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case should be tried separately from them. We assume that the commitment referred to is not open to objection on the ground of any illegality such as exists in this case. The joint trial under such circumstances could not, in our opinion, prejudice the approver in any way; nor could it prejudice the accused who are jointly tried with him. We allow this application and quash the commitment of Brij Narain Man Tewari.

(1) 14 A. 336.

(2) 14 A. 502.

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LATE
CIVIL.

20 A. 532 =
18 A.W.N.
(1898) 148.

20 A. 532 = 18 A.W.N. (1898) 148.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RADHA KISHEN AND ANOTHER (*Plaintiffs*) *v.* FATEH ALI RAM AND OTHERS (*Defendants*).* [22nd July, 1898.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 59—*Act No. I of* 1872 (*Indian Evidence Act*), *s.* 68—*Attesting witness—Scribe of a deed.*

Held, that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly as an attesting witness, on the margin, and has been present when the deed was executed. *Muhammad Ali* v. *Jafar Khan* (1), followed.

[Diss., 1 Ind. Cas. 179 = 5 N.L.R. 3; 16 Ind. Cas. 797; R., 34 A. 615 (616) = 16 Ind. Cas. 392 (393) = 10 A.L.J. 217; 33 B. 44 (48) = 1 Ind. Cas. 464 = 10 Bom. L.R. 943 (947); 5 C.W.N. 454; 19 Ind. Cas. 451; 24 M.L.J. 534 (536) = 13 M.L.T. 463 (465) = (1913) M.W.N. 400 = 19 Ind. Cas. 599 (590).]

[533] THE plaintiffs in this case sued to recover a debt secured by a bond dated the 26th of February 1889. The defendants put the plaintiff to proof of his bond and the plaintiff called numerous witnesses, but none of the marginal witnesses to the bond, and it was not shown that the evidence of the marginal witnesses was not procurable. Amongst those called by the plaintiff was the scribe of the bond. The Court of first instance (Munsif of Ghazipur) held with reference to ss. 68 and 69 of the Transfer of Property Act, 1882, that the bond sued on had not been legally proved, but gave the plaintiff a money decree against one of the defendants who admitted the claim.

The plaintiffs appealed, but the lower appellate Court (Subordinate Judge of Ghazipur) dismissed the appeal concurring with the finding of the Munsif that the bond sued on had not been proved.

The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants.

Munshi *Kalindi Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—It seems to me that this case is exactly on all fours with the case of *Muhammad Ali* v. *Jafar Khan* (1). It is true that none of the witnesses was called, but the plaintiff did call the scribe of the deed, who, though not an attesting witness, had affixed his name on the deed and who swore that the deed had been in his presence executed by the parties to it. The lower appellate Court finds that the evidence of the scribe is not sufficient to prove the bond. By that phrase it is clear that the learned Subordinate Judge means that, as the scribe was not an attesting witness, his evidence is not legally sufficient to prove the bond. The Subordinate Judge does not say that he disbelieves the scribe. If he had said so there would have been an end of the matter. I take it that the finding of the two lower Courts is that the plaintiff was bound to call one attesting witness at least, that he failed to do so, and that the evidence of the witness, that is to say, of the scribe, whom he did call,

* Second Appeal, No. 858 of 1897, from a decree of Maulvi Muhammad Ismail Khan, Subordinate Judge of Ghazipur, dated the 9th April 1897 confirming a decree of Munshi Achal Behari, Munsif of Ghazipur, dated the 6th January 1897.

(1) 17 A.W.N. (1897) 146.

was not in law sufficient to prove the bond. On [534] the authority of the case cited above I am of opinion that that decision is wrong, and that if the Munsif and the Subordinate Judge believed the evidence of the scribe to be true, they were quite at liberty on that evidence alone to find that the bond had been executed. This case has been decided on the preliminary point that the evidence of the scribe was legally insufficient to prove the bond. I set aside the decree of the lower Court and remand the case to the Court of first instance with instructions that, if the evidence of the scribe be in its opinion credible, that Court is at liberty on that evidence to find the bond proved. Costs of this appeal will follow the result.

Appeal decreed and cause remanded.

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20 A. 534 = 18 A.W.N. (1898) 142.

REVISIONAL CRIMINAL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* BEHARI LAL.* [23rd July, 1898.]

Act No. I *of* 1892 (*Local*) (*N.-W.P. and Oudh Lodging House Act*), *s.* 5, *sub-s.* 2—*Lodging house—House of "pragwal" used for accommodation of pilgrims.*

Held, that a "pragwal" who, according to custom, affords accommodation to his clients when they come to Allahabad for religious purposes, is bound, under the North-Western Provinces and Oudh Lodging House Act, 1892, to take out a license in respect of such houses as he may use for the accommodation of his clients.

IN this case one Behari Lal, a *pragwal* living in Kydganj, a mohalla of the city of Allahabad, was charged before a Magistrate of the third class of the Allahabad district with keeping without a license three lodging houses in respect of which licenses were necessary. It was found that, besides the house in which he himself lived, which was also used at times for similar purposes, Behari Lal kept two other houses which were used by him to accommodate the pilgrims who came from time to time to Allahabad and there availed themselves of Behari Lal's professional services. The case for the prosecution was that these houses were habitually used for the accommodation [535] of pilgrims, and that, although no direct consideration was received for their use from the pilgrims, some indirect consideration was received in the shape of presents, which on their departure the pilgrims customarily made to their priest. For the defence it was contended that the houses were not habitually used as lodging houses, but only on certain occasions when the occurrence of religious festivals brought pilgrims to Allahabad, and it was also argued that the presents given by the pilgrims were the same whether they received any accommodation or not, and that the reciprocal functions of priest and client were hereditary and the client was not at liberty to change his priest, so that no part of the presents made by the clients could be regarded as consideration for the accommodation afforded to them by the priest.

The third class Magistrate convicted Behari Lal under s. 5 (2) of the N.-W. P. and Oudh Lodging House Act and fined him Rs. 50.

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* Criminal Revision No. 401 of 1898.

1898 JULY 23. — REVISIONAL CRIMINAL. — 20 A. 534 = 18 A.W.N. (1898) 142.

He appealed to the District Magistrate, and the appeal was transferred by order of the High Court to the Sessions Judge On this appeal the Sessions Judge found both that the houses in question were used more or less at all times throughout the year for the accommodation of pilgrims, and also that some indirect consideration was received by Behari Lal in return for the accommodation so afforded. The Judge accordingly dismissed the appeal.

Behari Lal thereupon applied to the High Court for revision of the order of the Magistrate and of the Sessions Judge.

Mr. *W. Wallach*, for the applicant.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

JUDGMENT.

KERSHAW, C. J., and AIKMAN, J.—This is an application for revision of an appellate order of the Sessions Judge of Allahabad confirming a conviction of the applicant under s. 5, sub-section 2, of Act No. I of 1892 of the Local Legislature (The North-Western Provinces and Oudh Lodging House Act), and a sentence of fine imposed thereunder. The applicant relied on the contention that the houses in respect of which he had been **[536]** convicted did not, for two reasons, come within the definition of lodging house in s. 1, sub-section 3, of the Act above-mentioned. In the first place, it was argued that the houses were not ordinarily used for the purpose of affording temporary accommodation to persons, and, secondly, that, if they were so used, the applicant did not receive any compensation, direct or indirect for such use. The first contention of the applicant is negatived by the finding of fact of the Judge, who says :—"I think there is no doubt that pilgrims are lodged in these houses of the appellant at all times and seasons of the year, and that the houses are used ordinarily as lodging houses." The Court accepts that finding of fact. We find that there was evidence amply sufficient to support it, and we are therefore not justified in interfering where the question is one of fact, and where the fact has been found in a sense hostile to the applicant by the tribunal from which he has appealed. The second point under this sub-section 3 made by the applicant's counsel is that the applicant's houses do not come within the definition in that sub-section, inasmuch as the applicant did not receive any consideration, direct or indirect, for their user. The Magistrate has found that the persons who at various times of the year received temporary accommodation at the houses of the applicant did indirectly pay the applicant for such accommodation. Presents were received by him on the departure of the persons accommodated at his houses. We are of opinion that a portion of the value of those presents is to be ascribed to the accommodation which was given and received. The applicant derived his income from such presents. It was necessary that accommodation of some sort should be provided in order to enable him to keep his clients and so to receive in future such presents as they might give him. Under these circumstances we think that he was indirectly paid for the accommodation which he gave to those clients, and therefore that his houses come within the definition in the sub-section mentioned, and that he was rightly convicted. We therefore dismiss this application.

20 A. 537=18 A.W.N. (1898) 159.

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20 A. 537=
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(1898) 159.

[537] APPELLATE CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Knox.

RUP SINGH (*Judgment-debtor*) *v.* PIRBHU NARAIN SINGH (*Decree-holder*).*

[28th July, 1898.]

Hindu law—Mitakshara—Impartible raj—Impartible raj not necessarily inalienable.

If amongst Hindus governed by the law of the Mitakshara, a raj happens to be impartible and governed by the rule of primogeniture, it does not therefore follow that it is inalienable. The condition of inalienability depends upon special custom, or, in some cases, upon the special tenure of the raj and must be clearly proved. *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Parbati Charan Chatterji*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

KERSHAW, C. J., and KNOX, J.,—The parties to these proceedings are Maharaja Pirbhu Narain Singh Sahib Bahadur, Kashi Nares, who is decree-holder, and Raja Rup Singh, known and styled as the Raja of Bhare, who is judgment-debtor. On the 29th of November 1891, Raja Rup Singh transferred by way of mortgage his rights and interests in certain property to the Maharaja of Benares. Upon that mortgage-deed the Maharaja of Benares instituted a suit and obtained a decree for sale. An order absolute for sale was also given subsequently. In process of time the decree-holder applied for attachment of the property with a view to its being brought to sale. No objection was raised by the judgment-debtor, and on the 19th of November 1894, an order issued for sale, and proceedings were transferred to the Collector of Mainpuri in accordance with s. 320 of the Code of Civil Procedure. Upon the case reaching the Collector, steps appear to have been taken to bring the property under the management of the Court of Wards, and under its management the property [538] appears to have remained up to the 8th of May 1897, when the Courts of Wards withdrew from management. On the 27th of March 1897, the decree-holder again applied for execution of his decree. Notice was issued to the judgment-debtor under s. 248 of the Code of Civil Procedure, and the 19th of April 1897, fixed for hearing any objection that might be raised. The judgment-debtor raised no objection and the case went again to the Collector on the 27th of July 1897. Eventually the 20th of December 1897, was fixed for sale. On the 8th of December for the first time the judgment-debtor appears to have roused himself, or to have been roused into taking action. He on that date, after final orders for holding the sale of the property had issued, came forward, and for the first time asked the Court to consider whether the property which it was about to sell could or could not be sold in execution of the decree. The Subordinate Judge of Mainpuri considered that the objections taken were entitled to no weight and disallowed them. From that order the

* First Appeal, No. 13 of 1898, from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 14th December 1897.

(1) 15 I.A. 51.

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20 A. 537 = 18 A.W.N. (1898) 159.

present appeal is brought, and it is again urged upon us that the property ordered to be sold is property which cannot be sold because, first, it forms part of an impartible raj, which by Hindu law and custom is inalienable; secondly, because the son and heir of the Raja of Bhare should, under the terms of s. 85 of the Transfer of Property Act of 1882, have been made party to the proceedings.

It is admitted that the property forms part of an impartible raj. The learned vakil for the appellant strove to maintain that an impartible raj was also inalienable. He appears to have either overlooked or to have misunderstood the decision given by their Lordships of the Privy Council in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1). In that case it is laid down that in a raj the eldest son, where the Mitakshara law prevails and there is a custom of primogeniture, does not become a co-sharer with his father in the estate. If the estate be inalienable, the inalienability of it depends upon custom which must be proved, or it may be that in some cases it depends upon the nature of the tenure. Indeed, in **[539]** this case it does not lie in the mouth of the appellant to maintain at this stage this contention, seeing that when he offered the property for mortgage, he put forward that it was capable of alienation, that he made no resistance to the decree which was passed against it, and that he never, untill the 8th of December 1897, attempted to put forward the objection at all; even then he put it forward as being a question based upon the general principles of Hindu law.

The principle laid down by their Lordships of the Privy Council in the case above-mentioned cuts away the ground on which the seocnd contention is based. The Court below was quite right in dismissing both the objections taken as frivolous. They were, in our opinion, frivolous and intended to delay execution. At any rate there is ample ground for suspecting that there was such intent. We cannot believe for a moment that if they were valid objections, the appellant would not have urged them long ago, and taken care to have them fortified by evidence of custom or as to the nature of the tenure. We dismiss the appeal with costs.

Appeul dismissed.

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20 A. 539 = 18 A.W.N. (1898) 145.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHEORAJ SINGH (*Plaintiff*) *v.* AMIN-UD-DIN KHAN (*Defendant*).*

[28th July, 1898.]

Execution of decree—Application for execution by beneficial holder of decree—Application dismissed—Suit for declaration of applicant's right to execute the decree—Civil Procedure Code, s. 232.

Held, that where an application under s. 232 of the Code of Civil Procedure by a person alleging himself to be beneficially entitled under a decree to execute such decree has been rejected, it is still competent to the applicant (no appeal lying from the order under s. 232 rejecting his application) to bring a separate suit for a declaration that he is the person entitled to execute the decree. *Ram*

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* Second Appeal No. 123 of 1896 from a decree of L.G. Evans, Esq., District Judge of Aligarh, dated the 30th November 1895, reversing a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Aligarh, dated the 20th June 1895.

(1) 15 I.A. 51.

Bakhsh v. *Panna Lal* (1) and *Halodhar Shaha* v. *Harogobind Das Koiburto* (2), referred to.

[R., 3 O.C. 32 (34) ; 5 N.L.R.134 (135)=3 Ind. Cas. 922 ; D.,28 A. 613=3 A.L.J. 428= A.W.N. (1906) 183 ; 4 Ind. Cas. 160=12 O.C. 308.]

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20 A. 539= 18 A.W.N. (1898) 145.

THE facts of this case are fully stated in the judgment of the Court.

[540] Babu *Durga Charan Banerji*, for the appellant.

Mr. *D. N. Banerji*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal has arisen in a suit brought by the present appellant for a declaration that he is beneficially interested in a certain decree, and that he is entitled to take out execution of that decree. The facts are these :—Haji Mansur Khan, father of the defendant-respondent, and one Kadirdad Khan owned an indigo factory and other property. After Kadirdad Khan's death his legal representative sold his half share of the property under a sale-deed, dated the 23rd of August 1887, executed in favour of Asharfi Lal, who was a servant of the appellant's father, Raja Shankar Singh. It is said that Raja Shankar Singh was beneficially interested in the sale-deed, and that Asharfi Lal was a benamidar for him. This allegation has not been traversed in this suit and has been found to be true. It appears that the mother of the defendant-respondent brought a suit for pre-emption in respect of one of the villages included in the sale-deed referred to above, and in that suit impleaded Asharfi Lal and Raja Shankar Singh as defendants. Raja Shankar Singh disclaimed all interest in the property. The suit, however, was dismissed on other grounds. Subsequently a suit was brought in the name of Asharfi Lal against the respondent to recover damages for certain obstructions caused by him to the indigo factory comprised in the sale-deed. A decree was passed in his favour for Rs. 2,250 by the Subordinate Judge of Aligarh, which was affirmed by this Court on the 28th of June 1883. Raja Shankar Singh died in 1891. On the 11th of June 1894, Asharfi Lal executed a document in favour of the appellant, in which he declared that he was merely benamidar for Raja Shankar Singh. To this document we shall have to refer later on. On the 13th of August 1894, Sheoraj Singh applied for execution of the decree referred to above under s. 232 of the Code of Civil Procedure. That application was dismissed on the 18th of September 1894, and thereupon the present suit was instituted. The allegation of the plaintiff was, as we have said above, that he was beneficially [541] interested in the sale-deed and in the decree, and that he was entitled to apply for execution of the decree. The Court of first instance decreed his claim, but the lower appellate Court dismissed it. Hence this appeal.

The lower appellate Court has held, first, that the plaintiff is estopped from setting up a title to the sale-deed and the decree ; secondly, that he is not the assignee of the decree, and that on this point the order refusing his application under s. 232 of the Code of Civil Procedure is conclusive ; and thirdly, that it would be against public policy, after Raja Shankar Singh's repudiation of the sale-deed, to grant the declaration sought for in this suit.

We are unable to agree with the learned Judge in regard to any of the grounds relied on by him. The plea of estoppel was never raised by the defendant in his written statement, and the learned Judge has spelt

(1) 7 A. 457.

(2) 12 C. 105.

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out for him a case which he never set up. In his written statement the defendant distinctly stated that the plaintiff's father Raja Shankar Singh was the real owner of the property conveyed by the sale-deed of the 23rd of August 1887. He did not assert that by reason of the disclaimer made by Shankar Singh in the suit for pre-emption he was deceived or was induced to alter his position in any way. The learned Judge says, that in consequence of the statement made by Shankar Singh in the suit for pre-emption the defendant did not advance, in a suit for partition instituted by Asharfi Lal, the defence which he might have raised, and on this ground he holds that the plaintiff is now estopped from claiming an interest in the decree in question. This, however, was not an allegation made by the defendant. As we have said above, he nowhere stated in the pleadings that he was led by any representations of the plaintiff or his father into believing the existence of a state of things which did not in reality exist. As a matter of fact, the defendant has admitted that he was aware that Raja Shankar Singh was the actual purchaser under the sale-deed of the 23rd of August 1887. Any representation made by the Raja therefore could **[542]** not have induced the defendant to alter his position to his own prejudice.

The next ground of the learned Judge's judgment is in our opinion equally untenable. As the plaintiff was not recognised by the Court as a person who, under s. 232 of the Code of Civil Procedure, was entitled to execute the decree and his application under that section was refused, he could not appeal from the order of refusal. The propriety of that order was therefore liable to be contested in a suit, and s. 244 of the Code of Civil Procedure does not bar such a suit. This was held by this Court in *Ram Bakhsh* v. *Panna Lal* (1), and by the Calcutta High Court in *Halodhar Shaha* v. *Harogobind Das Koiburto* (2). The order relied upon by the learned Judge does not preclude the plaintiff from maintaining the present suit.

As regards the third ground of the learned Judge's judgment, we are unable to agree with it. A benami transaction is not illegal, and according to the rulings of the Lords of the Privy Council effect should be given to such transactions. The mere fact that the father of the present plaintiff made an untrue statement in a Court of justice in a previous litigation should not preclude the plaintiff from proving the real nature of the transaction on which he relies.

It has been contended before us that the plaintiff should be deemed to be a decree-holder within the meaning of the Code of Civil Procedure, and that as such decree-holder he is entitled to apply for execution of the decree in question. In our opinion a decree-holder within the meaning of s. 2 of the Code of Civil Procedure must be the person whose name is on the record of the suit and in whose favour the decree is passed, and the only other person who is included in the definition of decree-holder is the person to whom the decree is transferred. The beneficial owner of a decree cannot, in our judgment, be regarded as a decree-holder within the meaning of the Code. We are, however, of opinion that the plaintiff may be treated as the transferee of the **[543]** decree obtained by Asharfi Lal. The deed executed by Asharfi Lal on the 11th of June 1894. has the effect of transferring to the plaintiff all decrees obtained by him for damages or costs in relation to the property acquired under the sale-deed of the 23rd of August 1887. As the

(1) 7 A. 457.

(2) 12 C. 105.

decree now in question is a decree of such a character it was in our opinion transferred to the plaintiff by the instrument of the 11th of June 1894, and the plaintiff as such transferee was entitled to apply for execution of the decree under s. 232 of the Code of Civil Procedure. As such transferee he has still the right to apply for execution of that decree, provided, of course, the execution is not otherwise barred by law.

The learned counsel for the respondent contended that we should not make a declaratory decree in this case, inasmuch as such a decree would be infructuous, as any application for execution which the plaintiff may now make would be barred by the operation of limitation. It is true that a Court in the exercise of the discretion which it possesses in the matter of passing a declaratory decree should refuse to exercise that discretion where the declaratory decree would be fruitless, but we are informed that in this case certain applications for execution were made which might have the effect of saving the operation of limitation. It would be premature for us to express any opinion as to whether or not execution of the decree is time-barred, and we are not satisfied that this is so clear a case that we should be justified in holding that any decree which we may make in favour of the plaintiff will be of no value to him. For the above reasons we allow this appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

Title [redacted]

Author

Accession No.

Call No. [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date

21 A. 1=18 A.W.N. (1898), 153.

APPELLATE CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

HARDAT (*Decree-holder*) *v.* IZZAT-UN-NISSA (*Judgment-debtor*).*

[3rd August, 1898.]

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APPELLATE CIVIL.

21 A. 1=18 A.W.N. (1898) 153.

Civil Procedure Code, s. 583—Restoration of benefit obtained under a decree which has been subsequently reversed in appeal—Interest—Mesne profits.

Held, that a person who is entitled under s. 583 of the Code of Civil Procedure to the restoration of a benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or, if the thing to be restored is land, to mesne profits for the time during which he has been kept out of possession. *Phul Chand* v. *Shankar Sarup* (1) approved.

[R., 6 A.L.J. 715 (717)=3 Ind. Cas. 534.]

IN this case Musammat Izzat-un-nissa Begam sued one Dwarka Das for the purpose of having a lease which had been granted to him set aside. She obtained a decree in the Court of the Subordinate Judge on the 8th of March 1895. That decree cancelled the lease and directed Dwarka Das to give up possession of the land and to pay to Izzat-un-nissa the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court that decree was set aside and Izzat-un-nissa's suit was dismissed with costs. Meanwhile however, Izzat-un-nissa had executed the decree of the Subordinate Judge and had obtained possession, and she had realized also the amount of her mesne profits and her costs. Dwarka Das assigned the decree [2] of the High Court in his favour to Hardat, and Hardat applied under s. 583 of the Code of Civil Procedure, asking in the first place for restitution of the amount which Izzat-un-nissa had realized in execution of her decree as mesne profits and costs, with interest thereon, and, secondly, for mesne profits from the date when his assignor was ejected in execution of Izzat-uu-nissa's decree up to the date of the expiration of the lease.

The Court of first instance (Subordinate Judge of Bareilly) allowed the claim for the mesne profits and costs realized by Izzat-un-nissa, but disallowed the claim for interest and for future mesne profits.

The applicant thereupon appealed to the High Court.

Mr. *D. N. Banerji*, for the appellant.

The respondent was not represented.

JUDGMENT.

KERSHAW, C.J., and BURKITT, J.—This is an appeal against an order made by the Subordinate Judge of Bareilly on an application made to him under s. 583 of the Code of Civil Procedure.

* First Appeal No. 136 of 1898 from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th March 1898.

(1) 20 A. 430.

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The only facts which need be cited are that the respondent, Musammat Izzat-un-nissa Begam, sued the appellant's assignor for the purpose of having a lease which had been granted to the latter set aside. She obtained a decree on the 8th March 1895. That decree cancelled the lease and directed appellant's assignor to give up possession of the land and pay to Musammat Izzat-un-nissa Begam the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court the decree in that case was set aside, and Musammat Izzat-un-nissa Begam's suit was dismissed with costs.

But meanwhile Musammat Izzat-un-nissa Begam had executed her decree obtained in the lower Court; she had obtained possession, and she had realised the amount of her mesne profits and her costs. The present applicant asks for the restitution of these amounts with interest. The Subordinate Judge has ordered the mesne profits and costs to be refunded, but has refused interest. That is the first matter raised in appeal.

[3] It is contended that the order of the Subordinate Judge refusing interest is wrong, and we have been referred to the recent case of *Phul Chand* v. *Shankar Sarup* (1). In that case, on the strength of the decision of their Lordships of the Privy Council, it was held that in a case like the present, interest should be allowed. In our opinion that decision, to which one of us was a party, is correct and should be followed. We therefore set aside that part of the judgment of the Subordinate Judge which refused interest, and we direct him in execution to allow interest at 6 per cent. on all amounts which the appellant is entitled to recover from the opposite party.

The other matter asked for is, that appellant should be allowed mesne profits from the date when he was ejected under the execution of Musammat Izzat-un-nissa Begam's decree up to the date of the expiration of his lease, that is, up to the 6th of July 1897. It is a matter of regret to us that no counsel has appeared to argue this case before us, but we think that the principle underlying the ruling of their Lordships mentioned above is that we must put the appellant in the same position that he would have occupied if the plaintiff's decree had never been passed. Had that decree never been executed this appellant would have held possession of the leased property up to the date on which the lease expired, and would as lessee have been entitled to the rents and profits and the other advantages of possession as lessee. We think that we ought now to put him in that position, and we therefore direct that the Subordinate Judge on this application under s. 583, allow to the appellant the mesne profits which he would have received between the date when he was ejected in execution of the decree and the 6th of July 1897, the date on which the lease expired. Interest will be allowed on the mesne profits at 6 per cent.

We also give appellant the costs of this appeal.

Decree modified.

(1) 20 A. 430.

21 A. 4=18 A.W.N. (1898) 167.

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[4] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

JAFAR HUSAIN (*Defendant*) *v.* RANJIT SINGH (*Plaintiff*).*
[3rd August, 1898.]

21 A. 4=
18 A.W.N.
(1898) 167.

Mortgage—Construction of document—Mortgage of a mixed character partly simple and partly usufructuary—Decree for sale—Act No. IV of 1882 *(Transfer of Property Act), s.* 58.

In construing a mortgage-deed, the terms of which are of a doubtful character, the intention of the parties, as deducible from their conduct at the time of execution and other contemporaneous documents executed between them, is to be looked to.

Mortgage-deeds of a mixed character and other than those expressly defined in s. 58 of the Transfer of Property Act, 1882, must be construed as far as possible in accordance with the covenants contained in them. Where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. *Shunker Lall* v. *Poorrun Mull* (1), *Phul Kuar* v. *Murlidhar* (2), *Jugal Kishore* v. *Ram Sahai* (3), *Umrao Begam* v. *Vali-ullah* (4), *Ramayya* v. *Guruva* (5) and *Sivakami Ammal* v. *Gopala Savundram Ayyan* (6) referred to.

[F., 6 N.L.R. 20=5 Ind. Cas. 701 (704); App., 30 A. 162=5 A.L.J. 130=A.W.N. (1908) 70; R., 34 B. 128 (133)=11 Bom. L. R. 1315=4 Ind. Cas. 595; 26 M. 662 (667); 9 A.L.J 332=14 Bom L.R. 280=15 C.L.J. 411 (414)=16 C.W.N. 505 (509)=11 M.L.T. 265=(1912) M.W.N. 367; 10 Bom. L.R. 615; D., 28 A. 157=A.W.N. (1905) 226.]

THE facts of this case sufficiently appear from the judgment of KNOX, J.

Mr. *Karamat Husen* and Pandit *Moti Lal*, for the appellant.

Messrs. *D. N. Banerji* and *B. E. O'Conor* and Babu *Satish Chandar Banerji*, for the respondent.

JUDGMENT.

KNOX, J.—Syed Jafar Husen executed a deed on the 12th of January 1888, whereby he transferred his interests in certain immoveable property for the term of seven years to one Chaudhri Ranjit Singh for the purpose of securing the payment of one lakh of rupees advanced by Chaudhri Ranjit Singh to him.

The main dispute in this appeal turns upon the precise nature of the transaction between the parties.

The first plea in appeal is to the effect that the learned Subordinate Judge has misinterpreted the mortgage-deed in suit. The appellant contends that the transaction is a pure usufructuary mortgage.

[5] On the same day on which Syed Jafar Husen executed the mortgage-deed, three other documents were executed between the same parties. All the four deeds were registered on one and the same day, namely, the 21st January 1888. It will be necessary to examine carefully the wording of the mortgage-deed, and if its terms are not sufficiently clear and admit of more than one interpretation, it will be necessary further to ascertain in what manner the terms of the deed were under-

* First Appeal, No. 227 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 8th June 1896.

(1) N.W.P. H.C.R. (1867) 150=2 Agra 150. (2) 2 A. 527.
(3) 6 A.W.N. (1886) 212. (4) 8 A.W.N. (1888) 171. (5) 14 M. 232.
(6) 17 M. 131.

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stood and acted upon by the parties subsequent to their entering upon the contract, for, as was pointed out in *Shunker Lall* v. *Poorrun Mull* (1), the real intention of the parties to a deed may fairly be gathered from their conduct and from the effect given to the deed before the commencement of the dispute out of which the suit has arisen. It is hardly necessary to remind ourselves that where the terms of an instrument are doubtful, what we have to look at is the substance and not the mere form. The mortgage-deed will be found sufficiently well translated for the purposes of this appeal at page 1 of the respondent's printed book. After reciting that the shares in certain villages had been mortgaged by Syed Jafar Husen to Chaudhri Ranjit Singh, and that the mortgage money had been left with the mortgagee for the payment of debts due to certain creditors of the mortgagor, it states :—(1) that the mortgagor has put the mortgagee in possession of all the aforesaid villages ; (2) that he authorises the mortgagee to appropriate the profits of the mortgaged shares in the villages in lieu of interest of the mortgage money during the term of the mortgage ; (3) that he is entitled to redeem the mortgage after the expiration of seven years ; (4) that the mortgagee is entitled to demand repayment of the mortgage money after the expiration of the term ; (5) that if any difficulties or obstructions are placed in the way of the mortgagee, or any disputes or prior liens are found to exist, the mortgagee is at liberty to recover the mortgage money, together with costs, damages and interest, from the mortgagor and other properties of the mortgagor in the said **[6]** villages " according to the condition of a separate deed of agreement executed to-day ;" (6) that until the full payment of the mortgage money, the mortgaged property shall in every way remain liable for damages, interest and deficiency of profits. This deed was executed after the Transfer of Property Act, 1882, came into force. The definition of a usufructuary mortgage according to that Act is to be found at clause (*d*) of s. 58. Putting the terms above recited alongside of the definition, it is evident that the deed contains more than is provided for in clause (*d*). The portions of it where the mortgagor binds himself personally to pay the mortgage money in the event of disputes, &c., find no place in, and are directly contrary to the nature and essence of a transaction which is a pure usufructuary mortgage. So also is the clause which provides that the mortgaged property shall remain liable for damages, interest and deficiency of profits. It is also evident from the reference made to " the separate deed of agreement executed to-day " that the parties intended this latter document to be read with and interpreted by a document to be found at page 8 of the respondent's printed book. This document is termed a security bond. It recites that Syed Jafar Husen has given in mortgage to Chaudhri Ranjit Singh certain shares in certain villages—the shares and the villages in both deeds correspond exactly ; that Syed Jafar Husen has taken a lease of the said shares in the said villages upon certain terms to be found in a *qabuliyat* executed the same day; that the lease runs from January 1888 up to January 1895, or until redemption of the mortgage ; in other words, that as regards time it is coterminous with the mortgage. The deed then proceeds to state that for the satisfaction of the mortgagee in regard to payment of the lease money the mortgagor pledges and hypothecates in this security bond his equity of redemption over the mortgaged property and shares to which he was entitled in the mortgaged villages. It is this last portion of his deed

(1) N.W.P. H.C.R. (1867) 150 = 2 Agra 150.

which is cited in the mortgage deed and which under certain circumstances is to govern the parties to the mortgage-deed. If the two documents are read together, it is [7] evident that they deviate still further from the definition of a usufructuary mortgage as set out in clause (*d*) of s. 58 of the Transfer of Property Act, 1882. It will be observed that the two other deeds, namely, the lease and *qabuliyat* have practically been called in aid of the mortgage transaction. One of those two documents will be found at page 5 of the respondent's printed book. The terms of this document also refer to the mortgage-deed, and they show that the intention of the parties was to enter into a transaction covered by the four deeds. In our opinion the four deeds must be read together before it can be fairly understood what the intentions of the contracting parties were. Indeed the learned counsel on both sides are at one upon the point that the deeds were intended to be and must be read together. The learned counsel for the appellant argued from them all that the intention of the parties was not to charge the property mentioned in the mortgage-deed with the principal amount or any portion of it. He drew our attention to the fact that there is no mention made in any of the deeds as to how the principal sum advanced was to be recovered after the expiry of the seven years, and also that the property charged, should any difficulty or dispute, &c., arise within the seven years, was property other than that covered by the mortgage-deed. He referred particularly to the words in the end of the mortgage-deed, wherein the mortgaged property is made liable for everything except the principal money. It was for these reasons that he contended that the deed was a pure usufructuary deed, and nothing more. The transaction between the parties stood, as he said, upon precisely the same footing as what is known in England as a Welsh mortgage, and he travelled into what is laid down in Ashburner's Treatise on Mortgages (see specially p. 168.) He also referred us to the following cases:—*Teulon* v. *Curtis* (1), *Rankin* v. *Potter* (2) and *Cooper* v. *Cooper* (3). It is needless, however, to refer to English cases and English treatises, for we have the question in dispute [8] before us, in our opinion, sufficiently covered by the Transfer of Property Act, 1882, and by the general principles which have been uniformly followed by this Court for a long series of years. In 1879 a Full Bench of this Court, in *Phul Kuar* v. *Murlidhar* (4), in considering a deed which provided *inter alia* that if the mortgagor failed to pay the mortgage amount within the period of two years the mortgagee would be at liberty to recover the mortgage amount in any way he pleased, held, in spite of provisions in the same deed which recited that the mortgagee had been put in possession of the property mortgaged, and that the mortgagors intended to pay the mortgage money in a period of two years and get the property redeemed, that the transaction was in reality a simple mortgage-deed. In 1885 in the case of *Jugal Kishore* v. *Ram Sahai* (5), Straight, Officiating C.J., and Mahmood, J., agreed in holding that an instrument, the terms of which were far more in accord with the terms of the deed before us, was a combination of a simple mortgage and a usufructuary mortgage; that the shops were mortgaged as security for the debt; and that the plaintiff was entitled to maintain a suit to bring the property to sale. In 1888 in *Umrao Begam* v. *Vali-ullah* (6) Brodhurst and Mahmood, JJ.,

(1) Young's Reports, p. 610.
(2) House of Lords' Reports for 1873, p. 128.
(3) House of Lords' Reports for 1875, p. 55.
(4) 2 A. 527.
(5) 6 A.W.N. (1886) 212.
(6) 8 A. W. N. (1888) 171.

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had a deed which they considered covered both the case of a usufructuary mortgage and of a hypothecation charge. From these and other cases which were cited to us, it is abundantly evident that this Court has always looked to the intention of the parties in construing a mortgage-deed, the terms of which were of a doubtful character; also that it has constantly recognized the fact that the covenants in mortgage-deeds of a mixed character and other than those expressly defined in s. 58 of the Transfer of Property Act, 1882, may be given effect to in accord, as far as possible, with the covenants contained in them, and that where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of simple mortgage, the mortgagee is entitled to bring the the mortgaged property to sale under the conditions set out in the **[9]** deed. Looking at the mortgage-deed and the security bond and reading them together, we are satisfied that they were intended to form one and the same transaction, that the intention of the parties was that the person and property, both that expressly contained in the mortgage-deed and the further property set out in the security bond, were to be within the power and control of the mortgagee to bring to sale, if there was any default on the part of the mortgagor in the payment of the lease money.

Another question arose, namely, how far the mortgagee could in the present suit claim to include arrears of lease money for the years 1893 to 1896, for which he had instituted suits and obtained decrees prior to the institution of the present suit. Upon this point the learned advocate for the appellant admitted that the case *Altof Ali Khan* v. *Lalta Prasad* (1), was against him, and we think it is. No other questions were argued before us. The result is that the appeal is dismissed with costs. We extend the time for payment of the mortgage money to the 31st of January 1899. The costs of the plaintiff will be included in the amount, upon non-payment of which the mortgaged property will be sold.

BANERJI, J.—I, too, have arrived at the same conclusion as my learned colleague. If the mortgage in this case is a purely usufructuary mortgage as defined in clause (*d*) of s. 58 of the Transfer of Property Act, 1882, the plaintiff is not entitled, having regard to the provisions of s. 67 clause (*a*) of that Act, to institute a suit for sale, and the present suit must be dismissed. The principal question which we have to determine in this appeal, therefore, is whether, as contended by the appellant, the mortgage made in favour of the plaintiff is a purely usufructuary mortgage, or, as urged on behalf of the plaintiff and held by the Court below, it is a mortgage which partakes of the nature both of a simple mortgage and of a usufructuary mortgage, and is a combination of both those kinds of mortgage.

[10] I am of opinion that the mortgage in this case is of the latter description. The mortgage-deed is not artistically drawn. We must, therefore, look to all its provisions as a whole, to the other instruments which were executed at the same time and admittedly form parts of the same transaction, and to the surrounding circumstances, in order to gather the intention of the contracting parties. The document begins with the recital that the property mentioned in it was mortgaged and pledged. The vernacular words are "*rehn*" and "*girau*," both of which mean mortgage or pledge. It was argued that the words should be understood in the sense in which they are used in Muhammadan law, namely, to denote a

(1) 19 A. 496.

usufructuary mortgage. I am unable to agree with this contention. The words were evidently used in the mortgage-deed in the sense in which they are used in common parlance in the Hindustani language. As ordinarily understood in that language they are generic terms denoting a mortgage, whatever the nature of that mortgage may be. They apply as much to a simple mortgage as to a usufructuary mortgage. The use of those words does not, in my opinion, help the appellant. On the contrary, the fact that the deed begins by saying that the executant had "mortgaged and pledged all the aforesaid shares" for a lakh of rupees "for a term of seven years," coupled with the other recitals in the deed, raises the inference that the intention was to provide for the realization of the amount of the loan from the property itself and not from its usufruct only. The mortgage deed next provides for the payment of the mortgage money after seven years, and it contains a covenant to the effect that the mortgagee "will have the power to take back the mortgage money after the expiry of the term of seven years." This is a personal covenant to pay the mortgage money after thee xpiry of seven years—a covenant inconsistent with a usufructuary mortgage pure and simple. In a pure usufrucsuary mortgage as defined in clause (*d*), s. 58 of Act No. IV of 1882, the mortgage takes possession of the mortgaged property and is authorised to retain such possession until payment [11] of the mortgage money, and to receive the rents and profits, and appropriate them in lieu of interest only, or of the principal only, or partly of principal and partly of interest. The Mortgagee, so long as he remains in possession, has no right under the mortgage to claim the mortgage money, and the mortgagor undertakes no personal liability. But where the mortgage deed authorises the mortgagee to recover the mortgage money after a specified period or on demand, the transaction ceases to be a pure usufructuary mortgage of the kind contemplated by the Transfer of Property Act. It was held by the Madras High Court in *Ramayya* v. *Guruva* (1) that a mortgage which otherwise answers the definition of a usufructuary mortgage as contained in clause (*d*) s. 58 of Act No. IV of 1882, is not a usufructuary mortgage within the meaning of that Act if there is a covenant in it to pay the mortgage debt, and in the case of such a mortgage the mortgagee has a right to sue for sale. A Full Bench of that Court affirmed the same view in *Sivakami Ammal* v. *Gopala Savundram Ayyan* (2). With these rulings I fully agree. This case is almost on all fours with the decision of this Court in *Jugal Kishore* v. *Ram Sahai* (3) in which a mortgage of the same description as the one in suit was held to be a combination of a simple and usufructuary mortgage. It is contended in this case that the mortgage-deed does not in terms provide for the recovery of the mortgage-money by sale of the mortgaged property; but, as I have said above, the deed not being artistically drawn, we must gather the intention of the parties from all the provisions taken as a whole, and from all the surrounding circumstances. In my opinion, there is much force in the argument of the learned counsel for the respondent, that, all the four deeds executed on the same date being parts of the same transaction, the intention must be presumed to be the same in all of them, although the language employed in each deed to convey that intention may not [12] be the same. There can be no doubt that under the other deeds executed on the same date as the mortgage-deed the mortgaged-property and the other property mentioned in those deeds were rendered liable for

(1) 14 M. 232. (2) 17 M. 131. (3) 6 A. W. N. (1886) 212.

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interest. It is also clear from the last clause of the mortgage-deed that "until the full payment of the mortgage-money" the mortgaged property was to remain liable for "damages, interest and deficiency of profits." It is unreasonable to infer that the intention was that, although the mortgagee would have the right upon the expiration of seven years to recover the mortgage-money in cash, and although he would be competent to realise "damages, interest and deficiency of profits" by sale of the mortgaged property, he would not be competent to touch that property, except to hold it for the realisation of interest only out of the usufruct, and that he would not have the right to cause that property to be sold for the realisation of the principal.

For these reasons, I agree with my learned colleague in thinking that the Court below has rightly conceived the nature of the mortgage in this case, and that this appeal must be dismissed with costs.

Appeal dismissed.

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21 A. 12=18 A.W.N. (1898) 149.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SAHIB ALI AND OTHERS (*Plaintiffs*) *v.* SUBHAN ALI AND OTHERS (*Defendants*).* [3rd August, 1898.]

Regulation No. XXXI of 1803, s. 6—*Revenue-free grant—Settlement in favour of daughter purporting to render other lands than the lands settled liable in the hands of the settlor and his heirs for the revenue of the settled lands.*

One Bakhshish Ali in 1843 settled certain lands on his daughter Rahmat-un-nissa and covenanted that he and his heirs would pay the land revenue due on the estate so assigned along with the land revenue for their own estate. The deed of settlement then went on to provide that if at any time the heirs of the settlor, or whoever might be in possession of the rest of his estate, should demand from Rahmat-un-nissa, or the person in possession of the lands assigned **[13]** to her, the revenue assessed on those lands, then Rahmat-un-nissa and her heirs would be entitled to claim and take possession of the legal share in the settlor's estate to which she would be entitled under the Muhammadan law of inheritance.

Held, that as regards a person who had acquired a portion of the settled property partly by private sale and partly by sale at auction the settlement contravened the provisions of s. 6 of Regulation No. XXXI of 1803, and the heirs of the settlor could not be compelled to pay the land revenue due on the portion of the settled lands acquired by the said purchaser, nor had the purchaser any right under the deed of settlement to a proportionate part of the inheritance which would have come to Rahmat-un-nissa from her father.

THE facts of this case are fully stated in the judgment of the Court.
Pandit *Moti Lal*, for the appellants.
Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is a plaintiffs' second appeal. The following are the facts of the case:—One Bakhshish Ali was the owner of a taluqa called Taluq a Fatuha. On the 5th of December 1843, he executed a document called a *tamliknama*, in favour of his daughter Musammat Rahmat-un-nissa, by which he assigned to her lands in two villages,

* Second appeal No. 119 of 1896, from a decree of Babu Sanwal Singh, Subordinate Judge of Allahabad, dated the 22nd November, 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 27th May, 1895.

namely, chak Sikandar and Mugarsan. In this document he covenanted that he and his heirs would pay the land revenue due on the estate assigned to his daughter along with the land revenue for their own estate. The document went on to provide that if at any time his heirs, or whoever might be in possession of the rest of his estate, should demand from Rahmat-un-nissa, or the person in possession of the lands assigned to her, the revenue assessed on those lands, then Rahmat-un-nissa and her heirs would be entitled to claim and take possession of the legal share in his estate to which she would be entitled under the Muhammadan law of inheritance.

The suit out of which this appeal arises was brought by one Musammat Izzat-un-nissa, who had acquired a portion of the land bestowed by Bakhshish Ali on Musammat Rahmat-un-nissa, in the village Mugarsan. Part of this land the plaintiff had acquired by private sale on the 20th of September 1872, and another portion she had purchased at auction on the 22nd of February 1875. **[14]** The persons representing the other heirs of Bakhshish Ali having successfully asserted against the plaintiff Musammat Izzat-un-nissa, a right to recover from her land revenue payable on the portion of Musammat Rahmat-un-nissa's property which she (plaintiff) had acquired, the plaintiff brought this suit, claiming, first, a declaration that the defendants were bound by the *tamliknama* and liable to pay the land revenue assessed on the property in the possession of the plaintiff, and that if the amount of the revenue should be recovered by Government from the plaintiff, that the defendants were liable by reason of the *tamliknama* to repay the amount to the plaintiff; secondly, in the event of the above declaration being refused, the plaintiff claimed a decree for the amount of revenue which the defendants had recovered from her; and, thirdly, failing the above reliefs, the plaintiff claimed to be entitled to recover possession out of the share of Bakhshish Ali's estate which would have fallen to Rahmat-un-nissa by the Muhammadan law of inheritance of a portion bearing the same relation to the whole of Rahmat-un-nissa's share as the land which the plaintiff had acquired bore to the whole of the land bestowed on Musammat Rahmat-un-nissa. The Court of first instance decreed the second of the alternative reliefs set forth in the plaint. On appeal, the learned Subordinate Judge dismissed the suit of the plaintiff on two grounds: first, that under the *tamliknama* only the heirs of Rahmat-un-nissa were entitled to hold revenue-free, and that the plaintiff, not being an heir, but an assign, was not entitled to enforce the condition of the *tamliknama*; the second was that the grant by Bakhshish Ali to his daughter Musammat Rahmat-un-nissa was a grant in contravention of the provisions of section 10 of Regulation XIX of 1793, and that consequently the condition that she should hold it free from the payment of revenue was one which could not be enforced.

The plaintiff died during the pendency of the suit and is now represented here by her heirs. On their behalf three contentions are put forward. The first is, that the grant by Bakhshish Ali is not a grant of the nature prohibited by section 10 of Regulation XIX of 1793. We may observe that the Regulation applicable **[15]** to the question before us is really Regulation XXXI of 1803, which in s. 6 re-enacts the provisions of s. 10 of Regulation XIX of 1793. In support of this plea much ingenious argument was addressed to us. We are of opinion, however, that it cannot prevail. There is no doubt the grant was of a nature which was declared in the Regulations referred to

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to be null and void. It was argued that as no power save Government can free land from its responsibility to pay Government revenue, and that whatever the owner of the land may purport to do, Government can always in the last resort enforce its demand by having recourse to the land itself, the grant in question was not one of the kind at which the Regulations were aimed. The preamble to the regulations shows no doubt that the main object of the Government was the security of the land revenue which was considered to be imperilled by such grants. But that this was not the only object the Government had in view is clear from a reference to other legislation which took place about the same time. Regulation XLIV of 1793, for instance, was intended to prevent the grant by zamindars of leases and farms for long terms or in perpetuity at a reduced rent. The preamble states that such engagements, if held valid, would leave it in the power of weak, improvident or ill-disposed proprietors to render their property of little or no value to their heirs. Similarly, s. 81 of Act No. XIX of 1873 provides that grants of land which the grantor has expressly agreed not to resume shall be valid as against him, but not as against his representatives after his death. This shows that the intention of the Legislature was not merely to secure the public revenue, but to protect the heirs of zamindars from the effects of their improvidence. We hold that the grant in this case comes within the purview of s. 6 of Regulation XXXI of 1803, and consequently, being contrary to law, cannot afford a basis for either of the first two reliefs asked for in the plaint.

The next contention put forward by the learned advocate for the appellants was based on the provisions of s. 28 of Act [16] No. X of 1859. That section provides that applications to dispossess grantees of land exempt from revenue must be instituted within the period of twelve years from the time when the title of the person claiming the right to assess the land, or dispossess the grantee, or of some person claiming under him, has accrued; and that if such period has already elapsed or will elapse within two years from the date of the passing of that Act, the suit might be brought at any time within two years from such date. It was argued that the right of the defendants to resume the land and have it assessed expired on the 29th of April, 1859, on which date the period of two years after the passing of Act No. X of 1859 expired, and that consequently the plaintiffs had acquired an indefeasible title to hold the land revenue free. This plea might have been advanced by the plaintiffs in answer to the suit which was brought against them by the defendants in the Revenue Court to recover the revenue which they had paid for the land held by the plaintiff, but we do not think that this section, though it might perhaps have been pleaded in bar of a suit by the defendant for resumption or assessment, can be of any assistance to the plaintiff in this case.

The third and last contention on behalf of the appellants was that the defendants having failed to perform the conditions attached to the grant made in favour of Rahmat-un-nissa by Bakhshish Ali, by realizing from the plaintiffs the revenue for the land which was the subject of his grant, the plaintiffs were entitled to possession of a proportionate share of Rahmat-un-nissa's inheritance out of Bakhshish Ali's estate. In the view which we have taken of the validity of the grant, we are unable to accede to this contention. As in our opinion the condition which Bakhshish Ali imposed upon his heirs was a condition in violation of law, a breach of such a condition could not, in our judgment, confer on Rahmat-un-nissa, or on any person deriving title from her, the right to claim the

share which Rahmat-un-nissa would have inherited out of Bakhshish Ali's estate under the Muhammadan law.

For the above reasons the appeal must, in our opinion, fail. We dismiss it with costs.

Appeal dismissed.

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21 A. 12 = 18 A.W.N. (1898) 149.

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21 A. 17 = 18 A.W.N. (1898) 183.

[17] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

THE COLLECTOR OF MORADABAD (*Defendant*) *v.* HARBANS SINGH AND ANOTHER (*Plaintiffs*).*

[3rd August, 1898.]

Civil Procedure Code, s. 14—*Suit on a foreign judgment—Power of Court to inquire into the merits—Muhammadan Law—Dower.*

Where a suit was brought in a Court in British India upon the basis of a decree of the Council of Regency of the State of Rampur, it was *held* that the Court was empowered by s. 14 of the Code of Civil Procedure, as amended by s. 5 of Act No. VII of 1888, to consider the merits of the case in which the decree of the Council of Regency had been passed.

[F., 24 B. 86.]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan* and Mr. *A. E. Ryves*, for the appellant.

Mr. *W. M. Colvin* and Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

KNOX and BANERJI, JJ.—This was a suit instituted in the Court of the Subordinate Judge of Moradabad on the basis of the judgment of a foreign Court, namely, the Council of Regency of the Native State of Rampur. The suit in which that judgment was passed was brought by Musammat Humai Tajdar Begam against her husband Nawab Mohib Ali Khan, also called Nabba Sahib, to recover her dower, the amount of which was admittedly one crore of rupees and 25,000 Murshidabad gold mohurs. Both the lady and her husband belonged to the family of the Nawab of Rampur, the former being the daughter of a sister of the last reigning Nawab. Differences having arisen between Nawab Mohib Ali Khan and the ruler of Rampur, the former removed to Moradabad in the early part of 1887. His wife, however, continued to live in Rampur, and in the year 1888 brought against her husband the claim for her dower referred to above. Nawab Mohib Ali Khan having died in October 1889, during the pendency of the suit, it was continued against Sahibzada Sajjad Ali Khan, his minor son by another wife, whose estate in the district of Moradabad is under the management of the Court of Wards. On the 26th of January 1891 the [18] Council of Regency, the highest Court of appeal in Rampur, made a decree in favour of the lady. In execution of that decree a sum of nearly 22,000 rupees was realized in Rampur territory, and the amount now due is Rs. 1,07,53,088-7-0. The assets of Nawab Mohib Ali Khan in Rampur having been exhausted, the suit out of which this appeal has arisen was brought to recover the aforesaid amount from the property of the deceased in the district of Moradabad. It was instituted on the basis of the decree

* First Appeal, No. 198 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 29th June 1896.

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of the Rampur Court, dated the 26th January 1891, by Humai Tajdar Begam and the respondent Kunwar Harbans Singh, who has taken from her an assignment of a half of her rights under the said decree. Upon a plea of misjoinder of plaintiffs and causes of action being raised, the lady withdrew from the claim, which was continued by the other plaintiff alone, and she was made a formal defendant. The lower Court considered the case on the merits, and made a decree in favour of the respondent Kunwar Harbans Singh. From this decree the present appeal has been preferred. Mr. *Colvin*, on behalf of the respondents, urged before us in *limine* that as the suit is founded upon a foreign judgment and the object of it is to enforce that judgment, that judgment should be accepted as final between the parties, provided that it is not opposed to natural justice and was not obtained by fraud; that the Court below acted improperly in going into the merits of the case, and that we also in deciding the appeal should not consider the merits of the case. He cited to us several English and Indian rulings on the subject, which are well summarised in Chapter VIII of part II of Mr. Caspersz's work on the Law of Estoppel. It is not necessary for us to consider those rulings, as we are of opinion that the amendment of s. 14 of Act No. XIV of 1882 by s. 5 of Act No. VII of 1888 has introduced an important departure in this respect.

The authorities to which our attention has been drawn seem to show that it is now established in England that when a suit is based on the judgment of a foreign Court which that Court had jurisdiction to pass and which was not obtained by fraud, such judgment must be presumed to be right, and the Court in which the suit on [19] that judgment is brought should not enter into a consideration of the merits of the case. The Indian Legislature has, in our opinion, laid down a different rule in the paragraph added to s. 14 of the Code of Civil Procedure by s. 5 of Act No. VII of 1888. That paragraph declares that when a suit is instituted in a British Indian Court on the basis of a foreign judgment, that Court is not precluded from inquiring into the merits of the case if the judgment is that of certain Asiatic and African Courts specified in the section. In the case of judgments of such Courts the Courts in British India have been given the discretion to regard or not to regard those judgments as conclusive. The exercise of that discretion must depend on the circumstances of each case. But there can be no doubt that by the enactment of s. 5 of Act No. VII of 1888 the finality of the judgment of certain foreign Courts in Asia and Africa has been taken away by the Legislature when a suit is brought on the basis of such a judgment. The Court below was not, therefore, precluded from inquiring into the merits of the case. Whenever a discretion is vested in a Court, that discretion should, it is true, be exercised judiciously and not in an unwarrantable manner. But we are unable to hold that in this case the learned Subordinate Judge acted improperly in considering the case on its merits. It may be that, having regard to the constitution of that foreign Court in this instance, no further inquiry was needed than what could be made upon the material afforded by the judgment of that Court—*Fazal Shau Khan* v. *Gafar Khan* (1). As the learned Subordinate Judge has, however, inquired into the merits of the case, as he was competent to do, we think that we also should hear the appeal on its merits.

The judgment of the Court, after a discussion of the case on its merits, thus concluded:—

(1) 15 M. 82.

We are aware that the effect of the decree in this case will be to deprive the appellant—the only son of Nawab Mohib Ali Khan—of the whole of the large property left by the Nawab, and that the said property, or the proceeds of the sale of it, will go to the [20] plaintiff, who evidently embarked on a speculation in taking an assignment of the decree of the Rampur Court. This has made us examine the decree with all the greater anxiety, and we cannot but regret that the Courts in these Provinces have not been vested by the Legislature with the discretion which has been conferred on the Courts in Oudh by s. 5 of Act No. XVIII of 1876, to award to a Muhammadan lady only so much of the stipulated amount of dower as the Court may consider "reasonable with reference to the means of the husband and the status of the wife." We have therefore no alternative but to make a decree for the amount of the dower contracted for, however extravagant that amount may be.

We dismiss this appeal with costs.

Appeal dismissed.

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21 A. 20 = 18 A.W.N. (1898) 160.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

GUR PRASAD AND OTHERS (*Plaintiffs*) *v.* RAM LAL AND OTHERS (*Defendants*).* [5th August, 1898.]

Execution of decree—Civil Procedure Code, s. 244—Representative of a party to the suit—Purchaser of property under attachment in execution of a decree.

Held, that the purchaser of property which is at the time of the purchase under attachment in execution of a decree is a representative of the judgment-debtor vendor within the meaning of s. 244 of the Code of Civil Procedure. *Lalji Mal* v. *Nand Kishore* (1) followed. *Madho Das* v. *Ramji Patak* (2) explained.

[F., 5 A.L.J. 16, (N) ; Appr., 28 C. 492 ; R., 26 A. 447 = 1 A.L.J. 65 = A.W.N. (1904) 61 ; 34 M. 450 (451) = 20 M.L.J. 961 = 8 M.L.T. 240 = 7 Ind. Cas. 418 ; 5 C.L.J. 80 = 11 C.W.N. 163 ; 13 C.P.L.R. 1 ; D., 20 A.W.N. 107.]

THE plaintiffs in this case came into Court alleging that they had purchased from the defendants Mehrban Singh and others a 10-biswa share in a certain village, and out of the sale consideration, *viz.*, Rs. 8,000, had paid Rs. 5,999 in payment of a mortgage on the share held by the defendants Ram Lal and others, and that the mortgagees had previously, in execution of money decrees held by them against the vendors, caused the property purchased [21] by the plaintiffs to be attached, of which attachment the plaintiffs had been fraudulently kept in ignorance, and now sought to bring it to sale.

The plaintiffs prayed that the property purchased by them might be released from attachment, or, in the alternative, that the property should be sold subject to the sale consideration and mortgage money paid by the plaintiffs.

The Court of first instance (Subordinate Judge of Farrukhabad) decreed the plaintiffs' claim in part by declaring that the property should be sold subject to the mortgage money, Rs. 5,999, paid by the plaintiffs.

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* Second Appeal, No. 551 of 1896, from a decree of G. A. Tweedy, Esq., District Judge of Farrukhabad, dated the 6th July 1896, confirming a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farrukhabad, dated the 13th December 1895.

(1) 19 A. 332.

(2) 16 A. 286.

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(1898) 160.

The plaintiffs appealed, and the lower appellate Court (District Judge of Farrukhabad) dismissed the appeal.

The plaintiffs thereupon appealed to the High Court.

Pandit *Sunder Lal*, and Munshi *Gulzari Lal*, for the appellants.

Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—Upon the finding of fact that at the time of purchase there was an attachment, the only question is as to the application of the law to that finding. The question to be decided is:—Are the plaintiffs as purchasers representatives of the judgment-debtor so as to fall within the category of persons specified in s. 244 of the Code of Civil Procedure? Two cases have been cited to us which are in apparent contradiction. The first is the case of *Madho Das* v. *Ramji Patak* (1) and the other is *Lalji Mal* v. *Nand Kishore* (2). The first was decided by the late Chief Justice and our brother Banerji, the second by the late Chief Justice and one of us. In the former case it was found as one of the facts that there was a subsisting attachment at the time of purchase, though no mention of such attachment is made in the rest of the judgment.. We have consulted one of the judges who decided that case, and he having perused it, informs us that in the course of the delivery of the judgment the fact of the existence of that attachment was not present to the mind of the Court. We [22] see no reason to depart from the ruling in the latter case, which we believe to be sound and in accordance with the drift of the decisions of this Court. The result is that we find that the plaintiffs in this case are representatives of the judgment-debtor, and as such are bound to seek their remedy by application under s. 244, and not by separate suit. The result is, that we allow the preliminary objection taken to the hearing of this appeal, and it follows therefore that the decrees of both the lower Courts are set aside and the suit of the plaintiffs is dismissed *ab initio*, but, under the circumstances, without costs. We regret that it is impossible for us to take what we believe to be the equitable course of allowing the plaintiffs to turn their plaint into an application under s. 244, the Court in which the suit was field not being one in which the execution proceedings could be carried on. The appeal is dismissed.

Appeal dismissed.

(1) 16 A. 286.

(2) 19 A. 332.

21 A. 22=18 A.W.N. (1898) 151.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

MUHAMMAD HUSEN (*Defendant*) *v.* MUZAFFAR HUSEN AND ANOTHER (*Plaintiffs*).* [5th August, 1898.]

Act No. XII *of* 1881 (*N.-W.P. Rent Act*), ss. 93 (*h*), 203—*Suit for profits—Limitation—Act No.* XV *of* 1877 (*Indian Limitation Act*) *s.* 5—*Act No. I of* 1887 (*General Clauses Act*), *s.* 7.

Held, that a suit for profits under s. 93 (*h*) of Act No. XII of 1881, the period of limitation for the filing of which expired in respect of a portion of the claim on a day when the Court was closed, could not be brought on the day when the Court re-opened, but, so far as that portion was concerned, was barred by limitation.

[Diss., 23 A. 277 ; R., 6 Ind. Cas. 702=13 O.C. 103 (105) ; 4 O.C. 182 (186).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

AIKMAN, J.—This is an appeal by the defendant in a suit brought against him as lambardar by the plaintiffs under the [23] provisions of s. 93, cl. (*h*) of the Rent Act, to recover their share of profits for the years 1302 and 1303 Fasli, and for the profits of the kharif harvests of 1301 and 1304 Fasli. In the Court of first instance the defendant pleaded that the claim as regards the profits for the kharif of 1301 Fasli was barred by limitation. These profits fell due on the 1st February 1894. The suit was filed one day beyond the three years allowed for such a suit by s. 94 of the Act. The Assistant Collector overruled the defendant's plea on the ground that the Court was closed on the last day of the period of three years, and that the suit was within time, having been instituted on the day on which the Court re-opened. The Assistant Collector, however, found that no profits were due for that year, and gave the plaintiffs a decree for the profits of the remaining years claimed, calculated on actual realizations. The plaintiffs appealed to the District Judge, who modified the decree of the Assistant Collector, and gave a decree for profits for all the years in suit, finding that there had been gross negligence on the part of the lambardar, and that the rental, all but a small amount, might have been collected had due diligence been used. The defendant comes here in secon dappeal.

In the first ground of appeal he renews his plea that the claim for the profits of 1301 Fasli was barred by limitation. Nothing appears to have been said on the plea of limitation in the lower appellate Court, and it is contended on behalf of the respondents that the appellant should not be allowed to raise it now. I am of opinion, however, that it is open to me to entertain it even at this late stage, and I do so. In my opinion the claim for the profits for that year was barred. It is true that the last day of the period of the three years was a Sunday, but that does not, under the

* Second Appeal, No. 805 of 1897, from a decree of C. Rustamji, Esq., District Judge of Moradabad, dated the 7th July 1897, modifying a decree of Muhammad Nur-ul-hasan Khan, Assistant Collector of Moradabad, dated the 30th March 1897.

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Rent Act, entitle the plaintiffs to an additional day's grace. Section 203 of the Rent Act provides that whenever a Court is closed on the last day of any period provided in this Act for the presentation of any memorandum of appeal or for the deposit or for the payment of any money [24] in or into Court, the day on which the Court re-opens shall be deemed to be such last day. It is noticeable that nothing is said in this section in regard to the presentation of plaints. Consequently the provisions of that section do not apply to the present case. There is no other section in the Rent Act which would help the plaintiffs. The provisions of Act No. XV of 1877 do not affect special or local laws which specially prescribe periods of limitation; consequently the plaintiffs are not entitled to take advantage of the general provisions contained in s. 5 of that Act. Nor will s. 7 of the General Clauses Act of 1887 help the plaintiffs, for by s. 2 the application of part I of the Act, in which that section occurs, is limited to the Act itself and to all Acts made by the Governor-General in Council after the passing of the Act. The former General Clauses Act contained no provisions similar to s. 7 of the present Act. For these reasons I am of opinion that the first ground in the memorandum of appeal must be sustained, and that that portion of the decree of the lower appellate Court which awarded profits to the plaintiffs on account of the kharif harvest of 1301 Fasli must be set aside. In the remaining grounds of appeal it is contended that the lower Court was wrong in allowing the plaintiff's additional profits owing to rents remaining uncollected through the gross negligence of the defendant. Although the reasons given by the learned District Judge do not appear to me in all cases valid, yet there was, in my opinion, evidence upon which he could come to the conclusion at which he arrived. He found on a consideration of the evidence that the lambardar had been unable to collect a sum of Rs. 55-4-8 owing to the poverty of the tenants. With regard to the balance uncollected, his finding appears to me to be one of fact which I cannot disturb in second appeal.

For the above reasons I so far allow the appeal as to set aside that portion of the decree of the lower appellate Court which awarded Rs. 14-0-11 to the plaintiffs on account of the profits of 1301 Fasli. *Quad ultra* the appeal is dismissed.

[25] The parties will pay and receive costs throughout in proportion to their failure and success.

Decree modified.

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21 A. 25=18 A.W.N. (1898) 156.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS *v.* RAM BARAN SINGH.* [6th August, 1898.]

Criminal Procedure Code, s. 395—Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.

Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence and such sentence is accodingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum

* Criminal Revision No. 398 of 1898.

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which the Court passing the sentence is competent to inflict. *Queen-Empress* v. *Sheodin* (1) referred to.

THIS was a reference under s. 438 of the Code of Criminal Procedure made by the Sessions Judge of Benares. The facts of the case sufficiently appear from the order of the Court.

ORDER.

BANERJI, J.—In this case one Ram Baran Singh was convicted by a Magistrate of the first class under ss. 454 and 75 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment and to receive 30 stripes. He was medically certified not to be in a fit state of health to undergo the sentence of whipping. The Magistrate thereupon sentenced him to 6 months' additional rigorous imprisonment in lieu of whipping. The Magistrate was evidently acting under the powers conferred on him by s. 395 of the Code of Criminal Procedure. Under that section, upon the offender being found not to be in a fit state of health to undergo the sentence of whipping, the Court may either remit the sentence of whipping, or may, in lieu of whipping, sentence him to imprisonment or a term not exceeding twelve months, which may be in addition to any term of imprisonment to which he may have been sentenced for the same offence. But this term of imprisonment, as held in *Queen-Empress* v. *Sheodin* (1) [26] is a substantive sentence of imprisonment. That being so, the Magistrate was not competent to sentence the accused to imprisonment in lieu of whipping for a period which was in excess of the maximum term of two years, for which, under s. 32, he could order the imprisonment of the accused. This is clear from the second paragraph of s. 395, which declares that under that section a Court is not authorised to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Section 33, which relates to the powers of a Magistrate to pass a sentence of imprisonment in default of fine, distinctly provides that the imprisonment awarded under that section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under s. 32. The absence of a similar provision in s. 395 and the provision of the second paragraph of that section, to which I have referred above, leave no room for doubt that the sentence of imprisonment awarded in lieu of whipping cannot be in addition to a substantive sentence of imprisonment for the maximum term which the Magistrate was competent to award. The sentence of additional imprisonment in lieu of whipping passed in this case was therefore clearly illegal and I set it aside. Ram Baran's bail will be discharged.

(1) 11 A. 308.

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21 A. 26 = 18 A.W.N. (1898) 161.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

JADUBAR SINGH AND OTHERS (*Defendants*) *v.* SHEO SARAN SINGH (*Plaintiff*),* [8th August, 1898.]

21 A. 26 = 18 A.W.N. (1898) 161.

Suit for malicious prosecution—Reasonable and probable cause—Evidence—Conviction of plaintiff by a criminal Court.

The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if unrebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable [27] and probable cause. *Parimi Bapirazu* v. *Bellamkonda Chinna Venkayya* (1) followed.

[R., 26 M. 506 (508) ; 12 C.W.N. 818 (N) ; 6 Ind. Cas. 675 (677) ; 18 Ind. Cas. 830 (831) ; (2 L.B.R. 111 ; 176 P.L.R. 1901 ; U.B.R. (1906), Tort 5 ; D., 10 A.L.J. 423 424) = 17 Ind. Cas. 879.]

THE plaintiff in this case was prosecuted in the criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of first instance and fined Rs. 10. That conviction was, however, set aside in revision by the High Court, on a reference by the Sessions Judge, who was of opinion that the charge had not been substantiated. The plaintiff, accordingly, instituted the present suit claiming damages to the amount of Rs. 600. The first Court gave him a decree for Rs. 175, which sum was, on appeal, cut down to Rs. 75. The lower appellate Court (Additional Subordinate Judge of Ghazipur) in its judgment said :—

"Independently of that judgment (the judgment of the Sessions Judge) "there is a good deal of oral evidence which satisfactorily proves the "innocence of the plaintiff. The parties are old enemies. The defendants "had seen the plaintiff and his other companions carrying away the crops, "and identified them while beating them. Under the circumstances there "can be no question of reasonable and probable cause, as see the authority "noted in the margin. (Weekly Notes, 1889, p. 189). Now such being "my view as to the prosecution being false the plaintiff must be held "entitled to get damages."

The defendants appealed to the High Court. An issue was referred to the lower appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. On return of the finding of that Court, which was in favour of the plaintiff, the appeal again came up for hearing.

Messrs. *Amiruddin* and *Muhammad Ishaq Khan*, for the appellants.

Mr. *E. A. Howard*, for the respondent.

JUDGMENT.

BANERJI, J.—The plaintiff respondent was prosecuted in the criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of first instance and sentenced to a fine of Rs. 10. That conviction was set aside by this Court on revision, the Sessions Judge who reported the case to this Court [28] for revision having been of opinion that the charge had not been substantiated. The plaintiff thereupon instituted this suit claiming Rs. 600 as damages. The lower

* Second Appeal, No. 454 of 1897, from a decree of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 27th March 1897, modifying a decree of Babu Chandi Prasad, Munsif of Rasra, dated the 28th January 1897.

(1) 3 M.H.C.R. 238.

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appellate Court has granted him a decree for Rs. 75. That Court refused to enter into the question of reasonable and probable cause. As it was essential that in a suit of this kind the plaintiff, in order to succeed, must prove not only that the charge was unfounded and was instituted through malice, but also that it was without reasonable and probable cause, I referred an issue to the lower appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. That Court has returned a finding in favour of the plaintiff, to which exception has been taken by the appellants.

The question of the presence or absence of reasonable and probable cause is a mixed question, both of law and fact. In this case, as I have said above, a Magistrate believed in the truth of the complaint brought by the appellants. That alone was sufficient evidence of the existence of reasonable and probable cause. In the case of *Parimi Bapirazu* v. *Bellamkonda Chinna Venkayya* (1) the learned Judges observed:—"We do not know of any instance of a suit of this kind being successfully maintained after a conviction of the plaintiffs by the sentence of one competent tribunal." No doubt, as observed in the said judgment, the judgment of one competent Court against the plaintiff should not in every case be considered a sufficient answer to the suit. But the fact of a Court of competent jurisdiction having believed that the complaint is a true complaint is strong evidence to show that it was not brought without reasonable and probable cause. The conviction by the first Court was no doubt subsequently set aside; but on referring to the judgment of the learned Sessions Judge, dated the 11th of November 1895, which is to be found on the record of the connected suit No. 622, out of which Second Appeal No. 455 has been brought, it appears that he held the charge not to be established because he had doubts in his mind as to the truth of the complainant's story. He did not find that the complaint was an [29] utterly false one. On the contrary, it appears from his judgment that a riot did take place that night, for which the complainant's party was convicted by the first Court along with the party of the present plaintiff. We have thus a judgment of a Court of first instance convicting the plaintiff and the judgment of an appellate Court which gave the plaintiff only the benefit of a doubt. Such being the case, it cannot be said that the complaint was totally without probable cause. I have not been referred to any instance in which, under similar circumstances, a decree for damages has been granted. In my judgment the suit ought to have been dismissed. I allow the appeal, and, setting aside the decree of the Courts below, dismiss the suit with costs in all the Courts. The objection under s. 561 of the Code of Civil Procedure necessarily fails and is also dismissed.

Appeal decreed.

[The decision in this case was affirmed on appeal under s. 10 of the Letters Patent on the 7th of January, 1899.—ED.]

(1) 8 M. H. C. R. 238.

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AUG. 8.

APPELLATE CIVIL.

21 A. 29 = 18 A.W.N. (1898) 187.

21 A. 29 = 18 A.W.N. (1898) 187.

APPELLATE CIVIL

Before Mr. Justice Knox and Mr. Justice Banerji.

THE DELHI AND LONDON BANK, LD. (*Plaintiff*) *v.* CHAUDHRI PARTAB BHASKAR AND OTHERS (*Defendants*).* [8th August, 1898.]

Act No. XIX of 1873 (*N. W. P. Land Revenue Act*), *s.* 184—*Sale for arrears of Government Revenue—Alleged benami purchase—Suit on a mortgage against the debtor and the certified purchasers alleged to be benamidars of the debtor—Civil Procedure Code, s.* 317.

Per KNOX, J.—The operation of s. 184 of Act No. XIX of 1873 is not confined to disputes between certified auction purchasers and persons who allege that such auction purchasers purchased on their behalf as their *benamidars*, but extends to cases where the dispute is between the certified purchasers and third persons who allege that the certified purchasers are not the real purchasers. In such a case the claimants cannot succeed without proof of fraud.

Mussumat Buhuns Kowur v. *Lalla Buhooree Lall* (1), *Sohun Lall* v. *Lala Gya Pershad* (2), *Kanizak Sukina* v. *Monohur Das* (3), *Chundra Kaminy Debea* v. *Ram Ruttun Pattuck* (4) and *Tara Soonduree Debee* v. *Oojul Monee Dossee* (5) referred to.

[30] *Per* BANERJI, J.—Section 184 of Act No. XIX of 1873 contemplates a suit between the person claiming to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor and that the certified purchaser is only the *benamidar* of the debtor. Section 184 does not preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall* (1), *Bodh Singh Doodhooria* v. *Gunes Chunder Sen* (6), *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya* (7), *The Uncovenanted Service Bank* v. *Abdul Bari* (8), *Sohun Lall* v. *Lala Gya Pershad* (2), *Puran Mal* v. *Ali Khan* (9), *Kanizak Sukina* v. *Monohur Das* (3), *Subha Bibi* v. *Hara Lal Das* (10), *Ameeroon-nissa Beebee* v. *Binode Ram Sein* (11) and *Chundra Kaminy Debea* v. *Ram Ruttun Pattuck* (4) referred to.

[R., 21 A. 238 (245) = 19 A.W.N. 42 (44); 26 A. 82 = A.W.N. (1903) 199; 28 M. 526 = 15 M.L.J. 419; 8 O.C. 306 (311).]

THE facts of this case are fully stated in the judgment of Knox, J.

Messrs. *W. M. Colvin*, *C. Kirkpatrick* and *D. N. Banerji*, for the appellants.

Babu *Jogindro Nath Chaudri*, Pandit *Sundar Lal*, Pandit *Moti Lal*, Maulvi *Ghulam Mujtaba* and Kunwar *Parmanand*, for the respondents.

JUDGMENT.

KNOX, J.—In the suit which gave rise to this appeal the Delhi and London Bank, Ld., plaintiff (now appellant), laid a claim against one Chaudhri Partab Bhaskar *alias* Chaudhri Raj Kumar, for the recovery of Rs. 1,19,571-9-11, with interest, for an account of what sums might be due to them under a mortgage deed, dated the 17th December 1892, and, in default of payment of the sums found due, for sale of the properties covered by the aforesaid mortgage deed. The suit was instituted on the 27th day of June 1894.

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* First Appeal, No. 72 of 1896, from a decree of Maulvi Anwar Husain Khan, Subordinate Judge of Farrukabad, dated the 26th November 1895.

(1) 14 M. I.A. 496. (2) 6 N.W.P.H.C.R. (1874) 265. (3) 12 C. 204.
(4) 12 C. 302. (5) 14 W.R.C.R. 111. (6) 19 W.R.C.R. 356.
(7) 23 W.R.C.R. 358 = 2 I.A. 154. (8) 18 A. 461.
(9) 1 A. 235. (10) 21 C. 519. (11) 2 W.R.C.R. 29.

As the suit proceeded the plaintiff asked and obtained leave from time to time to add to the array of defendants (*i*) several persons who had purchased some of the villages covered by the deed on which the Bank had based their claim ; (*ii*) several other **[31]** persons who claimed a prior mortgage over certain of the same villages, and (*iii*) other persons whom they considered representatives of defendants who had died during the progress of the suit, until at last the total number of defendants arrayed on the record was twenty-five.

The plaint as originally framed was amended and added to more than once. Unfortunately these amendments and additions were so carelessly and inartistically carried out that even as it now stands the plaint abounds in errors which are creditable neither to the plaintiff nor to the Court which allowed the suit to proceed without taking care that so important a document as the plaint was free from all patent and obvious errors.

As an instance of such errors, the plaint says in paragraph 6 that "defendant No. 7", *i.e.*, Tulshi Ram, for he is No. 7 on the array of defendants, "purchased Ani Bojh." Now it is not and never was any part of the plaintiff's case that the mahal Ani Bojh was purchased by Tulshi Ram. Indeed, in the same paragraph, only two lines lower down, the plaint goes on to say that the auction purchaser of Ani Bojh was "defendant No 8, *i.e.*, the auction purchaser." Even here in these nine words there is another error, for on consulting the array of the defendants it will be found that Mashuk Ali is not defendant No. 8, but defendant No. 9.

It is evident that those who were responsible for the plaint have grievously neglected the duty imposed upon them by law of preparing for the Court to consider and for the defendant to answer an accurate, plain and concise statement of the circumstances constituting the cause of action. Ill considered and hasty additions have been made, until the plaint is no longer a safe guide as to what the plaintiff's case really is.

While reading the array of parties it has to be noted that after the appeal had been filed in this Court, Chaudhri Partab Bhaskar *alias* Chaudhri Raj Kumar, the principal defendant, died, and the name of Musammat Indomati has now been inserted in place of her deceased husband as his legal representative.

[32] The claim was not resisted in the Court below by Chaudhri Raj Kumar. In appeal no one appears to defend the appeal on the part of Musammat Indomati, his widow. The real litigant parties are the London and Delhi Bank, Ld., and the persons subsequently added to the array of defendants, who from time to time purchased or pretended to purchase portions of the property covered by the mortgage deed of the 17th of December 1892.

It will materially assist the understanding of the real points at issue if those matters are first set out, upon which the litigants are practically agreed, and to dispute which no attempt has been made in the very prolonged arguments which have been addressed to us.

The late Chaudhri Raj Kumar was the son of one Chaudhri Fateh Chand, the owner of a very large amount of landed property situate in the Farrukhabad and Mainpuri districts He was a man of a very spendthrift nature, and we find that the Collector of Farrukhabad had, with the sanction of the Board of Revenue, advertised for sale, on the 22nd of December 1892, 46 mahals, in all of which the Government revenue was in arrear. There is abundant evidence to show that the villages were good valuable property, well worth, if we may borrow a term in use in

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auction marts, the attention of purchasers. Chaudhri Raj Kumar suffered the day fixed for sale to come on without apparent effort to avert the catastrophe beyond the negotiations with the Delhi and London Bank, which ended in the mortgage deed of the 17th of December 1892. The 22nd of December arrived, and of the 46 mahals, there stood advertised for sale 32 villages, in which the Government revenue still remained in arrears.

The Assistant Collector, specially appointed by the Collector under s. 172 of Act No. XIX of 1873 to hold the sale, one Misr Banarsi Das, after selling by auction 3 of the villages so advertised, namely, the mahals Shahpur, Atrauli and Salimpur, stayed his hand and did not proceed to the sale of the remaining **[33]** villages on his sale sheet. His reason for abstaining from sale is set out in a proceeding which will be found at page 55 of the appellant's printed book No. 1. In this proceeding he begins by setting out that he found the total balance due from Chaudhri Raj Kumar, on the 22nd of December 1892, was Rs. 20,101. To recover this balance an auction sale was held. As by the sale of only 3 villages the whole of the money had been realized, as he thought, the remaining villages had not been sold, and he reported his proceedings to the Collector for necessary orders. On this report reaching the Collector, that officer drew up a proceeding (see page 10 of appellant's printed book II), in which he pointed out that the procedure adopted by the Deputy Collector was in error, and ordered that the sale be continued on the 24th of December 1892; that all the villages and mahals which were not sold on the 22nd of December 1892, and the demand in respect whereof had not been paid, be sold on the 24th of December 1892. No further proclamation was issued, and the Deputy Collector proceeded to sell 27 villages out of 29 still remaining on his list for sale. The remaining two villages which he did not sell were left unsold because money had been paid in on account of the arrears due from those two particular mahals. Just at the same time, *i. e.*, early on the morning of the 24th of December the plaintiffs, through their servants, paid over at Mainpuri to Babu Amar Singh, the attorney of Chaudhri Raj Kumar, the sum of Rs. 1,00,000, the consideration money for the mortgage deed upon which the suit is based, and had that same mortgage deed duly registered at the Mainpuri tahsil. This payment and registration preceded by a few hours in point of time the sale at Farrukhabad.

It is contended by the plaintiff that this sale of the 24th December 1892 was illegally held and bad in law, because (*i*) there was in the Government Treasury at the time of sale and to the credit of Chaudhri Raj Kumar, namely, on the 24th of December 1892, more than sufficient money to cover all arrears of Government revenue due on account of the villages under **[34]** sale, and (*ii*) because no fresh proclamation or notice of sale had been given.

A further contention is that the purchasers at the so-called sale of the 24th December 1892 were really fictitious purchasers. They were all of them friends or underlings of Chaudhri Raj Kumar, and the learned counsel promised to show that they purchased with the intention that the property purchased should still be Chaudhri Raj Kumar's and only revert to them if Chaudhri Raj Kumar failed to pay in the money which they promised on the 24th of December to pay as purchasers of the property sold.

Of the villages sold on the 24th of December, the following were

villages mortgaged to the Delhi and London Bank in the deed of the 17th December 1892 :—

(1) Chandpura Chaudhri, (2) Ayubpur, (3) Jhusi Nagar, (4) Kishanpur, (5) Malikpur, (6) Hasanpur, (7) Raura, (8) Bhawani Sarai, (9) Aima-uz-zam, (10) Jahangirpur, (11) Asafpur Patti, (12) Tikri and (13) Ani Bojh. At pages 12 *et seqq*, are the lists of bids made at the auction sale, and from these we learn that—

1. Chandpura Chaudhri was sold to Muhammad Umar for Rs. 58.
2. Ayubhur was sold to Mashuk Ali for Rs. 1,025.
3. Jhusi Nagar was sold to Lalta Prasad for Behari Lal for Rs. 4,100.
4. Kishanpur was sold to Lalta Prasad for Behari Lal for Rs. 9,050.
5. Malikpur was sold to Lalta Prasad for Thakur Das for Rs. 4,025.
6. Hasanpur was sold to Mashuk Ali for Rs. 1,600.
7. Raura was sold to Lalta Prasad for Behari Lal for Rs. 4,000.
8. Bhawani Sarai was sold to Kunwar Bahadur for Rs. 8,000.
9. Aima-uz-zam was sold to Mashuk Ali for Rs. 4,050.
10. Jahangirpur was sold to Muhammad Umar for Rs. 100.
11. Asafpur Patti was sold to Mashuk Ali for Rs. 3,780.

[35] 12. Tikri was sold to Ram Saran for Rs. 4.025, and

13. Ani Bojh was sold to Mashuk Ali for Rs. 2,450.

On perusing the history of the above villages after sale we find that the sale certificates of the mahals of Kishanpur, Malikpur, Raura and Jhusi Nagar were granted to Parsotam Rai Tantia Sahib ; that he was informed on the 3rd of May 1893, that the sales had been confirmed by the Commissioner ; and we also find that on dates between the 8th and 10th of September 1893 he formally acknowledged having been put into possession of them.

In respondents' book No. I at page 32 will be found a sale-deed, dated the 15th of September 1893, by which Mashuk Ali purported to convey to Nawab Safia Jehan Begam the village of Hasanpur Partabpur together with other villages. By a separate deed of the same date, Mashuk Ali conveyed to Nawab Syed Ali Hasan Khan the villages of Ayubpur, Aima-uz-zam, Asafpur Patti and Ani Bojh.

In respondents' book No. II, at page 3, will be found a deed of sale, dated 29th June 1894, under which Kunwar Bahadur conveys the village of Bahawani Sarai, with the village of Sarai Gujurmal to Tulsi Ram.

Chandpura Chaudhri, which was purchased by Muhammad Umar, was sold by him to Gauri Lal, since deceased. Gauri Lal's representative on the record is the respondent Kunj Behari Lal.

What the plaintiff seeks is that the mortgage deed of the 17th of December 1892, may be declared to have preference to all these transactions. According to him the sales of the 24th of December 1892 were illegal, because they were held without any fresh proclamation issued ; or if they were, in spite of this defect, sales according to law, then he contends that the real purchaser at all these sales was Chaudhri Raj Kumar, and the nominal purchasers were people who never intended to purchase in their own right, but who assisted him with loans of money on the security of the villages purchased. In either case the sales of the 24th and the subsequent transactions should be all held to in no **[36]** way derogate from the mortgage-deed in his (plaintiff's) favour and to have no higher status than that of subordination to it.

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This is the contention in appeal. Before considering it, it will be necessary once more to pass in review the case as put by the plaintiff for the defendants to answer; in other words, the case that on the pleadings had to be tried by the Court below.

The plaint sets out that Chaudhri Raj Kumar has not up to the present paid anything towards the principal or interest due under the mortgage-deed of the 17th of December 1892, and asks that a decree may be passed against him personally for such an amount as may be found due, and a further decree directing that on non-payment by him of the sum so found due on the account, the properties mortgaged in the deed may be sold, and the proceeds applied in liquidation of the sum due.

Two grounds are set out in the 7th paragraph of the plaint as the grounds upon which the sale of the 24th December should be set aside as being illegal and bad in law; the first being that prior to the sale and at the time thereof there was in the Government Treasury and in the hands of the Collector more than sufficient money to cover all arrears of Government revenue due on account of those villages, and the Collector was entitled to, and ought to, have realized the arrears therefrom; the second being that as the sales were originally fixed for the 22nd of December 1892, and the officer conducting the sale on that date had postponed the sale, subsequent sale without proclamation or notice on the 24th of December 1892 was invalid.

In the 8th paragraph the plaintiff says that as he did not advance any money until after the sale had been postponed, he cannot be bound by any sub-equent sale of which no proclamation was issued or notice given.

In the 9th paragraph, it is alleged that the said properties were purchased at the sale of the 24th of December 1892, on behalf of the principal defendant, and any subsequent [37] contract can- not affect the plaintiff's right. From this 9th paragraph has been deve- loped the further case, *viz.*, that the sales of the 24th of December 1892 were no sales at all, because the purchaser at one and all of them was the defaulter Chaudhri Raj Kumar, and not Muhammad Umar, Mashuk Ali, or any other of the persons who on that day were declared at the time of sale to be the actual purchasers.

Thus, then, the case in the plaint, as it was filed, which is that the sales of the 24th of December 1892, and all subsequent proceedings are tainted with illegality and convey no title, has been developed into a case that they were sales, not to the certified purchasers, but to Raj Kumar himself; that they are in fact *benami* transactions.

The paragraph 9 is all the foundation in the plaint for what has been argued before us, *viz.*, that the evidence points distinctly to one of two conclusions, either that the persons who pretended to purchase at the sales held on the 24th of December were *benamidars* for Chaudhri Raj Kumar and purchased with the agreed intention that, though the *benamidar* was declared actual purchaser, he should reconvey the property to Chaudhri Raj Kumar as soon as Chaudhri Raj Kumar repaid any money advanced by the *benamidars*, or that the purchase-money was to be advanced as a loan, the security for which was the particular mahal or mahals bid for by the pretending purchaser, Chaudhri Raj Kumar remaining throughout the *de facto* proprietor.

A third contention was raised that the evidence established that in some of the sales the money paid as purchase money was the money of Chaudhri Raj Kumar.

The first question then for determination is whether the sales of the several mahals held on the 24th of December 1892 were or were not illegal, either on the ground that there were in fact no arrears due from Chaudhri Raj Kumar on that date, or on the ground that they were held without a fresh proclamation issued.

[38] The Subordinate Judge has held, and rightly, that in the case of any irregularity in revenue sales application has to be made to the Commissioner of the Division, praying that the sale may be set aside. Applications were made by and on behalf of Chaudhri Raj Kumar to have the sales set aside, but such applications were rejected, and that order of rejection is final.

Section 178 of the North-Western Provinces Land Revenue Act, 1873, provides that every sale of land under the Act shall be reported by the Collector to the Commissioner. At any time within thirty days from the date of the sale application may be made under s. 179 to the Commissioner of the Division to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it. There is nothing in the Act which limits the right to present such an application to the parties to the decree only. The right is left open to any and every person, and this being so, it does not lie in the mouth of any person who can show that he has suffered or may suffer from the sale to contend that the section was not intended to and does not provide a means of obtaining the remedy provided and of getting the sale set aside.

The Commissioner of the Division is required by s. 180, on the expiration of thirty days from the date of the sale, where no application to set aside a sale has been made, or if such application has been made and rejected, to make an order confirming the sale, and every order so made is expressly declared by the law to be final.

A right is reserved under s. 181 for the institution of a suit in a civil Court for the purpose of setting aside a sale on the ground of fraud. These provisions, and a further provision in s. 241 (*j*) of the same Act, which enacts that no civil Court shall exercise jurisdiction over claims to set aside a sale for arrears of revenue other than claims under s. 181, point irresistibly to the conclusion that the view taken by the Subordinate Judge, that the Commissioner's order of rejection is final, was the right and only conclusion.

[39] There is, however, the attempt made to contend that the sales were no sales because there were no arrears of revenue existing for which they could be held.

This contention is hardly worth considering. It is based upon a false foundation of fact, and it ignores the principle upon which sales of land for arrears of Government revenue proceed. The Government to which the revenue is due does not keep a debtor and creditor account with each individual landholder, but keeps its account for each mahal separately with the proprietor or proprietors of that mahal. When a mahal is once advertised for sale on account of arrears of land revenue due on it at the time of the advertisement, the defaulter can release such mahal only by paying the arrear due on that particular mahal at some time before the day fixed for the sale, either to the person appointed under s. 147 to receive payment of the land revenue assessed on such mahal, or to the Collector of the district, or the Assistant Collector in charge of the sub-division of the district.

In the present case, no such payment had been made by or on behalf of Chaudhri Raj Kumar to any of the three persons above mentioned on

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account of any one of the mahals which were sold on the 24th December 1892.

The Deputy Collector who conducted the sales on the 22nd of December has recorded, in a proceeding to be found at page 55 of the appellant's printed book No. I, the reasoning upon which he stayed sale and held that no arrears of land revenue were due. His conclusion that no arrears of land revenue were due is arrived at by crediting purchase money on account of the three villages sold on the 22nd of December, *i.e.*, moneys payable in the future which might or might not be realized, and which would be in any case moneys paid not before but after the day appointed for sale, and other moneys not paid as required by s. 173 of the Act, but deposited in a civil Court. The proceeding shows most complete ignorance of the Land Revenue Act, 1873, and of the first principles of the land revenue system.

[40] I hold that the sales of the 24th of December 1892 were good and valid sales, and that we have no jurisdiction to entertain or determine claims to set them aside which are based upon alleged irregularities or mistakes in publishing or conducting the sales.

The next plea that we have to determine is whether the sales of the 24th of December were in fact sales made to Chaudhri Raj Kumar and not to the persons who were at the sale certified to be the auction purchasers or who have since been entered as certified purchasers in the certificate granted by the Government under s. 184.

The first question in considering the plea is whether the law as it stands permits the Court to entertain the plea. Section 184 of the Land Revenue Act expressly states:—"The certificate shall state the name of the person declared at the time of the sale to be the actual purchaser, and any suit brought, whether in a civil or revenue Court, against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

To inquire therefore, as the appellant asks us to do, whether the purchases of the 24th of December 1892 were made on behalf of Chaudhri Raj Kumar would be, it appears to me, to evade the clear provisions of law. The appellant must go further and show us, before we can set aside the sales, that fraud has entered into them. This he has not done.

There is a long array of decisions which at first sight would appear to be in favour of the view that the operation of s. 317 of the Code of Civil Procedure is confined to disputes between certified auction purchasers and persons who allege that such auction purchasers purchased on their behalf and are in reality fictitious purchasers.

It will be found, however, on examining them more closely, that the cases were one and all of them not cases against certified purchasers, but cases by certified purchasers, and therefore beyond **[41]** the letter and scope of s. 317 of the Code of Civil Procedure.

The leading case is that of *Mussumut Buhuns Kowur* v. *Lalla Buhooree Lal* (1). This was a suit brought by Lalla Buhooree Lall, the certified purchaser, against a mortgagee in possession for the redemption of the taluk and possession of it, alleging that the mortgage debt had been paid off by receipt of the profits, and if not, that he was ready to pay what might remain due. The defence was that the purchase was made by Lalla

(1) 14 M. I. A. 496.

Buhooree Lall in his own name and as a *benami* purchaser for one Brij Lall Opadhia and with his money, and that the attempt by Lalla Buhooree Lall to set up title in himself was a fraud. Their Lordships of the Privy Council had no hesitation in holding that this suit was not a suit within the words or scope of s. 260 of the Code of Civil Procedure. S. 260 of Act No. VIII of 1859 is the corresponding section which has been replaced by s. 317 of Act No. XIV of 1882, but with more than one addition to its terms. These additions I need not consider at present. As s. 260 ran, it was word for word identical with s. 184 of Act No. XIX of 1873 as it now stands, except that the latter section prohibits suits being brought, whether in the civil or in the revenue Courts. and the former simply said "any suit brought shall be dismissed."

It is well to look closely into what the Privy Council did lay down in their judgment, for it seems to me that a wider intention has been, in some of the following cases, attributed their Lordships than was ever intended by them. Their Lordships first point out that the Legislature had not by any general measure declared *benami* transactions to be illegal in India, and that it therefore followed that those transactions must still be recognized and effect given to them by Courts, except so far as positive enactment stands in the way and directs a contrary course. Their Lordships next examined s. 260 of Act No. VIII of 1859, which was put forward as such a positive enactment. They **[42]** pointed out that this enactment was clear and definite, and went on to say:—"There is nothing from which it can be inferred that more is meant than is expressed. It is confined to the suit brought against the certified purchaser and to a specific direction as to what should be done with that suit, namely, that 'it shall be dismissed with costs'" It will be observed that in this passage their Lordships do not lay down the person by whom the suit may be brought which is liable to dismissal. It has been contended, and the contention has been apparently approved, that their Lordships intended to confine the suit to one brought by the *benamidar* against the certified purchaser. But I can find no authority for such limitation. It is true that their Lordships went on to deal with the contention that there might be inferred from this section and other sections contiguous to it a general intention having for its object to prevent any inquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased upon the question whether the purchase was *benami* or not, and that effect should be given to that general intention. This inference their Lordships refused to draw. But they had not before them for consideration any other contention such as arises in the case before us, and I am not prepared to hold that what they lay down in reference to the contention directly under their consideration would have been laid down with equal emphasis to any other contention that might have been raised. Further on their Lordships say that the object which the framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property and to empower the Court selling under a decree to give effect to its own sale without contention on the ground of *benami* purchase by placing the ostensible purchaser in possession of what it had sold and insuring him in respect of that possession by enacting that "any suit brought against him on the ground of *benami* shall be dismissed." If this be taken to be the object, it seems to me that it applies with equal force to those who seek to raise a contention against the ostensible purchaser and to prevent the Courts giving possession **[43]** to him because they claim to have a title derived from the

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judgment debtor and which cannot be higher than that of the judgment-debtor. Their Lordships give the instance of cases where actual possession can be given of the things sold by the Court and where (they add) no difficulty arises, "for there the certified purchaser having both the certificate and possession can hold the property by virtue of cl. 260 against any suit brought" (not any suit brought by the judgment-debtor alone) "against him, and if that possession should be interfered with either by force or fraud on the part of any person, even a *benami* claimant, it no doubt ought, without inquiry as to the *benami* claim, to be restored." Their Lordships were very emphatic that they were not justified in adopting a construction of s. 260 beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so. What I gather from the above is that every case that may arise to which it is sought to apply s. 260 has to be carefully considered, and it is to be seen whether the case is one which falls within the expressed words of the section. If it does not, the section has no application. If it does, the section must be applied without any *arriere pensee* as to whether such a construction be one which might under certain circumstances encourage fraud.

Indeed to my mind the boundary line which separates a *benami* transaction from a fraud, though it may be abundantly real in some cases, in others dwindles down to a line so shadowy and unreal that it is impossible to say where the honest *benami* transaction, if there be such a transaction, ends and the fraud begins. While therefore I do not seek by the importation of extrinsic matter to expand the words "any suits," I am equally unprepared to import extrinsic matter which will limit or qualify the same words beyond those which are to be found in the section itself, and which limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. It seems to me that the **[44]** moment an attempt is made to limit those words, at once we limit the power of the Court "selling uuder a decree to give effect to its own sale without contention on the ground of *benami* purchase" and "of insuring respect to that possession." Is the suit before us against a certified purchaser and based upon this ground? It is a suit to enforce the mortgage covenant of the Bank as against Raj Kumar and assignees from Raj Kumar, *i.e.*, certified purchasers; and on what ground? The only ground is stated in the ninth paragraph of the plaint, namely, that the said properties were purchased on behalf of Raj Kumar. The person who framed this paragraph might almost be said to have had before his eyes the fatal words of s. 184 and to have copied them *verbatim*.

I know that it was held by Stuart, C.J., and Brodhurst, J., in *Sohun Lall* v. *Lala Gya Pershad* (1) that the provisions of s. 260 of Act No. VIII of 1859, which are very similar in terms, did not apply to a case in which a decree-holder brought a suit against the certified purchaser of property sold by a Civil Court, and that a suit based on the allegation that the certified purchaser had purchased the property *benami* for the judgment-debtor of the decree-holder would lie. The only reason given is that the Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. There was, moreover, a circumstance in that case which does not exist in the case before us, and that was the fact that,

(1) 6 N.W.P.H.C.R. (1874) 265.

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the judgment-debtor, the *benamidar*, had retained possession of property which in equity ought to have been given up to the decree-holder and was in possession of it at the time when the suit was brought. It was doubtless this fact which caused Mr. Justice Brodhurst to stigmatize the action as that of a fraudulent *benamidar* and to import the element of fraud into the case.

Again in the case *Kanizak Sukina* v. *Monohur Das* (1) Mitter, J. and Macpherson, JJ., held that if a creditor of the real owner of a property brings a suit for declaration that it belongs to his debtor and not to the certified auction purchaser, such a suit would **[45]** not be precluded by the provisions of s. 317. That section, they said, was intended to prevent fraud, and if it were to apply to a case like that stated instead of preventing fraud, it would promote fraud. The case which the learned Judges were considering and in which they uttered this pronouncement was a case by a certified purchaser to have his right declared as against his judgment-debtor and a third person, who were trying to resist his claim by a defence setting up the third person, and not the judgment-debtor as the real owner. The suit was really one by, and not against, a certified purchaser, whose title was the purchase just made. It is true that as against the third person it proceeded upon an allegation that the third person's name had been used in the transaction as *benamidar* for her mother and that she had no right to the property in the suit. It was really a suit by a certified purchaser against a trespasser and is quite distinct from the present suit.

The case of *Chundra Kaminy Debea* v. *Ram Ruttun Pattuck* (2) is also in reality a case by a certified auction purchaser against trespassers, a person who set up a title adverse to the title of the person whose property had been ostensibly sold and purchased, a person who sought to use s. 36 of Act No. XI of 1894 as a shield to cover her title. She may have been the certified purchaser at a previous sale, she was not the certified purchaser at the sale for the time being in question, and so far as the latter sale was concerned, was neither certified purchaser nor *benamidar*. Similar to this was the case of *Tara Soonduree Debee* v. *Oojul Monee Dossee* (3).

All these suits were suits which could not be brought within the terms of s. 317, except by expanding the words of the section, and are therefore no guide in the case before us.

For these reasons I hold that the law does not allow us to entertain this plea, and that I ought not to go into the question whether the appellants can or cannot, on the evidence, now substantiate a case to the effect that the purchasers at any of the sales of the **[46]** 24th of December 1892 were not the certified purchasers, but Chaudhri Raj Kumar, though, had I to do so, I should be prepared to show that in none of the sales has it, in my opinion, been established that the real purchaser was any person other than the certified purchaser. On this matter I am quite in accord with the conclusions drawn by my brother Banerji from his careful and exhaustive analysis of the evidence.

I would therefore dismiss this appeal with costs.

BANERJI, J.—This appeal arises in a suit brought by the appellant, the Delhi and London Bank, Ld., for sale under a mortgage dated the 17th of December 1892, executed by one Chaudhri Partab Bhaskar *alias* Raj Kumar, who was the first defendant to the suit. He has died since

(1) 12 C. 204. (2) 12 C. 302. (3) 14 W. R. 111.

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the institution of this appeal, and is now represented by his widow. The amount secured by the mortgage is a lakh of rupees, and the property mortgaged consisted of the zamindari property of the mortgagor (whom I shall in this judgment designate by his commonly known name of Raj Kumar) in several villages. There is no controversy in this appeal between the mortgagor and the mortgagees, or in regard to the amount claimed as due upon the mortgage. The only question before us is whether the appellants are entitled to a decree for the sale of such of the mortgaged villages as are in the possession of the respondents other than the widow of Raj Kumar. Those villages were sold by auction on the 24th of December 1892 for arrears of land revenue due in respect thereof, and were purchased by the said respondents or their predecessors in title. Those respondents claim that under s. 167 of the North-Western Provinces Land Revenue Act, 1873, they have acquired the villages purchased by them free of all incumbrances, and that the plaintiff's mortgage is void as against them.

Their claim is resisted on behalf of the plaintiffs on two grounds. First, that the sale was illegal and void; and second, that the property was in reality purchased by the mortgagor Raj Kumar in the names of the different purchasers.

[47] I propose to consider the questions thus raised in the order in which they were aruged before us. The learned counsel for the appellants first addressed us on the second of those questions, and urged that Raj Kumar was the *de facto* purchaser of the property; that the persons in whose names it was purchased were his *benamidars*, and that as he was the real purchaser and the respondents acquired their title, if any, from him, they could not defeat the plaintiffs' mortgage. This plea of *benami* purchase was distinctly raised in the 9th paragraph of the plaint as amended, and was traversed by all the defendants in their written statements.

It has been contended before us on behalf of only one of the respondents, namely, Tulsi Ram, that the plaintiffs are precluded by the provisions of s. 184 of Act No. XIX of 1873 from urging that the certified purchaser made the purchases on behalf of some other person, namely, the mortgagor Raj Kumar. It is noteworthy that this contention was not raised before us by the learned counsel who appeared for the other respondents. In my opinion the contention is untenable.

Section 184 of Act No. XIX of 1873, so far as it bears on the present question, runs as follows:—

"Any suit brought, whether in a civil or revenue Court, against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." The above provisions are exactly the same as those of s. 260 of Act No. VIII of 1859 (the former Code of Civil Procedure), and are similar to the provisions of s. 317 of Act No. XIV of 1882 (the Code of Civil Procedure now in force), of s. 36 of Act No. XI of 1859 (the Revenue Sale Law for the Lower Provinces), and s. 21 of Act No. I of 1845 (the Revenue Sale Law—now repealed). The policy of all these sections is only to discourage *benami* purchases at auction sales, and it seems to me that the Legislature intended to give effect to that policy by forbidding the person who purchases property at auction in the name of another from bringing a suit **[48]** against the ostensible purchaser for recovery of the property from him on the ground that he is not the real purchaser.

Those sections do not declare a *benami* purchase to be illegal and absolutely void. This has been repeatedly held by their Lordships of the Privy Council.

In *Mussammat Buhuns Kowur* v. *Lalla Buhooree Lall* (1), their Lordships observed :—"It is well known that *benami* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not by any general measure declared such transactions to be illegal, and therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way and directs a contrary course." With reference to the provisions of s. 260 of Act No. VIII of 1859, which, as I have said above, are exactly in the same terms as s. 184 of Act No. XIX of 1873, their Lordships said :—"The object which the framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at judicial sales of their property." They added :—"The Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. Its provisions must have been framed on grounds of public policy * * * . That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment."

A similar view was entertained in *Bodh Singh Doodhooria* v. *Ganesh Chunder Sen* (2), in which their Lordships, speaking of the provisions of the same section, remarked :—"They were designed to check the practice of making what are known as *benami* purchases at execution sales, *i.e.*, transactions in which *A* secretly purchases on his own account in the name of *B*." This opinion was adhered to by their Lordships in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya* (3). Upon the **[49]** authority of their Lordships of the Privy Council, the highest authority on the subject, it must be held as settled that a *benami* purchase is not illegal; that such a purchase at an auction sale is not *ab initio* void; that the policy of the Legislature in enacting s. 260 of Act No. VIII of 1859 and similar sections is only to discourage *benami* purchases, especially by judgment-debtors; and that the Legislature intended to enforce that policy by forbidding the institution of suits by real purchasers against ostensible purchasers on the ground that the purchase made by the latter was on behalf of the former. Section 184 of Act No. XIX of 1873, like s. 260 of Act No. VIII of 1859 (which, as I have said above, is worded exactly in the same terms as s. 184), and like s. 317 of Act No. XIV of 1882, contemplates, in my opinion, a suit between the person claiming to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor, and that the certified purchaser is only the *benamidar* of the debtor.

Even in regard to suits of the former description, the Privy Council has held in two of the cases cited above that if the certified purchaser is the plaintiff, his claim may be resisted on the ground that he is only a *benami* purchaser. In my judgment, s. 184 of Act No. XIX of 1873 does not preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. If any other construction were

(1) 14 M.I.A. 496. (2) 19 W.R.C.R. 356. (3) 23 W.R.C.R. 358 = 2 I.A. 154.

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placed upon that section, it would lead to the perpetration of fraud, and such surely could not have been the intention of the Legislature. The object of discouraging and checking *benami* purchases at auction sales by judgment-debtors is evidently to minimise the chance of the judgment-debtors being able to defraud their creditors. If, therefore the creditor of a person who has purchased his own property at auction in the name of another, with the intention of preventing that property being availed of by his creditors be debarred of the right of establishing [50] the real nature of the purchase and showing that it was made on behalf of the debtor himself, the very object of the Legislature would be frustrated, and facilities would be afforded to the debtor for perpetrating the fraud which it was the intention of the Legislature to prevent. The case-law on the subject is entirely in support of this view. With reference to the provisions of s. 317 of the Code of Civil Procedure (Act No. XIV of 1882), it was held by my brother Aikman and myself in *The Uncovenanted Service Bank, Ltd.*, v. *Abdul Bari* (1), that those provisions contemplate suits between the certified purchaser and the benificial owner, and do not bar a creditor of the latter from asserting that the certified purchaser is not the beneficial owner. The same was the ruling of this Court in *Sohun Lall* v. *Lala Gya Pershad* (2), and in *Puran Mal* v. *Ali Khan* (3), in regard to s. 260 of Act No. VIII of 1859. The High Court of Calcutta also held the same view in reference to s. 317 of Act No. XIV of 1882 in *Kanizak Sukina v. Monohur Das* (4) and *Subha Bibi v. Hara Lal Das* (5). The same Court held in *Ameeronnissa Beebee* v. *Benode Ram Sein* (6) with reference to the provisions of s. 21 of Act No. I of 1845 (the Revenue Sale law—now repealed) that they were "not intended to protect purchases made in the name of third parties from the operation of decrees against the person beneficially entitled to the purchased property." In *Chundra Kaminy Debea* v. *Ram Ruttun Pattack* (7), that Court held, according to the head note, that "the object of s. 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing a claim against the true owner in respect of the *benami* property." Wilson, J., in delivering the judgment of the Court, observed:—"It would be a departure from the principle on which these sections are framed, and would introduce, instead of checking [51] fraud and dishonesty, if we were to construe the section as meaning that where a creditor of the real owner has to bring the property to sale, this sham title of the *benamidar* may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, an instrument of fraud." These remarks have my full concurrence, and apply exactly to the case before us. We have not been referred to any ruling, nor am I aware of any, in which the provisions of s. 184 of Act No. XIX of 1873 were considered. But, as I have already said, that section is similar to s. 36 of Act No. XI of 1859 (the Revenue Sale Law for the Lower Provinces), and the principle and policy of all these sections are the same. I may add that our attention has not been drawn to any case, reported or unreported, in which a contrary view was held. Upon the provisions of the law itself and upon the authority of the case-law on the subject, I am of opinion that s. 184 of Act No. XIX of 1873 does not preclude the plaintiffs from showing that the

(1) 18 A. 461, (2) 6 N.W.P.H.C.R. (1874) 265. (3) 1 A. 235.
(4) 12 C. 204. (5) 21 C. 519. (6) 2 W.R.C.R. 29. (7) 12 C. 302.

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respondents, or those from whom they derive their title, purchased the property in question *benami* for Raj Kumar.

[The judgment then went on to discuss the evidence as to whether the purchases in question were in fact made *benami* for Raj Kumar, and, finding on this point against the plaintiff Bank, thus concluded] :—

The only question which now remains to be determined is that of the validity of the auction sale held on the 24th December 1892. That sale has been impeached in the argument before us on two grounds : first, that upon the sale not being proceeded with on the 22nd December 1892, the sanction which was granted by the Board of Revenue for the sale of the villages lapsed, and a further sanction was necessary ; and secondly, that a fresh proclamation of sale should have been issued, and as no proclamation was issued, a sale could not legally be held on the 24th. Neither of these grounds is, in my judgment, a tenable and valid ground for holding the sale to be *ab initio* void. The sanction which the Board of Revenue grants for the sale of the patti or mahal for **[52]** arrears of land revenue remains in full force until the sale has taken place or the arrears have been paid up before sale, and the mere fact of a sale which has been duly ordered being for some reason postponed does not necessitate the obtaining of a fresh sanction. An alteration in the date on which a sale is to take place does not, under any provision of Act No. XIX of 1873, put an end to the sanction already granted.

As for the issue of a fresh proclamation of sale, it is not necessary to decide whether or not the law enjoins it. The omission to issue a proclamation was nothing more than an irregularity or a mistake in publishing the sale on the ground of which an application could be made to set aside the auction sale. There is nothing in the Act which limits the right of making such an application to the defaulter alone. In this particular case applications were made by Raj Kumar which were rejected. I am unable to hold that the non-issue of another proclamation of sale renders the sale a nullity.

For the above reasons, I am of opinion that the Court below has rightly held that the plaintiffs are not entitled to enforce their mortgage against the property which was sold by auction on the 24th of December 1892, the purchasers of such property having acquired it free of all incumbrances.

I agree in dismissing the appeal with costs.

Appeal dismissed.

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PRESENT.

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

(On appeal from the High Court for the North-Western Provinces.)

SRI MAHANT GOVIND RAO, (*Defendant*), *Appellant*, *v.* SITA RAM KESHO AND OTHERS, (*Plaintiffs*), *Respondents*, AND A CROSS-APPEAL.

[26th April and 24th June, 1898.]

Lapse to the British Government of a foreign State in ceded territory—Grant of lands therein—Construction of official correspondence—Obari, or abatement of revenue on the estate.

The State of Jalaun, in the territory ceded in 1804 by the Peishwa, lapsed in 1840 to the British Government. Before the lapse, the lands now in suit belonged to the chief, and were in the hands of managers on his behalf. The last manager, the ancestor of the present parties, remained, after 1840, in possession of the estate till his death in 1880, having been continued therein for life in 1852. In 1867 the Government directed the continuance of the entire estate to "the loyal members of his family."

Held, that no proprietary interest in the estate had been shown to have belonged to the ancestors when Jalaun was a principality; that all that could be claimed by the decendents was derived from the Government, which, after the lapse of the State, had the right, at their discretion, to control the descent of the estate, and had exercised this discretion. There had been no formal sanad; but on the true construction of the official correspondence, as to which the Courts below had differed, the Government first continued the possession of the ancestor for life, and afterwards conferred the inheritance, as to one moiety of the estate, upon the defendant, who was one of the sons of the original holder, and, as to the other moiety of the estate, upon the plaintiffs, who were the four brothers of the defendant, then living. The claim made by the plaintiffs, having been founded on a different title, was dismissed by the High Court. But this dismissal was accompanied by a declaration that the above grant had been made. This was now altered into a declaratory decree to the same effect, with the direction that inquiry be made as to who were entitled to the plaintiffs' moiety, and further directions were reserved.

[R.,—28 B. 153 (160); 6 Bom. L.R. 288 (290); D., 11 Bom. L.R. 606 (622)=3 Ind. Cas. 257.]

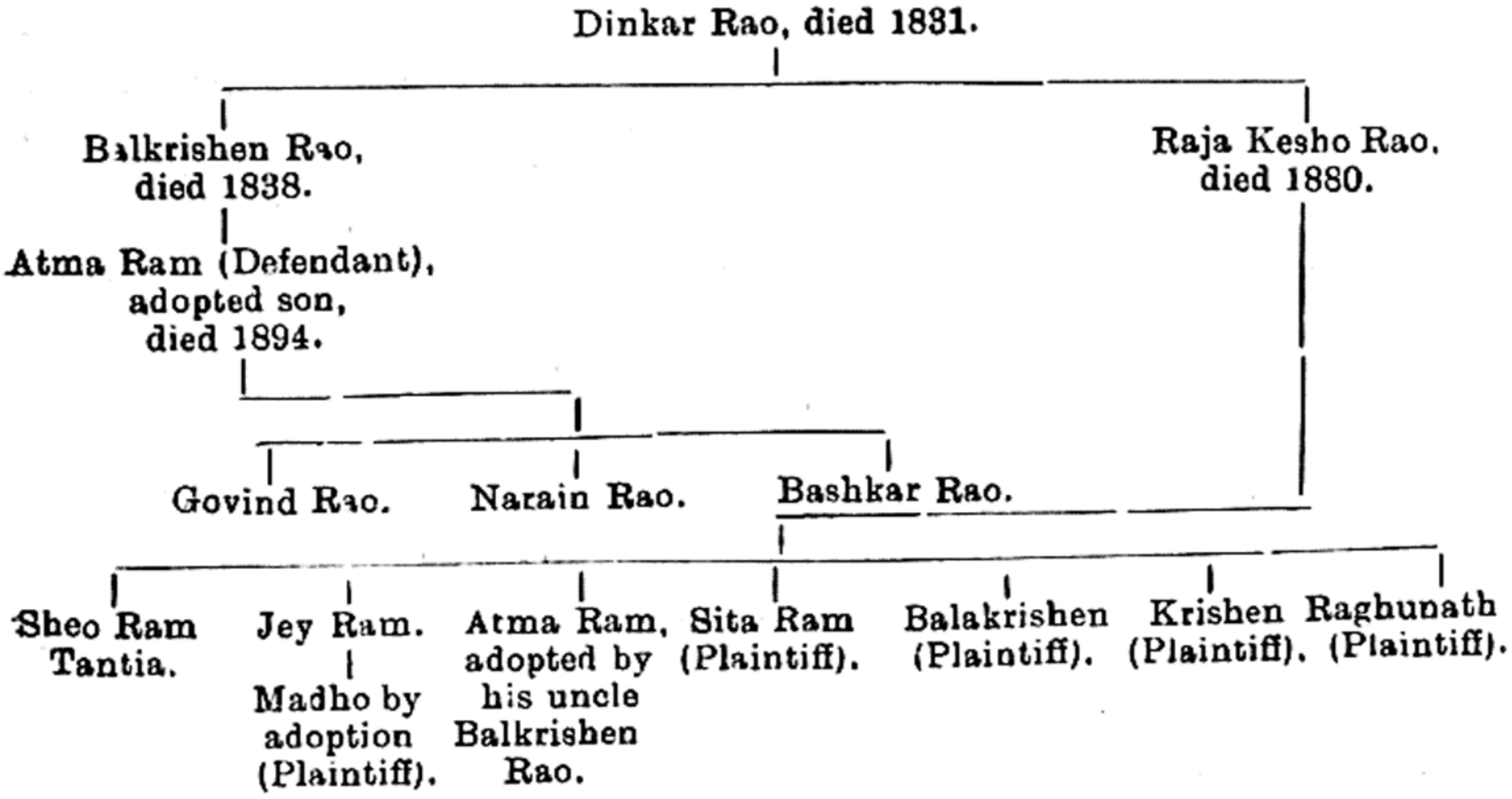
APPEAL and cross-appeal, consolidated, from a decree (30th July, 1890) of the High Court, reversing on second appeal a decree (14th January, 1889) of the Commissioner of the Jhansi Divison, who had decreed the plaintiffs' suit. The Commissioner had reversed a decree (21st April, 1888) of the Deputy Commissioner of Jhansi, who had dismissed the suit.

The plaintiffs, now respondents and cross-appellants, claimed in this suit possession from the defendant of the estate of Gur-[54]sarai which, before 1840, was in the territory of the Maharatta State of Jalaun, which was brought under the administration of British India in that year. The estate consisted of sixty villages, the fort and town of Gursarai, with land. It was termed in the plaint a riasat, and described as having been, before the lapse of the State, managed by two brothers on behalf of the Rao, who then ruled Jalaun. The one brother was the father of the parties, and the other brother had adopted the defendant.

A claim for moveables had been found by the first Court to be barred by limitation, and had been no further pursued. The defendant Atma Ram died in 1894, and for him was substituted, on this record, his son

Mahant Gobind Rao, now appellant, who was also guardian of two minor brothers.

The relationship of the parties is shown in the following table. All the facts appear in their Lordships' judgment.



The questions sought to be raised on these appeals related to alleged rights of inheritance in the estate held during his life by the late Raja Kesho Rao, those rights being contested between Atma Ram on the one side, and his brothers on the other; and [55] related to a declaration of their rights made by the High Court. The object of the defendant's appeal was to get rid of that declaration.

The title alleged in the plaint, which claimed possession, was that "the father of the plaintiffs in 1852, obtained from the Government the "estate of Gursarai on an obari of Rs. 22,500 a year as a reward for his "services"; that this estate had been managed by their father and his brother Balkrishen Rao, under the Raj of Jalaun, to which the estate belonged. Balkrishen, according to this plaint, had adopted the defendant, Atma Ram, and had died in the year 1838, before the acquirement of the property by Kesho Rao, and the defendant, being such adopted son, had no right to inherit from his natural father, Kesho Rao.

The defendant, in his written answer, set up that, before the grant of 1852 to Kesho Rao, the estate belonged to Balkrishen in proprietary right as ancestral property, and the defence was a title through Balkrishen. It was added that, with the sanction of the British Government, the defendant had been declared "owner, and possessor, and gaddi-nashin" of the estate in suit, which had been granted for life to Kesho Rao on an obari of the above sum, it having been recorded that after his death, "the "obari should be fixed in the name of this defendant."

The principal issues raised questions of the terms on which the estate was held under the British Government; as to whether it was ancestral property, or acquired by Kesho Rao; as to what the character and effect of his possession had been, and whether the obari was a holding on the terms of the reduction of the revenue below what might have been assessed on the estate; also as to the meaning of the orders of the Government made in 1852 and 1867, and whether the last was effective to confer estates of inheritance, and on whom.

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The Deputy Commissioner found that the brothers, Balkrishen and Kesho Rao, had no proprietary interest in Gursarai. There was, in his opinion, no evidence to show that the defend-[56]ant was in possession of any heritable zemindari interest in respect of which such a suit as the present could be maintained. According to this judgment the defendant held only an obari, or right to have remitted to him a part of the revenue that was assessable on the estate. The suit was, accordingly, dismissed.

That decision was reversed by the Commissioner who, however, concurred in the findings of fact by the Court below that, under the Jalaun State, the Gursarai estate was only under the management of the brothers, who had no proprietary interest in it, but had to account for the revenue collected by them, and pay the allowances assigned thereout; while the ruler of Jalaun could make rent-free grants within the estate.

Under ss. 584 and 585 of the Code of Civil Procedure, this finding was final, as was adjudged by the High Court, who, however, assented to it.

The Commissioner found that in 1852 Kesho Rao was in sole possession of the estate, as an obari, at Rs. 22,500 a year, receiving for his own benefit the difference between that sum and the annual yield of the estate. This privilege acquired by him was to pay a reduced jama, and was resumable by the Government, who could have raised, but allowed to remain as it was, the revenue to the full amount. To inherit the estate, subject to this, the plaintiffs, in the Commissioner's opinion, had title. Their right, as they were the heirs of Kesho Rao, prevailed over that of the defendant, who had passed from among the sons of the latter, having been adopted by Balkrishen, who died before Kesho Rao acquired the estate.

The defendant's appeal to the High Court was heard by a Divisional Bench, Sir JOHN EDGE, C.J., and YOUNG, J. In his appeal he abanddoned what he had claimed in his written statement, *viz.*, to be exclusively entitled to Gursarai as heir to Balkrishen. He now sought to maintain that the right to the inheritance, having been after the lapse of the State at the disposal of the Government, had been conferred upon himself; and that, in any event, he was entitled to half the properties in suit.

[57] The following contains that part of the judgment of the Chief Justice which is referred to at the beginning of the judgment of the Lords of the Judicial Committee.

"The estate of Gursarai had, prior to the death in 1840, of the boy-"chief of the family of Jalaun, formed part of the property of the Jalaun "State. On the death of the boy-chief without issue, in 1840, his "territories lapsed to the British Government.

"As appears from the judgment of the lower appellate Court, Dinkar "Rao, the father of Balkrishen Rao and Kesho Rao, had been in the "management or charge of the Gursarai estate from at least 1815 down to "his death in 1831. In 1815, Dinkar Rao made up the accounts of the "estate from 1775. Those accounts were returned for revision, and were, "fifteen years later, finally accepted by the then chief of Jalaun. On the "death of Dinkar Rao, in 1831, Balaji Gobind, the then chief of Jalaun, "wrote to Balkrishen Rao and Kesho Rao condoling with them on the "death of their father Dinkar Rao, and desiring them to continue in the "management of the fort and mahal.

"Gobind Rao Bala, who was the Chief of Jalaun from 1832 to 1840,

"wrote, ordering a payment of a pension which had apparently been "kept in arrear. The lower appellate Court considered that it appeared "from letters which were in evidence that the Gursarai family, that is, "Dinkar Rao and after him Balkrishen Rao and Kesho Roa, were treated "by the chiefs of Jalaun with high consideration, and that, probably, the "family of Gursarai was related to the chiefs of Jalaun.

"In considering what had been, prior to the lapse of the Jalaun "territories and estates to the British Government in 1840, the position "of the Gursarai family, Dinkar Rao and after his death Balkrishen Rao "and Kesho Rao, and their connection with the Gursarai estate, the "lower appellate Court has found:—'The evidence, however, establishes "'very clearly the fact that, under the Jalaun Government, the "'Gursarai family had no [58] proprietary right in the estate. They had "'to pay the allowances assigned to individuals upon that revenue, and "'the ruler of Jalaun was free to make rent-free grants within the "'estate.' There can be no pretence for suggesting that, prior to the "lapse of the Jalaun territories, including the estate of Gursarai, to the "British Government in 1840, Balkrishen Rao and Kesho Rao, or Kesho "Rao alone had acquired any proprietary or any heritable in the estate "of Gursarai. It would be contrary to rudimentary principles of "law to hold that an agent could, adversely to his employer, acquire "any proprietary or any heritable interest in an estate which he "was managing for that employer, and in respect of which he "was accounting to him. Indeed, the plaintiffs do not in their plaint "suggest, nor is there any evidence, that any heritable interest in the "Gursarai estate had been acquired by Kesho Rao or by any one prior "to 1852. It is obvious that the lower appellate Court, when it found "that from the date of the lapse of the Jalaun estates in 1840 until the "death of Kesho Rao on the 26th of October 1880, he had enjoyed the "income of the Gursarai estate upon the sole condition of paying Rs. 22,500 "annually to the British Government, did not mean by that finding that "prior to 1867, Kesho Rao had acquired any proprietary or any heritable "interest in the Gursarai estate; for in the opinion of the lower appellate "Court such proprietary title as was conferred on the family of Kesho "Rao was conferred by the order of the Secretary of State for India in "Council, conveyed by the despatch of the 28th of February 1867, "and not before. It is also clear from the judgment of the lower appel-"late Court that, from 1840 to 1852, Kesho Rao had been permitted to "enjoy the income of the Gursarai estate as an obaridar under a miscon-"ception on the part of the Government as to his true position and "rights."

It was then added that in 1852, when the orders of the Government, to the effect that Kesho Rao's rights should not be touched during his life, were communicated to the Governor-[59]General's Agent with a representation that the estate was an obari, what was then intended as the recognition of an old status was in fact, the recognition of a new one. That status was, however, merely for the life of Kesho Rao, and the estate did not carry with it heritable rights. The judgment also referred to a suggestion made to the Court that the existence of the obari gave rise to the inference of a heritable estate, already and before then, existing in Kesho Rao. There had, however, been no descent of the Gursarai riasat except in the family of the chiefs of Jalaun; and all the documentary evidence was against there having been before the lapse of the estate any inheritance conferred.

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The judgment passed on to the effect of the order of the Secretary of State of the 25th of February 1867, sanctioning the family arrangement between the sons of Kesho Rao, andconferring upon both the parties to this suit interests in the moieties of the eatate. That the British Government had the right to confer such interests, and did confer them, could not be doubted. On the findings of fact of the Courts below, and on the construction of the order last mentioned, the judgment was that the claim of the plaintiffs to exclusive possession must fail.

This was followed by the dismissal of the suit. With a view to settling the rights of the parties, a declaration was added that the defendant was entitled to a moiety only of the Gursarai estate, and that the plaintiffs were entitled, among themselves, to the other moiety.

The defendant appealed from this decree contending, among other objections, that this declaration should not have been made. The plaintiffs afterwards obtained special leave to cross-appeal, and now claimed that, as declared by the High Court, they were, at all events, entitled to the half of the estate under the order of the 25th of February 1867.

Mr. *Herbert Cowell* for the cross-appellants, respondents, obtained leave to begin, as their cross-appeal raised the whole question of title to the estate. In 1840 the estate came under the revenue administration, and until December 1852 the Agent to **[60]** the Governor-General in Bundelkhand controlled that administration for Jalaun. After that time the Government of the North-Western Provinces administered the District. Thereupon all mahals, or estates, would in ordinary course be brought under settlement, a survey would be made, an assessment of revenue would take place, and a jama be adjusted with those responsible. The rules to güide Collectors were complied and issued in 1842, showing clearly that those persons who were entitled to surplus profits, beyond the revenue demanded, would be the proprietors of the land in respect of which they engaged for the revenue. And as such proprietors they would, unless reason were assigned, possess the heritable estate. For the Gursarai riasat, or estate, Kesho Rao was admitted to engage for the revenue due thereon, and this he paid for forty years, from 1840 to 1880, in undisturbed possession. No village survey was made upon the estate, and in other respects it was treated as exempt from the ordinary course. The Government, in fact, instead of bringing Gursarai to an assessment at the full jama, on the half assets principle, allowed Kesho Rao to pay a privileged jama of Rs. 22,500 annually. This remission of revenue was generally attendant upon an interest in the land where admitted, and had not the Government been under an implied promise not to enhance that amount, they might have exercised their right to raise this jama. No such right was enforced. The inference was a just one that, inasmuch as the Government when they succeeded to the rights of the Jalaun State did not effect any confiscation whatever of any private right, there remained the proprietary right in the possessor, who was admitted on the above favourable terms to continue in the possession for forty years. The proprietor, as a general rule, was the person who engaged for the revenue, whether in a regular settlement or on special and exceptional terms, including such a holding as the one in question, locally known as an obari. It was argued that, as obaridar, Kesho Rao had a heritable property in the land. The Government had the right to assess it to the full revenue but there their right ended.

[61] Reference was made to Thomason's Direction's for Settlement Officers, published by the authority of the Government of India in 1848.

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The Raja Kesho Rao had held possession, exclusive and adverse, for a period beyond limitation, in virtue of a proprietary right by title, family arrangement, and by recognition of Government. Thus it appeared that, on his death in 1880, the plaintiffs, his sons, became entitled to possession of the riasat. The right of the Government was to bring the estate under assessment on full terms under the North-Western Provinces Land Revenue Act, XIX of 1873, Chapter III. The correspondence in evidence was referred to in order to show that the Government, not exercising any rights over the estate other than rights to the revenue, had left the proprietary rights to Kesho Rao, in whom they were at the time of the lapse, and had confirmed and granted the inheritance to him and his family. On the other hand, Atma Ram had not been shown to have acquired any right in the estate but such as he might have acquired under the grants made by the Government in 1852 and 1867 to Kesho Rao; and in virtue of such share in the succession as he might be found entitled to. If the contention failed that Kesho Rao's other sons could receive more than the moiety, which was declared in the Secretary of State's order of the 25th of February 1867, still that order itself was conclusive against Atma Ram's having a title to he whole estate. The High Court should not have dismissed the plaintiffs' suit, but, in order to gave effect to the declaration which the Court had made, the suit should have been decreed in their favour. The claim to such a decree would have been covered by the issues raised and the evidence adduced.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the appellant, were not called upon as to the title of Kesho Rao during his life, but as to the declaration added by the High Court at the dismissal of the suit. They urged that the plaintiffs had not come forward seting up the case, which the High Court had declared in their favour. They had, on the contrary, set up a claim which **[62]** was inconsistent with the declaration made after the dismissal of the suit. The appellant now only asserted his title to the moiety assigned to him in the order of the 25th of February 1867.

Mr. *H. Cowell*, in reply, contended that the relief granted in the declaration was right, upon the whole of the evidence, and the issues. There was no reason why the form of the decree should not be reconciled with the declaration.

Afterwards, on the 24th June, their Lordships' judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

The question raised in these appeals arises out of transactions following on the merger of the Native State of Jalaun into the dominion of the East India Company. The earlier history of the case, which goes back so far as the year 1840, is stated both succinctly and lucidly by the learned Chief Justice of Allahabad, and their Lordships need not re-state it except in bare outline until they come to the documents on which the Courts have differed. There has been very little dispute as to matters of fact; and now as the appeal to the High Court was a second appeal, the facts found by the Commissioner of Jhansi, the First Appellate Court, are conclusively found; but the three Courts below have taken different views as to the proper treatment of the case upon those facts.

The property in dispute is the riasat or estate of Gursarai, consisting of 60 villages and some other particulars. It was part of Jalaun, one of the subordinate Mahratta States or chieftainships within the large territory of Bundelkhand, the sovereignty of which passed to the Company

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by treaties with the Peishwa. The chieftainship was continued to the existing chief, called the Rao, and to his family, which became extinct in the year 1840. The estate of Gursarai was managed for the chief by Dinkar Rao, the head of a noble family, till his death in 1831. He had two sons, Balkrishen and Kesho. Balkrishen, having no issue, adopted his nephew Atma, one of Kesho's sons; and he died about the time of the change of dominion. When the **[63]** Company's officers came to make the requisite arrangements they found Kesho in occupation of the estate.

It is conclusively established in this suit that Dinkar Rao and his sons had no proprietary interest in the estate; they were only managers, accountable to their chief for the revenues and bound to deal with the estate as he ordered. It is probable that the officers of the Company who came to deal with the Jalaun lands were, as both the Deputy Commissioner and the Commissioner of Jhansi have intimated, under a misapprehension on this point, and thought that Kesho enjoyed some proprietary holding on a favourable rent, called locally an obari tenure. We need not examine this hypothesis very closely. It would account for some inaccurate expressions which occur in the official correspondence, but it does not affect the official acts of the authorities. Kesho made himself acceptable to the British Government, and, though no sanad or grant of any kind was made to him, his possession of Gursarai was continued, and his jama was assessed at the low rate of Rs. 22,500.

The earliest official document in the Record which relates to Gursarai is a letter dated the 8th of October 1852 from the Government of India to the Bundelkhand Agent.* The material passage is as follows:—

"Case No. 1, Book 7.—Family arrangements of this description, His Lordship in "Council observes, particularly where no deeds are executed, are in general open to "revision on the death of incumbents. The present incumbents has done good, "service, and his rights should not be touched during his lifetime, but on his death, "His Lordship in Council desires the case should be reported for orders."

There is no clue to the meaning of the terms "family arrangement" and "his rights." There may have been, as above observed, some misapprehension. But the important point to mark is that whatever benefit was given to Kesho, the present incumbent, was for his life only, and that everything beyond that was reserved for further orders.

Kesho has had seven sons. The eldest, Tantia, rebelled in the year 1857, but he must have made his peace with the Government **[64]** afterwards, though not admitted to favour. The second, Jey, is dead and is represented in this suit by his adopted son Madho, one of the plaintiffs. Atma was the third He was the sole defendant in this suit, and appellant in the first appeal to the Queen in Council, but he has since died and has been re-placed by his eldest son, Mahant Gobind. The four younger sons are plaintiffs in this suit. Two of them were born subsequently to the transactions now about to be mentioned.

On the 31st of July 1866 Atma and his four then existing brothers signed an agreement to the effect that Atma, being the descendant of Balkrishen, the eldest son of Dinkar, was sharer of half the riasat, and the four others were sharers in equal shares of the other half.† This agreement is of no legal validity in itself; if only because it was not registered; but it is of importance as leading up to and explaining that which has legal validity.

* [Rec. p. 47.—ED.]

† [Rec. p. 50.—ED.]

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On the 4th of August 1866 Major McNeile, then Commissioner of Jhansi, wrote to the Provincial Board of Revenue intimating that Kesho was anxious to obtain the orders of Government regarding the terms on which his estate was to descend to his sons*. The letter relates not only to Gursarai, but to other villages which it seems had been granted to Kesho for his loyalty during the Mutiny. The writer mentions the agreement between the brothers thus :—

"All parties interested in the matter have consented that Atma Ram shall take "half the estate on his father's death and the other four brothers one-eighth each, and "this may be considered as finally adjusted."

He then goes on to suggest what shall be done with what he calls the quit-rent, meaning the obari or reduced jama. He goes into many particulars which need not be detailed now because they are summed up in a document of higher authority, which was not produced to the two lower Courts, but was before the High Court.

That document is a letter from the Board of Revenue to the Government of the North-West Provinces†. The material passages are as follows :—

[65] "The Raja's eldest son, who was a rebel in 1857, has been set aside by a "family arrangement, duly executed by all parties and attested before the Deputy "Commissioner; and Atma Ram, the third son of the present Raja, has been declared "to be the heir to the Raj by virtue of an adoption on the part of his uncle, the late "Raja.

"The rebel son of the present Raja is consequently excluded from the succession, "and there would therefore appear to be no reason why the Government should not "authoritatively declare its intention in regard to the tenure upon which the estate is "to be held after the death of the present Raja.

"The proposals submitted by the Commissioner, and to which the Board see no "objection, are as follows :—

"The family compact is that Atma Ram shall succeed to the Raj and to one-half "of the estate as adopted son of the late Raja Balkrishen.

"That the other four sons of the present Raja shall each take one-eighth of the "estate.

"The Commissioner's proposals in regard to the estate, are :—

"1st. That the villages in Jalaun, granted in reward for the loyal services of the "family, be at once resumed.

"2nd. That on the death of the Raja, the present obari jama be raised from "Rs. 22,500 to Rs. 25,000 per annum, and be continued to the family in perpetuity.

"3rd. That this obari grant be continued on the condition of the estate remaining in joint undivided possession of the family, and that if any member of it should "cause his share to be divided off, such share be liable to assessment at full jama.

"4th. That Atma Ram be recognised as the heir to the title and privileges enjoyed "by the present Raja, the latter (privileges), which consist in the exercise of police and "judicial powers, to be dependent upon a proper exercise of them by the Raja for the "time being."

It may be observed here that the chieftainship of Atma in succession to Kesho did not form a term of the written agreement between the brothers, nor does it seem to have been at this time the wish of Kesho, himself‡. But both Kesho and his sons recognized Atma as the son of Dinkar's eldest son; and in later years Kesho treated him as head of the family.

There are no letters in the records showing the transmission of the proposals through the regular stages to the Governor-General in Council, and to the Secretary of State in Council. They were probably pure formalities. The answer of the **[66]** Secretary of State is dated the 25th of February 1867, and is as follows :—

"Having considered in Council the letter of Your Excellency's Government, "No. 190, dated 23rd November 1866, in which you suggest the continuance to the loyal

* [Rec. p. 90.—ED.] † [Rec. p. 143.—ED.] ‡ [Rec. p. 53.—ED.]

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"members of the family of Kesho Rao Dinkar of Gursarai in Bundelkhand, of the entire "estate now held by him, on the terms set forth by the Board of Revenue of the North-"West Provinces and Commissioner of the Jhansi Division, I have to signify to you the "ready assent of Her Majesty's Government to the indulgence now accorded to the "family of this meritorious chieftain.

"You will of course take measures to prevent the occurrence, on the death of the "aged chief, of any disputed relative to the succession of the second son."

Nobody has doubted that by the terms "second son" Atma is meant. It is to be observed that this letter is not only the effective source of whatever title Kesho's descendants have, but is also the most accurate statement of the true nature of the grant to them. Previous documents in 1852 and 1866 use some inapt and inaccurate expressions such as "family agreements," "rights," "descent" of the estate, and so forth. The facts as we now know them were, that such grant as was made, or can be implied, to Kesho was for his life only; that there was no heritable interest to descend; that the reversion was vested absolutely in the Secretary of State in Council; and that his grant is described with exact precision as a continuance to Kesho's family of the estate then held by him, and as an indulgence to them, on account, it is hinted, of his merits.

The record contains other letters which passed between Kesho, Atma, and the officers, but they do not give any additional light, unless it be to show that Kesho himself was quite conscious that the enjoyment of the property after his death was entirely in the discertion of the Government, only he claimed favourable consideration on account of his services. He lived long, and died in the year 1880. In 1878 or 1879 he entrusted the management of the estate to Atma, and declared him in a formal letter to be head of the family.* Some family disputes occurred, but were [67] composed, at least for the time, by the officials. On Kesho's death Atma took, or more probably retained, possession. The Government accorded the title of Raja to him, and the jama of the estate was raised, as intended, to Rs. 25,000.

How soon afterwards disputes took their present form is itself a matter of dispute, but at some time Atma refused to allow that his brothers owned shares in the estate, and they commenced this suit in March 1887. The plaintiffs claim the entire estate, as having been acquired by and inherited from Kesho; omitting mention of Tantia, and claiming to exclude Atma on the score that he had been adopted by Balkrishen. They refer to the agreement of 1866, but only to contend that it is void. The defendant Atma also claims the whole estate, on the ground that it belonged to Balkrishen and had descended from him. He referred to the agreement of 1866 and to some order of Government in so obscure a way that it is difficult to know what he founds upon them. In fact both sides put forward unsustainable claims, and neither put forward the true case. When, however, the issues came to be settled the effect of the proceedings of 1866 was brought into question. The issue was not clearly defined, but it was clear enough for both parties to go fully into evidence, and for the Courts to treat it as being the substantial point of dispute in the case.

The Deputy Commissioner, who formed the Court of First Instance, shows that the family of Dinkar Rao were simply managers, and that the plaintiffs failed to prove any grant except that of the Secretary of State, which he calls the sanad on which the defendant bases his claim to succession. He dismissed the claim with costs.

[* Rec. pp. 96, 97.—Ed.]

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On appeal the Commissioner found *that the estate was acquired by Kesho, and that the plaintiffs as heirs of Kesho had a title superior to that of the defendant; and he decreed accordingly. His view, to state it very briefly, was that in some way not now apparent the ownership of the estate had become absolutely vested in Kesho, and that the official correspondence and acts in 1852 and 1866 are explained by confining the **[68]** discretionary action of the Government to the obari or favourable jama. That view has been supported by Mr. Cowell in argument at this Bar. It is true, as before observed, that some expressions in official letters tend to imply that the writers ascribed to Kesho some proprietary interest which it is shown that he did not in fact possess. It is also true that the estate and the jama are not always clearly distinguished. But their Lordships find it impossible to read even one of the material letters without seeing that it refers to both estate and jama; and the correspondence as a whole would lose the greater part of its meaning if it were supposed that the Government was not exercising the discretion which it had to determine how the estate should be enjoyed after Kesho's death.

To this effect was the opinion of the High Court, which reversed the decree of the Commissioner and dismissed the suit, but with a declaration the effect of which and the reasons for it are explained in the following passage at the end of the judgment of the learned Chief Justice:—

"I would allow this appeal with costs, and dismiss the suit with costs in all Courts, "with this exception that in order, if possible, to prevent further litigation between "these parties, I would make a declaration, but without costs, that the defendant Atma "Ram is entitled to a moiety only of the Gursarai estates, and that the plaintiffs *inter* "*se* are entitled to the other moiety. It is true that no such declaration was asked for "in the plaint, and that, as a general rule, according to the decisions of their Lordships "of the Privy Council which have been cited to us, a relief, a right to which is not "disclosed in the plaint, and which is not asked for in the plaint, should not be granted. "Mr. Reid, who has appeared before us on behalf of the plaintiffs, has pressed us to "make a declaration, declaring the rights of the parties in the Gursarai estate, and has "informed us that the plaintiffs raise no question of their rights *inter se*. Mr. Reid also "asked us for a decree for possession to the extent which might be covered by the "declaration which we might make. This latter request we should not, in my opinion, "accede to. The estate has not been partitioned and this is not a suit for partition. "Should the estate be partitioned, then the plaintiffs can get possession of those portions "of the estate which may be allotted to them on partition."

The defendant's appeal is for the purpose of getting rid of this declaration.

[69] Their Lordships quite agree with the High Court that, as a rule, relief not founded on the pleadings should not be granted. But in this case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule. As between plaintiff and defendant the case has been thoroughly tried out. Indeed, Mr. Mayne for the defendant does not now dispute that the other members of the family are entitled to a moiety. It is quite right to make a declaration on the subject. But then their Lordships think that the terms of the declaration may be advantageously modified, and that the Court may found on the declaration an inquiry into the plaintiff's title.

According to the letter of the 17th of August 1866, paragraphs 6 to 10, † the persons entitled to the four shares, each to a separate share, are

* [Rec. p. 144—ED.]

† [Rec. p. 148—ED].

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"the other four sons of the present Raja." Two of those sons are plaintiffs, and one being dead is represented by his adopted son, who is a plaintiff. Tantia, the eldest, is passed over in silence. But under the family compact which is the basis of the grant, Tantia takes a share. It was his claim by primogeniture which was set aside, not his claim as a sharer, as is clearly shown by Major McNeile's letter.* What has become of his share does not appear. The two youngest sons took no share under the compact. It may be that by agreement of the brothers the plaintiffs are entitled as their Counsel state, but there is no proof, and no other allegation of it. The declaration should be founded on the grant by the Secretary of State, but that will not of course preclude the effect of any agreement between the brothers by which the younger brothers have been or may be admitted to a share, or other transfer of interest created.

The same reasons which support the declaration also show the propriety of giving in this suit such effect to the declared title of the plaintiffs as circumstances may admit. The High Court has [70] made a declaration in favour of the plaintiffs, but it has dismissed the suit. Neither Atma Ram nor his son has shown any disposition to yield any thing which the law does not exact. If the title of the plaintiffs is still disputed, they must bring a new suit, which would certainly increase expense; and in which, considering the peculiar nature of the grant, the lapse of time, and the uncertainty whether a declaration in a dismissed suit can supply a fresh starting ground, the plaintiffs would run substantial risks of miscarriage. Instead of dismissing the suit, the better course will be to direct an inquiry who are the persons now entitled, and to reserve further directions, under which it will probably be found possible to place them in legal possession and so to terminate this unfortunate litigation. The High Court has quite rightly refused to make any order for possession under present circumstances.

The decree does not notice the personal position of Atma, as head of the family. He is now dead, and it does not appear that the title of Raja or any other position of dignity which the Crown may confer has been conferred on his successor. The provision against partition appears also to concern the Treasury alone, which was not willing to continue the favourable jama to any sharer who would not hold his share in an undivided state.

With regard to costs, their Lordships think it just that both parties should bear their own. Both have made excessive demands. The plaintiffs have persisted in theirs up to the present moment.

The defendant persisted in his before the three Lower Courts, though in the High Court he made an alternative case that he was at all events entitled to a moiety. Even now, though he does not claim the entirety, his whole appeal is grounded on his objection to any declaration as to the moiety which is not his. And he has excluded his co-sharers at least till the High Court judgment was delivered, if not later.

Though their Lordships agree with the High Court on the substance of the case, and indeed are doing little more than to apply the views of the learned Judges in a more ample way, it will be simpler in point of form to discharge their decree and to [71] substitute a decree to the following effect:—Reverse the decree of the Commissioner of Jhansi. Declare that the defendant Atma Ram was entitled to a moiety only of the Gursarai estate, and that his successors in title are now

* [Rec. p. 91—ED.]

entitled to a like moiety. Declare that the other moiety belongs to the persons entitled thereto by virtue of the letter of the Secretary of State in Council, dated the 25th of February 1867, and according to the terms of the letter of the Board of Revenue dated the 17th of August 1866 (that is to say) the four brothers of Atma then living referred to in the last-mentioned letter or those who represent them in title. Inquire who, having regard to the above declaration, are either directly or by inheritance, transfer, agreement or otherwise entitled to the last-mentioned moiety. Declare that as regards all proceedings in the Courts below, the parties are to bear their own costs respectively. Reserve further directions, and costs subsequent to this decree.

As regards these appeals, both parties are in the wrong and they must bear their own costs.

Solicitors for the appellant and cross-respondent: *Messrs. Pyke and Parrott.*

Solicitors for the respondents and cross-appellants: *Messrs. Ranken, Ford, Ford and Chester.*

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PRESENT.

Lords Watson, Hobhouse and Davey, and Sir R. Couch.

On Appeal from the High Court for North Western Provinces.

SHAM SUNDAR LAL AND OTHERS, (*Plaintiffs*) *Appellants v.* ACHHAN KUNWAR AND ANOTHER (*Defendants*), *Respondents.* [24th June and 27th July, 1898.]

Estate of Hindu widow, or daughter—Powers to alienate family estate—Ancestral family trade—Powers of manager.

The estate of a Hindu family, in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account.

Held that the restriction upon her power to alienate remained the same, notwithstanding the trade, without being relaxed on that account.

Justifying necessity, or good grounds, after due inquiry, for belief in its existence, would have been required to render valid an alienation made by her of the family estate.

[72] The case of a widow, or of a daughter under such circumstances, differs from that of the manager, or head of an undivided family, who manages an ancestral trade, and has a certain power to pledge for the requirements of the business. The validity of his charge, however, on the family estate, where there is a minority, or non-consent, among the members of the family, depends on proof that the charge was necessary, or was believed to be so by the mortgagee, after due inquiry.

The manager, appointed by the daughter, on whom the family estate has devolved, has no larger power to pledge the ancestral assets than his principal.

It is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman, holding her limited estate, to plead or to prove such absence: but it is for the plaintiff to state and to prove all that will give validity to the charge.

Lala Amarnath Sah v. *Rani Achhan Kuar* (1) referred to and followed.

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(1) 19 I. A. 196 = 14 A. 420.

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[F., 31 A. 53=6 A.L.J. 49=A.W.N. (1908), 284 ; 35 B. 169 (178)=12 Bom. L.R. 910= 8 Ind. Cas. 625 ; 9 C.L.J. 50 (52)=1 Ind. Cas. 590 ; **Rel.**, 32 A. 88=7 A.L.J. 11 =4 Ind. Cas. 144 ; **R.**, 27 A. 97 (104)=1 A.L.J. 435 (442) ; 33 A. 342=8 A.L.J. 474=13 Bom. L.R. 384=13 C.L.J. 441=15 C.W.N. 466=21 M.L.J. 641=9 M L. T. 465=(1911) M.W.N. 445=10 Ind. Cas. 274 ; 26 B. 206=3 Bom. L.R. 738 ; 31 B. 165 (173)=8 Bom. L.R. 781 (786) ; 32 B. 577 (580)=10 Bom. L.R. 927 (929) ; 29 C. 355 (358) ; 31 M. 366=18 M.L.J. 309=3 M.L.T. 355 ; 7 Bom. L.R. 172 ; 8 Bom. L.R. 252 ; 10 Bom L.R. (210) (218) ; 9 C.L.J. 453=13 C.W.N. 544 =1 Ind. Cas. 434; 17 C.L.J. 499=17 C.W.N. 701 (730) ; 2 Ind. Cas. 865 ; 14 M. L.J. 175 ; 1 N.L.R. 66 (68) ; 8 O.C. 21 (25) ; 10 O.C. 277 (279) ; 14 O.C. 170 ; 9 P.L.R. (1904) 17 (26) ; **Expl. & D.**, 10 C.L.J. 263=3 Ind.Cas. 178 (180) ; **D.**, 2 A.L.J. 436 (441) ; 8 O.C. 349.]

[N B.—See in this connection 17 A. 125 whereon this appeal has arisen.—*Ed.*]

APPEAL from a decree (15th January 1895) of the High Court, reversing a decree (9th June 1892) of the Subordinate Judge of Bareilly.

The plaintiffs now appellants were bankers in Philibhit. The defendants, respondents, Achhan Kunwar, and Inayat Singh, mother and son, were the daughter and grandson, of Raja Khairati Lal, who resided in Bareilly. He died without a son in 1866. The daughter, who was married to Raja Lalji, succeeded for her daughter's estate on the death of her father's widow, Hulas Kunwar, on the 22nd of June 1878. The son, Inayat Singh, was the only surviving, next reversionary heir, expectant on the death of his mother. She had one other son, Shamsher, who died before this suit was brought.

Besides owning zemindaris, Raja Khairati Lal had a hundi business, and lent money. This, after his death, was carried on by Raja Lalji, for the benefit of the widow. He was the husband of Achhan Kunwar, and he afterwards managed the business for her. He died in 1889.

This suit (2nd June 1890) was brought to enforce two mortgages securing sums of money, together with interest. The first was dated the 2nd of December 1877 ; the second, the 1st of April 1881.

[73] On the 5th of March 1877, a mukhtarnama to Raja Lalji was executed by the widow and the two respondents. This authorization came into question in 1886-87 in *Amarnath Sah* v. *Achhan Kuar* (1).

The facts of the case, and the contents of the documents, are stated in their Lordships' judgment.

The main question on this appeal related to Achhan's having possession, as a daughter, for life, of a family inheritance, which included an ancestral trade, the latter having been carried on, on her behalf, by a manager. The question was whether the restriction on her power, as a daughter, to charge the inheritance with mortgages, was or was not relaxed by reason of the requirements of the family business, and her position in reference to it.

In a joint answer the two defendants set up that they had no knowledge of the mortgage of the 2nd of December 1877, which was signed by Raja Lalji only, and that his signing was unauthorized by them. They stated that the mortgage of the 1st of April 1881, had been sealed by them under his influence, and without their knowing that a liability upon the family estate was thereby acknowledged.

The Subordinate Judge found, that Raja Lalji was duly authorized by the defendants, now respondents, in regard to the first of the two mortgages, and that it was supported by good consideration. He found that

(1) 19 I.A. 16=14 A 420.

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the second, also, had been sealed by them of their own free will and consent. He decreed the plaintiffs' claim.

On appeal (1), the High Court (Sir John Edge, C. J., and P. C. Banerji, J.,) held that Achhan Kunwar, who signed the muktarnamah of the 5th of March, 1877, understood that she was signing a document which empowered her husband, Raja Lalji, to act as the agent of the family in the management of the zamindaris and family estate, but no more. That its object and scope were not explained to any of the persons who executed it, and that neither [74] of the respondents was bound by it. In addition to this, the Court found that it was not proved that there was any necessity for borrowing the money secured by the mortgage of the 2nd of December, 1877, or that those who were stated to have lent it had made due inquiry as to the necessity for the loan. With regard to the mortgage of the 1st of April, 1881, the appellate Court found that no receipt of consideration by the respondents had been shown, nor had it been proved that the document was ever explained to Achhan Kunwar. They found that Inayat "blindly executed it at the bidding of his father Raja Lalji," but added "even if it were to be assumed that he understood its scope "and effect, that would not entitle the plaintiffs to the relief claimed by them."

They found that Inayat had no present vested interest in the estate. As a reversioner he had no power to sell, or to mortgage, his interests in expectancy; *Ram Chunder Tantra Doss* v. *Dhurmo Narain Chuckerbutty* (2) was referred to on this point.

They found no proof that the daughter, or her son, or the family property, were under any liability in respect of any part of the money, the alleged consideration for the mortgage of the 1st of April, 1881, or that either of the two had received any of it. They found that mortgage not to be binding upon Achhan Kunwar, or her estate as a Hindu daughter. Also, they found that Shamsher, her son, was then alive, and had an equal interest with Inayat, in expectancy; neither of them being capable of binding that prospective interest. There was no valid mortgage at all: and further, that advantage had been taken of Inayat's inexperience. They decreed the appeal, dismissing the suit. The judgment of the High Court will be found reported at length in I.L.R. 17 All., at pp. 127 *et seqq.*

The plaintiffs having filed this appeal—

Mr. *Cozens Hardy*, Q. C. and Mr. *H. Cowell*, for the appellants, argued that the respondents were bound by the mortgages in suit which operated as charges on the family estate. [75] There had been sufficient evidence that Rani Achhan Kunwar had, as well as her son, understood the documents which they had sealed. They could hardly have been under the belief that the mukhtarnama of the 5th of March, 1877, which empowered Raja Lalji to act for them, was only to manage the zamindaris and general property left by Raja Khairati Lal, and not raise money for the family business. But the main point was one upon which there should have been an issue, as being the important question really in contest, what was the implied authority of the agent and manager Lalji to pledge the assets of the estate for the conduct of the family business in hundis and money dealings? The assents of the respondents had been taken to these particular transactions, from abundant caution, to obtain the concurrence of the members of the

(1) See 17 A. 125.

(2) 15 W.R. F.B. 17.

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family having interests in the inheritance; but the engagement in trade must be regarded as the source, at once, of the authority and the necessity. In such a case third parties dealing with the firm, carried on after the death of the founder, could not know the precise rights vested in each member of the family partnership, but they would regard the manager as empowered to act in the matter of raising money for the requirements of the business. The managing member of a family under the Mitakshara, where that family was a trading firm, was entrusted with the full conduct of its affairs, though some of the members might be minor in age. Trade liabilities affected the family estate. Thus a question had arisen of partnership liability and agency.

Reference was made to—

Ram Lal Thakursidas v. *Lakhmichand Muniram* (1), *Johurra Beebee* v. *Sreegopal Misser* (2), *Joykisto Cower* v. *Nittya Nund Nundy* (3), *Bemola Dassee* v. *Mohun Dassee* (4), *Dowlut Ram* v. *Mehr Chand* (5), *Samalbhai Nathubhai* v. *Sameshvar Mongal* (6).

[76] Mr. *J. D. Mayne* for the respondent Achhan Kunwar, who alone appeared, argued that the suit had been rightly dismissed. There was no sufficient evidence of the defendants' having understood the effect of either of the documents, and one of them was a parda-nashin. The mukhtarnama under which Lalji professed to act in executing the mortgage of the 2nd of December, 1877, was not understood by Achhan Kunwar, and the transaction was not binding on Inayat, who was a minor at the time. The mortgage of the 1st of April, 1881, was without any more consideration given than what was already contained in security already invalid as against the daughter who sealed it.

There was no evidence that Achhan Kunwar knew anything about this second bond. Nor that Inayat Singh knew what he was executing, nor that he received such explanations as should have been given in the case of a son who had recently reached majority and was acting under his father's directions.

As to the question of necessity, the burden of proof had been entirely on the appellants to prove a justifying necessity. But on all the facts in evidence it was clear that the finding of the High Court was correct as to the absence of such necessity. Some of the items in the account belonged neither to the family expenses nor to the liabilities of the firm; and it was part of the appellants' case to establish affirmatively the necessity of the loan; *Lala Amarnath Sah* v. *Rani Achhan Kuar* (7).

The authority of Raja Lalji could not be implied from his position as manager. The power to mortgage this ancestral family estate could only be founded on proof of recognised necessities. None had been shown to exist. Therefore neither the principal in this case, holding the daughter's estate, nor the agent, had power to bind by their direct alienation any part of the family estate inherited from Khairati.

Mr. *Cozens Hardy*, Q. C., replied. Afterwards on the 27th of July, their Lordships' Judgment was delivered by Lord Davey.

JUDGMENT.

[77] On the 2nd June 1890, the present appellants brought their suit in the Court of the Subordinate Judge of Bareilly, against the present

(1) 1 B.H.C.R. App. LI at p. LXXI. (2) 1 C. 470. (3) 3 C. 738.
(4) 5 C. 792 (805). (5) 14 I.A. 187=15 C. 70.
(6) 5 B. 38. (7) 19 I.A. 196=14 A. 420.

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respondents for Rs. 32,858-8-6 on account of a bond, dated the 2nd of December, 1877, and Rs. 53,485-4-6 on account of a subsequent bond, dated the 1st of April, 1881, in all Rs. 86,338-13* and to enforce payment by sale of the property purporting to be hypothecated by the two bonds. The First Court found that the personal remedy upon the bonds was barred by limitation, but that the bonds were effectual against the property. The High Court held that the property was not bound, and dismissed the suit.

The property sought to be sold for payment of the bond debts was formerly the estate of Raja Khairati Lal, who died in 1866. He seems to have carried on during his lifetime a business of money-lender and dealer in hundis. He left no sons, and his widow Rani Hulas Kunwar, on his death, succeeded to a widow's estate in his property. He left one daughter, the respondent Mussamat Achhan Kunwar, who was married to Raja Lalji and had two sons, Inayat Singh, the other respondent and Shamsher, who died sometime after the 1st April 1881, the date of the second bond. Hulas Kunwar died on the 22nd January 1878, and Lalji died about 1888. Lalji, during his lifetime, seems to have managed the property for Hulas Kunwar, and after her death for his wife Achhan Kunwar, who on death of her mother succeeded to her father's property for a daughter's estate. Inayat Singh though named as a respondent did not appear on this appeal.

On the 5th of March, 1877, Hulas Kunwar and the two respondents executed a mukhtarnama of that date, whereby they purported to appoint Lalji as the mukhtar-a'am and to empower him on their behalf (amongst other things) to borrow money and execute documents or hypothecate, mortgage, sell or otherwise transfer moveable and immoveable property.

The bond of the 2nd of December 1877, purports to be made by Raja Lalji, son-in-law, Hulas Kunwar wife, and Achhan Kunwar daughter, and Inayat Singh, grandson, heirs of Raja Khairati **[78]** Lal, and contains an hypothecation of certain property formerly of Khairati Lal and described as "in our possession and enjoyment as proprietors" for Rs. 10,000, of which Rs. 7,683-3 is deducted on account of debts previously due to the creditors and Rs. 2,311-13 is said to be paid in cash. It is signed by Lalji alone, and it is at least doubtful whether such an execution would be a valid exercise of the power of attorney, but the Counsel for Achhan Kunwar declined, very properly, to insist upon this point.

The second bond of the 1st of April 1881 purports to be made by the same parties other than Hulas Kunwar (who was then dead) under the same description as in the previous bond. It commences with a declaration that Rs. 20,000 have been found payable by them to the creditors on account of prior debts and interest on two bonds for Rs. 30,000 as detailed below in addition to the principal amount of the two bonds aforesaid, and contains a statement that "the creditors have no deed of any "sort other than the bond dated the 25th of May 1877 and the bond "dated the 2nd of December 1877, which are payable, and this bond." The zamindari property hypothecated is admittedly part of the estate of Khairati Lal. The mortgagors "profess to bind all rights which we possess or may possess in future." The Rs. 20,000 acknowledged to be owing is thus made up:—

[N.B. * It is true that the suit was for Rs. 86,338-13. But the figures that go to make up this amount, as given here (Rs. 32,858-8-6 and Rs. 53,485-4-6) seem to be incorrect.—ED.]

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	Rs.	A.	P.
Interest on two bonds, less previous payments	8,100	0	0
In respect of the Rukka dated 1st December 1880 :—			
Principal	10,475	0	0
In respect of the interest on the amount of the Rukka	1,300	14	0
In cash	124	2	0
	20,000	0	0

[79] And in a note to the Record* the sum of Rs. 10,475 is explained to be made up as follows :—

	Rs.	A.	P.
On 22nd June 1879 for revenue	2,000	0	0
On 5th November 1879 to pay interest to Intizam Begam	1,575	0	0
On 17th May 1880 to defray expenses of daughter's marriage	2,000	0	0
On 2nd August 1880 to pay interest to Moti Ram Sah	4,000	0	0
On 9th October 1880 to pay interest to Intizam Begam	900	0	0

This bond is executed by Raja Lalji by the affixing of the seal of Achhan Kunwar and by Inayat Singh then of age. It should be mentioned that by a previous power of attorney, dated 1st August 1878, Inayat Singh, Achhan Kunwar and Lalji in his own right and as father and guardian of Kunwar Shamsher Bahadur, appointed Lala Shankar Sahai their general attorney and agent with power (amongst other things) to have documents executed by them registered. The bond of 1881 was registered on the admission by this person of the execution, completion and receipt of Rs. 124-2 in cash on behalf of the executants.

What was the position of the parties at the respective dates of the execution of these two bonds? At the date of the bond of 1877, Hulas Kunwar as the heir of Khairati Lal was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and would, if she survived, her mother become her father's heir and take the estate subject to the same restriction. Inayat Singh was one of the two male heirs next in succession to the restricted estates who would be full owners in the event of their surviving their grandmother and mother. Inayat was moreover a minor. At the date of bond of 1881, Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Inayat Singh was one of the heirs apparent. At both dates [80] Inayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Inayat Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Inayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To

* [p. 58 - ED.]

give validity to the bonds as against the estate of Khairati Lal the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds or either of them, and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption from such concurrence as there was of Achhan Kunwar and Inayat Singh in the first bond or of Inayat Singh in the second bond that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect. There is a complete absence of any such evidence in the present case. Achhan Kunwar was a purdahnashin lady. In her evidence she states that she remembers having executed a mukhtarnama in Lalji's name with a view to manage the villages. She did not know her estate was encumbered, and came to know of the existence of debt when the Paharwalas filed a suit. She does not know the mortgagees. She did not borrow any money from them and never heard of Lalji having borrowed money from them, but since the filing of the present suit she came to know that a demand was made upon herself and her son. "Raja Lalji never consulted me "in matters relating to the management of the estate. He was my elder "and malik, and out of respect for him I could not interfere." Inayat Singh admits the [81] execution of the power of attorney in 1877, but says that at that time he had not sufficient maturity of understanding to judge of what he was writing. Indeed, as already mentioned, he was a minor at the time. He says he signed the document of 1881 because filial duty prevented him from disobeying his father's order. So long as Lalji was alive the income of the ilaka was brought to and spent by him. His parents and he lived together. There is no evidence that either Achhan Kunwar or Inayat Singh had any advice on the matter independent or otherwise. It is unnecessary to pursue this topic further.

Nor is there any proof of any legal necessity for borrowing on the credit of Khairati's estate or of any such representation made to the creditors as could give validity to either of the bonds sued on. It is unnecessary to discuss the evidence that was offered because the learned Counsel for the appellants very properly admitted that if it was incumbent upon them to prove a legal necessity for the borrowing the appellants had failed to do so, but they contended, first, that the absence of necessity was not pleaded in the written statement of the defendants and there was no issue raising the question, and, secondly, that Khairati's estate included the business of a money-lender or dealer in hundis which was carried on after his death for the benefit of his heir under the management of Lalji, and that as such manager Lalji had by Hindu law a power to pledge any part of the estate for the purposes of the business.

As regards the bond of 1877 their Lordships think that paragraph 3 of the written statement of the defendants sufficiently, though not in such precise or accurate language as is desirable, raises the absence of necessity for the borrowing as a defence, and that the 3rd issue as settled by the Judge after presentation of the written statement is directed

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to the same point. But their Lordships observe that in a suit like the present on a bond made by a person with restricted power of alienation the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to [82] allege and prove the circumstances which alone will give validity to the mortgage, and they repeat what was said in the judgment of this Board in an appeal arising out of a suit on another bond executed by Hulas Kunwar (1):—

"When the issues were settled this point was treated as belonging to "the defence and was raised in the form of a question how far the objec- "tions resting on the absence of necessity were tenable. It is obvious "that such a mode of raising the question is incorrect, because it appears "to assume that it was for the defendants to show absence of necessity; "whereas the rule is that a mortgagee claiming title under a Hindu widow "as against her husband's heirs should prove the validity of his mort- "gage."

Moreover it appears from the record that the question of necessity was explicitly raised in the first reason of the present respondents for their appeal to the High Court*, and the present appellants, so far from complaining that the question was not in issue on the trial before the Subordinate Judge, accepted the issue, and in their 3rd and 6th reasons§ contended that upon the evidence it had been established that the consideration of the bond of 1877 was advanced for legal necessity after due and proper inquiry, and as regards the consideration of the bond of 1881 also that it was advanced for meeting family necessities and in any case under the *bona fide* belief that it was required for such purposes and after due and reasonable inquiry. And the case was dealt with in the High Court upon this footing.

Their Lordships think that the second point made by the appellants is unsupported either by reason or authority. The owner of the business at the time of the execution of the bond of 1877 was Hulas Kunwar, and Lalji was managing it as her agent only and for her benefit, and she could not of course confer on her agent any larger power than she had herself, and there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business. [83] The authorities quoted by Mr. Cowell have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family, and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited, including that of *Doulut Ram* v. *Mehr Chand* (2). To use the language of Mr. Justice Pontifex in a judgment quoted in that case, the touchstone of the authority is necessity.

These considerations dispose of the appeal so far as it rests on the bond of 1877 alone. But the appellants say that the earlier bond was

[* Rec. p. 74, ED.]
[§ Rec. p. 95, ED.].
(1) 19 I. A. 196.
(2) 14 I.A. 187.

confirmed by the bond of 1881. It remains to consider the validity of this bond as against Khairati's estate represented by the two respondents. By the 5th paragraph of their written statement the defendants plead that they signed the bond at the earnest request of Lalji, whose position in the family influenced them, and that at the time of execution of the said bond they did not understand the nature of the document, nor were they informed that the debt incurred or admitted under the bond in question was actually payable and was such as would create liability upon the estate of Khairati Lal. One of the issues upon which the case was tried was founded upon this paragraph of the defence. The evidence of the two respondents has been already referred to.

The admission of the bond of 1877 is contained only in the statement that the creditors have no deed except the bonds of the 25th of May 1877 and the 2nd of December 1877 "which are payable," and this bond. The effect of these apparently innocent [84] words was certainly not likely to attract the attention or arouse the suspicion of the executants of the bond unless it was specially explained to them.

The Subordinate Judge on this issue found in favour of the appellants. The High Court reversed this finding and found that the bond of 1881 was not explained to Achhan Kunwar and that it is not proved that she understood that bond or the liabilites it purported to create or admit. The Court also found that it was not proved that there was any family necessity for the making of the bond of 1881 or that the mortgagees satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond.

It will be convenient to examine the nature of the consideration for the bond of 1881. The first item is made up of compound interest on a bond dated the 25th of May, 1877, and the bond of the 2nd of December, 1877. There is no evidence whatever that the bond of the 25th of May, 1877, was binding upon Khairati's estate or upon either of the defendants—and their Lordships have already expressed their opinion that the bond of the 2nd of December was not binding on Khairati's estate. There is no proof that the sum of Rs. 2,000 was owing for revenue, or if it were that it was necessary to borrow in order to pay it. Then come two items for interest to Intizam Begam. The principal witness for the appellants was Nand Kishore, the father of Gobind Prasad one of the appellants. He states that Lalji and Inayat Singh asked him to get some more money advanced to them and accordingly he got Rs. 30,000 advanced to them by Intizam Begam, wife of Asman Khan, and that she had obtained a decree, but against whom is not stated. Even assuming that Nand Kishore's statement may be relied on, it does not prove that Intizam Begam's debt bound the estate of Khairati Lal, but their Lordships observe that no question on this point was addressed to Inayat Singh in cross-examination, and Nand Kishore's statement is uncorroborated. There is no explanation why the expenses of "daughter's marriage" (which apparently means a daughter [85] of Lalji and Achhan Kunwar) should be paid out of Khairati's estate instead of by her father Lalji. And lastly the payment to Moti Ram Sah was for interest on the bond which was decided not to constitute a charge on Khairati's estate in the case already referred to and reported in 19 Ind. Ap. 196. It does not appear to whom the small balance of Rs. 124-2 was paid, and it is conjectured that it was applied in paying the cost of the stamp. It is therefore not proved that any part of the debt which Achhan Kunwar purported to admit and which formed the consideration of the bond of 1881 was a debt for which Khairati's

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estate was liable, and as to the greater part of it there is proof that Khairati's estate was not liable for it.

The respondents' admission could not make it a debt of Khairati, or one for which his estate is liable, and that is the only question in this suit. It was not contended that the bond could be enforced against Achhan Kunwar's interest in the income of the estate during her lifetime, but their Lordships think it right to add that there is no proof, and having regard to the relation both of Achhan Kunwar and Inayat Singh to Lalji, and to her own evidence and that of Inayat Singh which has been quoted above, the form of the professed admission of the bond of 1877 and to all the other circumstances of the case they do not believe that the nature and effect of the bond of 1881 or of the admission of liability for past debts contained in that bond was ever explained to or, properly appreciated by either of the respondents, and they do not differ from the finding of the High Court on this issue.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the appellants must pay the costs of the respondent Achhan Kunwar, who alone appears on this appeal.

Solicitors for the appellants: Messrs. *Ranken, Ford, Ford* and *Chester.*

Solicitors for the respondents: Messrs. *Pyke* and *Parrott.*

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21 A. 86 = 18 A.W.N. (1898) 162.

[86] REVISIONAL CRIMINAL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* MAN MOHAN LAL AND ANOTHER.*
[11th August, 1898.]

Criminal Procedure Code, ss. 110, 121, 514, *sch. V., Form No. XLVI—Security for good behaviour—Conviction of principal—Forfeiture of bond—Mode of proving conviction.*

Where a person has given a security bond under s. 118 of the Code of Criminal Procedure, for the good behaviour of another, and the principal during the term for which the bond is in force, is convicted of an offence punishable with imprisonment, the production of the conviction and, if necessary, of proof of identity of the principal, is sufficient evidence upon which the Magistrate is authorized to issue notice to the surety under s. 514 of the Code, to show cause why the penalty of the bond should not be paid. In such case, it is for the surety to show what cause he can. It is not incumbent on the Magistrate to re-summon the witnesses on whose evidence the principal was convicted and practically to re-try the the case against the principal.

[F., 12 Cr.L.J. 404=11 Ind. Cas. 588=226 P.L.R. 1911=35 P.W.R. 1911.]

THE facts of this case sufficiently appear from the order of the Court.

The Officiating Government Advocate Mr. A. E. (*Ryves*), for the Crown.

ORDER.

KERSHAW, C. J., and BURKITT, J.—This is a reference made under the following circumstances by the learned Sessions Judge of Allahabad. In July 1897, one Ballam Das was bound over by the Joint Magistrate to be of good behaviour for two years, and two persons became sureties for

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* Criminal Revision No. 451 of 1898.

his good behaviour during that period. In January, 1898, the said Ballam Das was convicted by a bench of Honorary Magistrates at Allahabad of the offence punishable under s. 323 of the Indian Penal Code. Subsequently the District Magistrate, in the exercise of his powers as such, recorded a proceeding setting forth the above facts, and stating that it had been proved to him that a breach of the bond had been committed. Thereupon the District Magistrate issued to Ballam and his surviving surety a notice in the Form No. XLVI in sch. V to the Code of Criminal Procedure. After hearing the cause shown, the Magistrate ordered the penalty of the bonds to be paid by Ballam and by his surety.

[87] On an application in revision by the surety, the Sessions Judge referred the case to this Court, recommending that the Magistrate's order should be set aside. The wording of the notice prescribed by Form XLVI is important, and the difference between it and Form No. XLIX is noticeable. It recites the execution of the security bond by the sureties, and then proceeds to say that as the principal had been convicted of an offence—in this case the offence punishable under s. 323 of the Indian Penal Code—the security bond had become forfeited. Now this schedule No. V is as much a portion of the Code of Criminal Procedure, as any other portion of it, and is most useful in throwing light on the meaning of those sections of the Code in connection with which the forms prescribed by it are to be used. Now the wording of the notice to which we have just referred distinctly lays down that a conviction for an offence, such as here, works a forfeiture of the bond, and this notice moreover is one which is to be issued after the Magistrate has satisfied himself that the bond has been forfeited.

Reading this notice with the provisions of s. 121 and s. 514 of the Code of Criminal Procedure, we are satisfied that the production of the conviction, and, if necessary, of proof of the identity of the principal, is sufficient evidence upon which the Magistrate is authorised to issue the notice No. XLVI. The purport of that notice is that the surety should show cause why his security bond should not be forfeited.

It was contended before the Magistrate and before the Sessions Judge, who apparently approves of the contention, that before the penalty of the bond can be forfeited it is necessary for the Magistrate practically to re-try the case in which the principal had been convicted, that is to say, in the words of the reference by the Sessions Judge, that the surety is entitled to have the witnesses to the offence again examined in his presence, and to be given an opportunity of cross-examining them and proving that the conviction was wrong. To this contention we cannot accede. The notice served on the surety is one calling upon him to show **[88]** cause. If he has any cause to show, the burden lies upon him. It is for him to produce his own witnesses, and from their mouths to establish that the conviction of his principal was wrong. We do not think that at the hearing of a notice of this kind it is incumbent on the prosecution to prove that the principal was properly convicted. On the form of the notice the burden of proof rests on the surety; and as to the suggestion that the surety would be allowed to cross-examine the witnesses, we do not see how that is possible. Just as much as the surety was not a party to the case in which his principal was convicted, so he would practically thought present, be no party to the renewed trial of the charge against, his principal on the hearing of the notice to show cause. In the former case he would have had no *locus standi* to cross-examine the prosecution witnesses, and similarly at the re-trial on the hearing of the notice he

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would not be in a better position. When the surety appears before the District Magistrate under the notice to show cause he should then be prepared with any evidence he can produce to show the impropriety of the conviction of his principal, or with a list of witnesses whom he desires to have summoned to give evidence in his behalf; but we are quite satisfied for reasons given above, that it is no part of the duty of the prosecution to have re-tried, on the hearing of the notice to show cause, the case in which the principal was convicted and to prove again the guilt of the principal. In this case the surety did not produce any witnesses or ask for any to be summoned. We therefore see no reason for interfering in this case.

As to the further portion of his reference in which the Sessions Judge suggests that the District Magistrate did wrong in forfeiting the full amount of the bond, we need only say that we decline to interfere with the discretion of the Magistrate, who is responsible for the peace of the district. Let the record be returned.

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21 A. 89 = 18 A.W.N. (1898) 157.

[89] REVISIONAL CIVIL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

VIAS RAM SHANKAR (*Decree-holder*) v. RALLA RAM MISIR (*Judgment-Debtor.*)* [11th August, 1898.]

Act No. IX of 1887 (*Small Cause Courts Act*) *s.* 25—*Civil Procedure Code, s.* 622—*Revision—Discretion of Court in dealing with applications under s.* 25 *of Act No. IX of* 1877.

Although s. 622 of the Code of Civil Procedure may properly be taken as indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under s. 25 of the Small Cause Courts Act, a Judge is not absolutely bound to refuse any application under s. 25 of the latter Act which could not be admitted under s. 622 of the Code of Civil Procedure. *Sarman Lal* v. *Khuban* (1) (2) referred to and explained.

[R., 5 A.L.J. 295 = A.W.N. (1908) 141 ; 9 Bom. L.R. 466 ; 5 C.L.J. 413 ; 138 P.L.R. 1903 = 66 P.R. 1904.]

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Moti Lal* (for whom Mr. *D. N. Banerji*), for the applicant.

Mr. *G. E. Foy* and Babu *Jogindro Nath Chaudhri*, for the opposite party.

ORDER.

KERSHAW, C. J., and BURKITT, J.—This is an application for revision of an order passed by the Judge of the Court of Small Causes at Benares, in the suit *Vyas Rama Shankar* v. *Ralla Ram Misr*. The applicant, it appears, had obtained a decree *exparte* against the opposite party. The latter applied, under the provisions of s. 108 of the Code of Civil Procedure, as amended by s. 17 of the Provincial Small Cause Courts Act (No. IX of 1887), to have the *ex parte* decree set aside and the case re-heard. That application was allowed by the Judge of the Court of Small Causes, who directed the case to be re-tried. The contention on behalf of the plaintiff in the suit—the applicant here—was that, under art. 164 of the second schedule to the Limitation Act of 1877, the

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Civil Revision No. 29 of 1898.

(1) 16 A. 476.

(2) 17 A. 422.

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application to have the *exparte* decree set aside was time-barred and should not have been [90] entertained. That is the contention which the Court below over-ruled, and which is now repeated in the present application.

At the hearing before us, Mr. *Chaudhri* took a preliminary objection to the effect that this application, which calls in question a decision of the Court of Small Causes, which by law is final between the parties, is one which, with reference to former rulings of this Court, we ought not to entertain. The learned advocate cited the cases of *Raghu Nath Sahai* v. *The Official Liquidator of the Himalaya Bank, Limited* (1), *Sarman Lal* v. *Khuban* (2) and *Sarman Lal* v. *Khuban* (3). For the opposite party Mr. *Banerji* cited *Muhammad Bakar* v. *Bahal Singh* (4) and the *The Poona City Municipality* v. *Ramji* (5). We have carefully considered all the cases cited on both sides.

The argument on one side in this matter proceeded very much on the assumption that in the cases cited from the 15th, 16th and 17th volumes of the Allahabad Series of the Indian Law Reports this Court had bound itself by an inflexible rule not to admit, under s. 25 of the Small Cause Courts Act, any application which would not be admissible, under s. 622 of the Code of Civil Procedure. That assumption is entirely erroneous, as will be seen from the remarks of the late Chief Justice when delivering the decision of the Full Bench in the case of *Sarman Lal* v. *Khuban* (2). The judgment points out that s. 622 of the Code of Civil Procedure should be taken as a guide indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under s. 25 of the Small Cause Courts Act. But neither that case, nor any of the others, professes to compel a Judge to refuse any application made under s. 25 of the Small Cause Courts Act which could not be admitted under s. 622 of the Code of Civil Procedure. Those cases leave the discretion of the Judge quite unfettered, while at the same time indicating to him a line which he might well follow, and a general principle which he ought to apply. [91] As to the case now before us, we, in the exercise of our discretion in this particular case, refuse (as in *Sarman Lal* v. *Khuban*, (3)) to try in revision and reopen questions of law and fact which have, in the lawful exercise of its jurisdiction, been decided by a Court whose decision the Legislature made final. We reject the application with costs.

Application rejected.

(1) 15 A. 139.
(2) 16 A. 476.
(3) 17 A. 422.
(4) 13 A. 277.
(5) 21 B. 250.

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21 A. 91 (P.C.) = 25 I.A. 219 = 7 Sar. P.C.J 304.

21 A. 91(P.C.)=25 I.A. 219=7 Sar. P.C.J. 304.

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PRESENT.

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On Appeal from the High Court for the North-Western Provinces.*]

MAZHAR HUSEN (*Defendant-Appellant*) v. BODHA BIBI AND ANOTHER (*Plaintiffs-Respondents.*)

[16th February, 3rd August, 1898.]

Muhammadan will—Construction of a letter containing a bequest—Suicide of testator.

A letter, written shortly before the testator's death, contained directions as to his property, conferring the proprietary right therein in equal shares on certain persons, to take effect on his death. Accordingly, the letter acted as a will under Muhammadan Law. The testator died, within a few hours after, from poison administered by himself with the intention of sucide. The letter stated that he had taken poison, but this was construed as a representation of the state of things as they would present themselves at the time when the letter arrived.

Title under the will having been disputed in this suit, on the ground that the will having been made by a person who had taken poison for the above purpose, was invalid by Muhammadan Law.

Held, that the burden of proving that the will was written after the taking the poison was on the party impugning the will; that the letter was consistent with its having been written before the taking the poison; that the other evidence tended strongly to show that it was written before; and that, therefore, the reason alleged against the validity of the will was not applicable to the case.

[N.B.—See in this connection 17 A. 112 (P.C.) reporting the opinion of the Privy Council on the application for special leave to appeal to the Privy Council.—ED.]

TWO appeals, by special leave, consolidated from two decrees (11th January 1894) of the High Court, reversing decrees (17th March 1891) of the Subordinate Judge of Allahabad.

The plaintiff in both these suits, which were heard together in the original and appellate Courts, was Bodha Bibi, widow [92] of Amir Ali, and in one of the suits Nasiban Bibi joined her. The defendants were the same in both. They were Haidri Begam; her husband, Syed Mazhar Husen, who, after her death in 1894, represented her; and Nazir Bandi, Habib Bandi, two sisters, with Fayed Fazal Husen, husband and representative of Rahim Bandi, a third sister.

In each of the suits proprietary possession was claimed of property alleged to have been bequeathed by the will of the late Syed Ibn Ali to the extent of one-third of his estate, consisting of zemindaris and other immoveables, to the three sisters abovenamed, his first cousins.

The plaintiffs claimed, as assignees of the property from the legatees, to recover from the second defendant, who had obtained possession of the property from the first defendant, all such interests in it as had been validly bequeathed to them by Ibn Ali's will. And they joined two of the assignors, and the representative of the third, these being the said three sisters, as defendants.

The alleged testator, Syed Ibn Ali, died on the 2nd August 1878, unmarried and without issue. It was a fact not disputed that he committed suicide with arsenic; and it was not contested that, if a letter written by him on the forenoon of the 1st August, the preceding day, had not contained a valid bequest of his property to the three sisters, his mother, Hindri, would have inherited his property.

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The question raised was whether the letter of the 1st August contained a valid bequest to the three sisters; this comprehending a further question (in view of what was alleged by the appellant to be the Muhammadan Law on the subject of wills), whether or not the deceased had taken the poison which caused his death before he wrote the letter alleged to contain his will.

The facts, as stated in the judgment of the appellate Court below, were that Syed Ibn Ali, early in the forenoon of the 1st August 1878, wrote a letter to his mukhtar, Zain-ul-Abdin, which was the document relied upon as containing his will, [93] and that he was found to be dead on the 2nd August 1878. The letter professed to be written an hour before his death, and used words which gave rise to the question whether they might, or might not, accord with his having already taken poison. The letter stated his desire that his mother should not get a pie of his property, and for a disposition in one part of the letter in favour of other persons the writer substituted a direction that the three daughters of his paternal uncle should share equally his property, directing Zain-ul-Abdin to see that each should get an equal share. The words of the bequest appear in their Lordships' judgment.

The two principal issues tried by the Subordinate Judge were, first, as to whether the letter of the 1st August contained what could by the law of the Shias be held to be a bequest to the three daughters. As to this the Judge was of opinion that Ibn Ali's object was to exclude his mother from a share in his estate, but he decided as follows :—

"There was no *tamlik ain* (constituting a proprietor of the property itself) nor *ijab* (proposal) which is one of the conditions for enforcement (of a bequest) in respect of the profit. For *tamlik ain* it would have been essential to write in clear terms—'My uncle's daughters shall be the owners of my property on my death.' And for *ijab* it would have been necessary to write :—'I have given my property to my sisters (cousins) after my death.' The modes of transferring the property suggested in the letter were calculated to waste the property, and they did not show an intention to carry out a bequest, or to bequeath the property absolutely to his cousins. From these circumstances it may be concluded that the contents of the letter do not amount to a will, and, according to Muhammadan Law, as observed by the *Shia* sect, a bequest cannot be inferred from such a declaration or writing."

Secondly, as to whether the will was or was not invalid on the ground that it had been written after the writer had taken poison. As to this the Subordinate Judge wrote :—

"The book called *Riyaz-ul-masæl*, commonly known as *Sharah* " *Kabir*, Volume IV, chapter on wills, contains a [94] passage in Arabic " which may be translated thus :—If any one intentionally wounds " himself so that there is a danger of death, and then makes a bequest, " such bequest will not be accepted. *Sharah Suma*, chapter on wills, which " is in Arabic, contains a passage which may be translated thus :—But a " bequest made by any of these, namely, a lunatic, one in a state of intoxi- " cation, and he who has inflicted a fatal wound on himself is void ; in the " first two cases, apparently from want of sense, and in the last case there " is a saying of Abi Vilad based on a tradition of Sadik, may peace be with " him, that is, if any one makes a bequest after he has wounded himself " or done an act which must necessarily result in his death, such bequest " will be illegal, for this act goes to prove his want of sense, and also " because he falls within the category of a dead man, and therefore the

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" provisions which hold good in respect of the living will not hold good in " respect of him, and consequently it is not necessary for him to pay " *zakat*, though he be fit to pay it. And the less authoritative saying is " that the bequest is valid provided the mind was sound. This opinion " was a good one, if it were not inconsistent with the well-known tradition. " The book called *Tahzip* also says that bequests made by such persons are " invalid. In *Maula-yah Zar-ul-fakih* also this tradition is found. This " doctrine was followed in the book called *Vasail Tashaya*. In *Furu* " *Kafi* this doctrine has been recognized and *Jawahirul-kalam* contains a " verdict that such bequests are invalid. In the book called *Sharaya-ul-* " *Islam* and in its commentary, and in the book *Mukhtasar Mani* also this " doctrine has been followed.

" The passage in the book called *Javahar-ul-Kalam*, which bears upon " this doctrine may be translated thus,—'One who voluntarily does an " 'act from which he thinks he must die, is to be classed with one who " 'has committed suicide ; for instance, one who has taken poison will " 'come under the same category.' From the above authorities it will " appear that, even assuming that the letter written by Ibn Ali amounts " to a **[95]** will, such will is void and unenforceable, because Ibn Ali " made it after his attempt at suicide."

From this decision the plaintiffs appealed, and the judgment of a divisional bench (TYRRELL and BLAIR, JJ.) reversed it. They were of opinion that the letter constituted a will under Muhammadan Law, and that it was not bad as being executed by a suicide, who had already taken poison when he wrote it. They remanded the suit under s. 562 of the Code of Civil Procedure.

Their judgment was the following,—part being omitted.

" The two leading questions sent to trial below were :—First, can it be " concluded from the contents of the letter, and from its surrounding " circumstances, that the letter is not a will under the Muhammadan Law " of the Shias from the declarations of which a bequest cannot be inferred ? " and, secondly, whether the will is invalid because it was made by a man " who had previously taken poison for the purpose of suicide ?

" The Court below has found on both these issues against the appel- " lant. It is convenient to deal with the suicide question first."

With reference to this question the Judges, after examining the evidence on the record, decided as follows :—

" We think that the finding that the letter was written after the writer " had poisoned himself is based on flimsy evidence and is against good and " solid evidence to the contrary. So far, therefore, the appellant succeeds, " and the bequest, if it was a bequest, is not bad for being the act of a " suicide."

With regard to the question as to whether it could be concluded from the contents of the letter and from its surrounding circumstances, that the letter or document dated August 1st, 1878, was not a will, under the Muhammadan Law of the Shias, from the declarations of which a bequest could not be inferred, the Judges differed from the conclusions arrived at by the Subordinate Judge, and held that the letter constituted a valid will, under the **[96]** Muhammadan Law of the Shias, and they concluded their judgment as follows :—

" In what we have said, we have tried to show that the very terms of " this will are virtually the terms which the Court below would accept as " fulfilling the requirements of the Shiah law as to bequests. We believe " that the word 'bequeath' has been rightly defined under that law.

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"'as the act of conferring a right in the substance or the usufruct of a "'thing after death.' We find on the 460th page of the first volume of "Syed Amir Ali's book on the Muhammadan Law relating to Shias that a "bequest may be constituted by the use of any expression that sufficiently "indicates the intention of the testator. A ruling of their Lordships of the "Privy Council to be found in the 25th volume of the Weekly Reporter, "page 121, where their Lordships held, that 'no particular form, even of "'verbal declaration, is necessary as long as the intention of the testator "'is sufficiently ascertained.' If this decision was between Shias, and we "have no reason to think otherwise, it lends the strongest authority to "our view of the effect of paragraph 10 of Ibn Ali's document of the 1st "August 1878. The result of these our findings is that this case must "be remanded under s. 562 of the Code of Civil Procedure, to be "restored to the register of original suits, and to be disposed of on the other "issues according to Law. The costs will abide the result."

The High Court refused to admit an appeal to Her Majesty against their decision, on the ground that their decree was not a final one within s. 595 of the Code of Civil Procedure. But on an application for special leave to appeal being made on the 24th November 1894 it was granted. *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (1).

Mr. *J. D. Mayne* and Mr. *W. A. Raikes*, for the appellant, contended that the High Court should have found that there was no evidence that the poisoning took place after the letter had been written. As regards the state of the testator's mind, the **[97]** important consideration, there would be little difference whether he had already taken the poison or had resolved to take it immediately afterwards. The sources of the law on the point did not appear numerous. Reference was made to the translations on the judgment of the Subordinate Judge of the passages on the work cited by him.

They also referred to the Muhammadan Law Imamia by E. N. Baillie, 232, and to Taylor's Medical Jurisprudence (edn. 1883), 252.

The Indian Evidence Act, 1872, s. 101.

Mr. *G. E. A. Ross*, for the respondents, argued that the case that the letter operated as a will had been established.

The High Court had rightly reversed the finding of the original Court as to the arsenic having been taken before the letter was written. The expressions in the letter were consistent with the writer's not having, in fact, already taken it at the time of writing. The general evidence tended to show clearly that he had not. He referred to the Introduction, Baillie's Imamia, p. 26, and p. 232 of the book.

The order of remand under s. 562 of the Code of Civil Procedure was right under the circumstances.

Mr. *J. D. Mayne* replied. Afterwards, on 3rd August, their Lordships' judgment was delivered by LORD MORRIS.

JUDGMENT.

Ibn Ali died on the 2nd of August 1878. He was possessed of property. The respondents are the assignees of two ladies, the first cousins of Ibn Ali, and described in the letter or will of the 1st of August as his paternal uncle's daughters.

The appellant is the assignee and representative of Haidri Begam, the mother and heir of Ibn Ali. The respondents claim the property in dispute under a letter or will of the 1st of August 1878.

(1) 17 A. 112=22 I. A. 1.

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Two questions arose: 1st, whether the letter of 1st August amounted to a will. 2nd, was it written after Ibn Ali had taken poison from the effect of which he died. On both questions the Subordinate Judge decided in favour of the appellants, [98] holding that the passages in the letter of 1st August did not amount to a bequest, and that even if they did it was written after Ibn Ali had taken poison, the cause of his death. On appeal, the High Court reversed the decision of the Subordinate Judge on both questions. The bequest on which the respondents rely is contained in the letter written by Ibn Ali to his general attorney, Syed Zain-ul-Abdin. The fact of the writing the letter by Ibn Ali was clearly proved and was so accepted by the Subordinate Judge and is not now disputed. The letter was sent by the hand of Musharraf, a servant of Ibn Ali. The Subordinate Judge decided that the contents of the letter did not amount to a bequest, as they did not bequeath the property directly to his cousins. The letter by cl. 10 states "You should not have the property given to (my) grandmother and "paternal uncle's wife, but you should give the whole to my three "sisters, who are my paternal uncle's daughters. You should see that "they all get an equal share, and in the same manner as stated by me "in paragraph 3." This paragraph appears to their Lordships to confer a right on the three sisters in the property to take effect on Ibn Ali's death, and accordingly that the letter acts as a will under Muhammadan Law.

Now comes the more important question as to the writing of the will being before or after the poison was taken by Ibn Ali. It is not at all free from difficulty, but their Lordships are not prepared to dissent from the decision of the High Court. It appears reasonable to hold that the onus of proving whether the letter or will was written after the swallowing of poison should rest on the party impugning the will. The Subordinate Judge came to his conclusion apparently on the terms of the letter itself in which the writer states "I, in consequence of my honour having "suffered to a certain extent, and the exposure being so great that I "could not show my accursed face to any one, thought it advisable to "put an end to my life and therefore took poison and died to-day." And again in paragraph 5 the writer states: "Please begin to take all these [99] "proceedings after perusing this letter. Don't delay in hope of my "life, for, by God, I am actually dead and this letter I have written an "hour before death." The Subordinate Judge considers these passages prove that Ibn Ali had taken the poison, but their Lordships are of opinion, though the words "took poison" are in the past tense, they are connected with the words "and died to-day," which cannot be read in the past tense, and the statement is consistent either with the fact that he had taken the poison or that he had resolved to take poison and resolved to die. The evidence is circumstantial and the evidence of Musharraf and Husen Bakhsh go strongly to show that it must have been subsequent to the sending of the letter that Ibn Ali retired from the mardana and went into the zenana on the 1st of August then apparently well. The circumstances lead their Lordships to agree with the conclusion of the High Court that the deceased Ibn Ali took the poison after sending the letter to his friend, who lived some twenty miles distant. Their Lordships will therefore humbly advise Her Majesty that the appeals in this case should be dismissed. The respondents will have their costs.

Solicitor for the appellant: Mr. *T. C. Summerhays.*

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

21 A. 99=18 A.W.N. (1898) 170.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

SHOME SHANKAR RAJENDRA VARERE (*Plaintiff*) *v.* RAJESAR SWAMI JANGAM (*Defendant*).* [11th August, 1898.]

Hindu Law—Mitakshara—Sudras—Illegitimate sons—Collateral succession.

Amongst Sudras governed by the Mitakshara law an illegitimate son does not inherit collaterally to a legitimnate son by the same father. *Sarasuti* v. **[100]** *Mannu* (1), *Jogendra Bhupati Hurro Chandra Mahapatra* v. *Nityanand Man Singh* (2), *Sadu* v. *Baiza* (3), *Nissar Murtojah* v. *Kowar Dhunwunt Roy* (4), and *Krishnayyan* v. *Muttusami* (5).

[Appr., 25 M. 429; 25 M. 519=11 M.L.J. 399; **R.**, 34 B. 321 (325)=12 Bom.L.R. 204=5 Ind. Cas. 964; 12 Ind. Cas. 767 (769)=14 O.C. 227; 9 O.C. 352 (354).**]**

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellant.

Pundit *Sundar Lal*, and Munshi *Jwala Prasad*, for the respondent.

JUDGMENT.

BANERJI, J. (AIKMAN, J., concurring).—The appellant brought the suit out of which this appeal has arisen for recovery of certain sums of money and for possession of a grove and some moveable property alleged to have formed the separate estate of Raja Lingraj, a legitimate son of the ex-king of Coorg.

Raja Lingraj died on the 16th of January 1874, leaving two widows, Rani Deo Amma and Rani Chin Amma. The latter died shortly afterwards. The former took possession of her husband's estate, and continued in possession till her death on the 21st of May 1891. She devised the estate by will to the predecessor in title of the defendant, who has obtained probate of the will.

The property claimed consists of Government Promissory Notes for Rs. 31,000 in deposit in the Bank of Bengal at Benares, Rs. 20,000 deposited with the Maharaja of Vizianagram, withdrawn by the defendant, articles of furniture of the value of Rs. 1,000, and a grove valued at Rs. 1,000.

The plaintiff is one of the sons of the ex-king of Coorg by a lady alleged by the defendant to have been one of the concubines of the king. The plaintiff, however, claims to be of legitimate descent and to be a half-brother of the deceased Raja Lingraj, and as such his legal heir under the Hindu law. As the parties are admittedly Sudras governed by the Mitakshara law, it is further claimed on behalf of the plaintiff that even if he is illegitimate he is entitled to inherit the estate of Raja Lingraj as a collateral heir.

[101] The claim was resisted on two grounds: first, that the plaintiff being an illegitimate son of his father could not, under the Hindu law, inherit the separate estate of a legitimate son of his father; and, secondly, that the money and moveable property claimed did not form part of Raja Lingraj's estate, but belonged solely to Rani Deo Amma.

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* First Appeal, No. 117 of 1896, from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 24th March 1896.

(1) 2 A. 134. (2) 18 C. 151. (3) 4 B. 37.
(4) (1863) Marshall 609. (5) 7 M. 407.

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1898) 170.

The lower Court has dismissed the claim on the first of the above grounds, and has expressed no opinion as to the other.

The learned advocate for the plaintiff who has preferred this appeal has frankly conceded that he is unable to support the plea of legitimacy. It appears that the ex-king of Coorg died in England, and upon his death a suit was filed in regard to his estate in the Court of Chancery. That Court declared the present plaintiff and other sons of the king similarly circumstanced to be illegitimate sons, and made a decree dividing the estate between them and Raja Lingraj, the legitimate son. There can be no question therefore that the plaintiff is an illegitimate son of his father.

It has been held in this Court in *Sarasuti* v. *Mannu* (1), that the son of a continuous concubine is a *dasi putra* (son begotten on a female slave), to whom the rule of succession laid down in chapter I, s. XII of the Mitakshara, applies. The plaintiff is therefore a *dasi putra* within the meaning of s. XII.

It is stated by the author of the Mitakshara in § 1 of that section that Yajnavalkya "delivered a special rule concerning the partition of a Sudra's goods" in the following terms :—"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brother may inherit the whole property in default of daughter's sons." (vv. 134 and 135). According to this rule, which is interpreted by the author of the Mitakshara in § 2, an [102] illegitimate son of a Sudra inherits a part of his father's estate jointly with the legitimate son of his father, and it is by virtue of this rule that the plaintiff obtained a share out of his father's estate under the decree of the Court of Chancery. It has been held by their Lordships of the Privy Council in *Jogendra Bhupati Hurro Chundra Mahapatra* v. *Nityanand Man Singh* (2), affirming the decision of the Calcutta High Court in the same case, and approving the judgment of the Bombay High Court in *Sadu* v. *Baiza* (3), that where property was jointly inherited from their father by the son of a wedded wife and an illegitimate son, and was held jointly by them, the rule of survivorship applies, and upon the death of the legitimate son the property goes to the illegitimate son by right of survivorship. Had the property claimed in this suit been property which the plaintiff and the deceased Raja Lingraj had inherited jointly from their father and held as undivided property, we should have been bound to hold, upon the ruling of their Lordships of the Privy Council, that the plaintiff was entitled to it. The property in dispute in this case is, however, admitted to be the separate property of Lingraj, and the plaintiff claims it, not by right of succession to his father or by right of survivorship, but as heir to his legitimate brother, the deceased Lingraj. We have therefore to determine whether the plaintiff is, under the Mitakshara law, an heir to Raja Lingraj.

The special rule of succession of illegitimate sons among Sudras to which we have referred above, appears in chapter I of the Mitakshara, which deals with unobstructed heritage, that is, lineal inheritance. The plaintiff's claim is based upon the right of collateral inheritance, which is treated of in chapter II. In § 2, s. I of that chapter, the order of succession on failure of sons "principal and secondary," is thus stated :—"The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student; on failure of the first

(1) 2 A. 134. (2) 18 C. 151. (3) 4 B. 37.

among these the next in order is indeed heir to the estate of one who departed for heaven **[103]** leaving no male issue. This rule extends to all (persons and) classes." No mention whatever is made in this chapter of illegitimate sons or persons who are entitled to inherit collaterally. On the contrary, we have in the 11th section of chapter I a text of Manu, that an illegitimate son, that is, the son of an unmarried woman, is not a collateral heir. With reference to the different classes of sons, it is laid down in that chapter as follows :—

"Section 30. Manu having premised two sets of six sons, declares the first six to be heirs and kinsmen and the last to be not heirs, but kinsmen. The true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin and one rejected (by his parents) are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, and a son self-given, and a son by a Sudra woman are six, not heirs, but kinsmen.

"Section 31. That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen (*sapindas* and *samanodacas*) if there be no nearer heir, but not so the last six."

This is a distinct authority for holding that the illegitimate son is not a collateral heir. By an exceptional rule laid down in s. XII of chapter I of the Mitakshara on the authority of Yajnavalkya he takes only his father's estate by right of inheritance, and according to their Lordships of the Privy Council he does so by right of survivorship also. But there is no authority for holding that he succeeds to the estate of collaterals as heir. Had it been intended to confer on him the right of collateral succession in the same way that the right of lineal succession has been bestowed on him, we should have expected a similar rule in chapter II, as an exception to the general rule, in the case of Sudras. The enumeration of heirs in that chapter is no doubt not exhaustive, but the rule which guides collateral succession is based on the text of Manu that "to the nearest sapinda the inheritance next belongs." As sapinda **[104]** relationship pre-supposes a lawful marriage, an illegitimate son cannot come within the category of sapindas so as to have a right of succession collaterally. He cannot be ranked as a brother within the meaning of s. IV or of § 2 of s. I. The brothers referred to in chapter I, s. XII, § 2, are sons of the wedded wife of a Sudra. The brothers referred to in the first portion of § 1 are also brothers of the same description. (See Virmitrodaya, Sarkar's Translation, p. 130). In the last clause of that *placitum* it is no doubt said that the son of a female slave "who has no 'brothers' may inherit the whole property in default of daughter's sons"; but there the word seems to have been used in its usual signification, an illegitimate son of the father being in one sense the brother of a legitimate son. As such brother he succeeds to the father lineally and by survivorship under the exceptional rule laid down in s. XII, but there is no authority for holding that he can succeed collaterally to the separate estate of his legitimate brother. The authority of Manu and the author of the Mitakshara is, as has been pointed out above, the other way. To the same effect is the opinion of writers on Hindu law. In W. H. Macnaghten's Principles and Precedents of Hindu Law it is stated, at p. 15, that there is "no law admitting the son of a Sudra by a female slave to share the estate of collaterals." West and Buhler express the opinion that "illegitimates inherit collaterally only by caste custom" (p. 83); and Mayne in his Hindu Law and Usage

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says, in paragraph 508, that "illegitimate sons can only take to their father's estate. They have no claim to inherit to collaterals." The authority of decided cases, such as we have on the subject, is also to the same effect. In *Nissar Murtojah* v. *Kowar Dhunwunt Roy* (1), and in *Krishnayyan* v. *Muttusami* (2), it was held that illegitimate sons cannot succeed collaterally, and we have not been referred to any authority in which a contrary view was adopted. The learned counsel for the appellant has urged that the decision of the Privy Council in the case to which we have referred above must be held to be conclusive [105] on the point and to have finally decided it in favour of the appellant's contention. As we have pointed out above, all that their Lordships held was that an illegitimate son succeeds by right of survivorship to the paternal estate which jointly passed to him and his legitimate brother. The question of collateral succession was neither raised nor considered, nor was it decided. So far as the illegitimate son's right of survivorship goes, the ruling of their Lordships must be regarded as conclusive. But the question which we have to decide in this case was not raised before their Lordships and was not decided. In the case of *Sadu* v. *Baiza* (3), Nanabhai Haridas, J., advisedly abstained from deciding that question. We see no reason therefore to extend the operation of the ruling of the Privy Council beyond what was actually decided in the case with which their Lordships were dealing. In *Sadu* v. *Baiza*, Sir Michael Westropp, C.J., observed that a legitimate son and an illegitimate son who had jointly inherited the estate of their father should be regarded as joint tenants and not as tenant in common, and that therefore the rule of survivorship would apply to them. This view, it seems, was approved by the Lords of the Privy Council. In a case like this where the legitimate son and the illegitimate son were separate that rule can have no application. It does not follow from the fact that a person is entitled to succeed by right of survivorship that he is an heir and may inherit collaterally also, although the converse proposition may be true.

The learned advocate for the appellant referred us to a passage on p. 944 of Sarvadhikari's Tagore Lectures on the Hindu Law of Inheritance, where the author expresses the opinion that the son of a *dasi* should "by all the analogies of Hindu law and the plain rules of equity and justice" be declared entitled to the property of collaterals. The analogy to which he refers is that of an adopted son; but it must be observed that by an express text of Manu an adopted son is declared "entitled to take the heritage [106] of his father's collateral kinsmen." (See Mitakshara, Chapter I, s. XII, §§ 30 and 31.)

For the above reasons, we are of opinion that the plaintiff appellant has been rightly held not to be the heir of Raja Lingraj, deceased, and his suit has been properly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1863) Marshall 609. (2) 7 M. 407. (3) 4 B. 37.

21 A. 106 = 18 A.W.N. (1898) 185.

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21 A. 106 = 18 A.W.N. (1898) 185.

CRIMINAL REVISIONAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS *v.* BABU LAL.* [22nd August, 1898.]

Criminal Procedure Code*, s. 285—*Assessors—Effect of incapacity of assessors to understand the proceedings.

Three assessors were chosen to assist the Court at a trial. Before the case commenced, it was discovered that one of the assessors was deaf, and his presence was accordingly dispensed with. The trial proceeded with two assessors present; but after the Public Prosecutor had closed his case, it was discovered that one of the remaining assessors was so deaf as to be incapable of understanding the proceedings. Under these circumstances, it was *held* that the trial having been held with practically only one assessor, the proceedings ought to be set aside and a new trial ordered.

[F., 25 B. 694 = 3 Bom.L.R. 274; **R.**, 24 M. 523 (528).]

THE record of this case was submitted to the High Court by the Officiating Sessions Judge of Azamgarh for such orders as the Court might think fit to pass. There was also an appeal to the High Court by the convict. The facts which led to the case being referred are stated in the order of the High Court, which was as follows :—

ORDER.

BANERJI, J.—This case has been reported to this Court by the learned Sessions Judge of Azamgarh. It appears that before the trial, began it was discovered that, of the three assessors who attended, one was deaf, so that the trial began with two assessors. It was discovered, after the Public Prosecutor had closed his case, that another assessor was so deaf as to be incapable of understanding the proceedings. The learned Judge, however, proceeded with the trial, being of opinion that by the analogy **[107]** of s. 285 of the Code of Criminal Procedure the trial would be a valid one, one assessor having been present throughout and having understood the proceedings. I am unable to agree with the learned Sessions Judge. Section 285 contemplates the case of a trial which had commenced with the aid of two or more assessors, who at the commencement of the trial were capable of acting as assessors. Such was not the case here. The assessor who has been discovered to be deaf and incapable of understanding the proceedings was not a fit person to be selected as an assessor; therefore the trial was really held with the help of one assessor only. Section 268 requires that all trials before a Court of Session should be either by jury or with the aid of assessors, and under s. 284 two or more assessors should be chosen to aid the Judge. Whereas, in this case, the trial was held with the aid of only one assessor who was capable of acting as such, the Court holding the trial was not properly constituted, and all the proceedings were null and void. The same view appears to have been taken by the Madras High Court—see the case cited at p. 270 of Henderson's edition of the Code of Criminal Procedure, 1898. I set aside the proceedings held by the learned Sessions Judge of Azamgarh, and direct that the accused be tried again with the aid of assessors chosen, according to law.

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* Criminal Miscellaneous No. 86 of 1898.

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21 A. 107 = 18 A.W.N. (1898) 185.

21 A. 107 = 18 A W.N. (1898) 185.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS *v.* MUTASADDI LAL.* [24th August, 1898].

Criminal Procedure Code, ss. 110, 119—*Security for good behaviour—Power to order further inquiry—Accused person—Criminal Procedure Code, s.* 437.

Held that a person against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken is "an accused person" within the meaning of s. 437 of the Code. *Queen-Empress* v. *Mona Puna* (1) and *Jhoja Singh* v. *Queen-Empress* (2) followed.

[Diss., 42 P.R. 1905 (Cr.) = 131 P.L.R. 1905; **F.**, 35 B. 401 (403) = 13 Bom. L.R. 505 (507) = 12 Cr.L.J. 430 = 11 Ind. Cas. 614; 36 C. 163 = 8 C.L.J. 565 = 13 C.W.N. 151 = 9 Cr. L.J. 36 = 1 Ind. Cas. 737 (738); **Appl.**, 25 A. 375 (377) = 23 A.W.N. (1903) 79; **R.**, 24 A. (148 150) = 21 A.W.N. (1901), 206; 34 A. 533 (536) = 10 A.L.J. 27 (31) = 13 Cr. L.J. 452 (453) = 15 Ind. Cas. 84; 28 C. 709 (714) = 5 C.W.N. 749; 2 L.B.R. 80; **D.**, 2 C.L.J. 149 (151) = 9 C.W.N. 983.**]**

[108] IN this case a Magistrate of the first class of the Muzaffarnagar district instituted proceedings, upon a report made by the Police, against Mutasaddi Lal under s. 110 of the Code of Criminal Procedure. Mutasaddi Lal appeared to show cause before the Magistrate; evidence on both sides was heard, and ultimately the rule against Mutasaddi Lal was discharged. Subsequently the Magistrate of the district again took up the proceedings against Mutasaddi Lal, purporting to act in doing so under s. 437 of the Code of Criminal Procedure. Mutasaddi Lall was called upon to show cause why the order of the first class Magistrate discharging him should not be set aside. On the date fixed no cause was shown, and the District Magistrate set aside the order of discharge, and called upon Mutasaddi Lal to show cause again why he should not furnish security to be of good behaviour.

Against this order Mutasaddi Lal applied in revision to the High Court, on the ground mainly that, as he was not an "accused person" within the meaning of s. 437 of the Code, the District Magistrate had no jurisdiction to reopen the proceedings against him under s. 110.

Mr. *G. W. Dillon*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

BANERJI, J.—The applicant was called upon by a Magistrate to furnish security for good behaviour. After holding proceedings under Chapter VIII of the Code of Criminal Procedure, the Magistrate being of opinion that sufficient reasons had not been made out for ordering the applicant to give security, discharged him under s. 119 of the Code. The District Magistrate has ordered further inquiry into the matter, purporting to act under s. 437. It is urged that under that section the Magistrate of the District was not competent to order further inquiry, as the applicant was not an "accused person" within the meaning of that section. The Code of Criminal Procedure contains no definition of an "accused person," but it was held by the Bombay High Court in **[109]** *Queen-Empress* v. *Mona Puna* (1), that the term "accused" means "a person over whom a Magistrate or other Court is exercising jurisdiction."

* Criminal Revision No. 441 of 1898.

(1) 16 B. 661. (2) 23 C. 493.

The same view was held by the Calcutta High Court in *Jhoja Singh* v. *Queen-Empress* (1). I see no reason to put a different interpretation on the words "an accused person" in s. 437. The District Magistrate was therefore competent to order further inquiry, and this application is not sustainable. I dismiss the application.

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21 A. 109=18 A.W.N. (1898) 186.

21 A 107=
18 A.W.N.
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REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS v. ABDUL RAZZAK KHAN AND ANOTHER.*

[25th August, 1898.]

Criminal Procedure Code, ss. 190, 191—*Cognizance taken by Magistrate under s.* 190, *sub-s* 1, *cl.* (c)—*Jurisdiction of the Magistrate to hold preliminary inquiry not thereby ousted.*

Held that the fact of a Magistrate having taken cognizance of a case under s. 190, sub-s. 1, cl. (*c*) of the Code of Criminal Procedure, does not disqualify such Magistrate from holding a preliminary inquiry and committing the case to the Court of Session.

IN this case a preliminary inquiry was pending before the District Magistrate of Mainpuri into a charge of offences under s. 218 of the Indian Penal Code alleged to have been committed by one Abdul Razzak Khan, an Inspector of Police, and another. Previously to this inquiry, the same Magistrate had made a departmental investigation into the charges against the accused, and had thus taken cognizance of the case under s. 190 (1), cl. (*c*) of the Code of Criminal Procedure. The accused accordingly under s. 191 of the Code moved the District Magistrate to transfer the case to some other Magistrate. This the District Magistrate declined for various reasons to do, mainly, because the charge was exclusively triable by the Court of Session, and must necessarily [110] be committed if any case against the accused were made out, and, if the transfer were to be granted as a matter of grace, the case was one which ought to be in the hands of the Magistrate of the District, and the other Magistrates to whom it was possible to transfer it were for one reason or another unsuitable.

Against the order of the District Magistrate rejecting their application for transfer, the accused applied in revision to the High Court, urging that the Magistrate having taken cognizance of the case under s. 190 (1), cl. (*c*), was thereby debarred from making a preliminary inquiry into it.

Mr. *B. E. O'Conor* and Kunwar *Parmanand*, for the applicant.

JUDGMENT.

BANERJI, J.—This is an application for the transfer to another Court of a criminal case now pending in the Court of the District Magistrate of Mainpuri. The application purports to be made under ss. 191 and 526 of the Code of Criminal Procedure. The case is one exclusively triable by a Court of Session, so that the Magistrate is only holding a preliminary inquiry into the matter. It appears that he has taken cognizance of the

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* Criminal Miscellaneous No. 87 of 1898.

(1) 23 C. 493.

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21 A. 109 = 18 A.W.N. (1898) 186.

case under sub-s. 1, cl. (*c*) of s. 190, and it is urged that, that being so, the Magistrate is not competent to hold a preliminary inquiry in this case, having regard to the provisions of s. 191. I am unable to agree with this contention. In my opinion that section does not disqualify a Magistrate who has jurisdiction even to try the case from holding a preliminary inquiry. What that section provides is that if a Magistrate takes cognizance of on offence under sub-s. 1, cl. (*c*) of s. 190, and if, before any evidence is taken, the accused objects to being tried by such Magistrate, he may either transfer the case to another Magistrate or commit the case to the Court of Session. He is thus empowered to make a commitment in a case within his cognizance. He cannot make a commitment without holding a preliminary inquiry, so that the section distinctly empowers him to hold a preliminary inquiry even in cases triable by him-[111] self. It necessarily follows that he is competent to hold a preliminary inquiry in cases exclusively triable by a Court of Session. In this case it has not been satisfactorily shown that there is a sufficient reason under s. 526 of the Code of Criminal Procedure to transfer the preliminary inquiry to some other Court. It is desirable that the inquiry should be held by an officer holding the position of the District Magistrate, and there is no reason to assume that the District Magistrate of Mainpuri will not make his inquiry with an open mind. I dismiss the application and withdraw the order for stay of proceedings.

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21 A. 111 = 18 A.W.N. (1898) 196.

APPELLATE CRIMINAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS *v.* JEOCHI.* [7th September, 1898.]

Criminal Procedure Code, s. 288—*Evidence—Use in Sessions Court of evidence taken before the Committing Magistrate.*

Although under certain circumstances a Court of Session may use evidence given before the Committing Magistrate as if it had been given before itself, it is not proper for a Court of Session to base a conviction solely upon such evidence, there being no other evidence on the record to corroborate it. *The Queen* v. *Amanulla* (1), *Queen-Empress* v. *Bhiramappa* (2) and *Queen-Empress* v. *Dhan Sahai* (3), referred to.

[R., 28 A. 863 = 3 A.L.J. 852 (854) = A.W.N. (1906) 187 = 4 Cr. L.J. 61.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

BANERJI, J.—The appellant, Musammat Jeochi, was charged with having torn off an ear-ring from the ear of a boy named Muneshar, and has been convicted under s. 394 of the Indian Penal Code. The evidence adduced in the Court of Session did not at all prove the guilt of the appellant. On the contrary, [112] that evidence showed that the ear of the boy had been torn by a mere accident. The witnesses examined in the Court of Session had all of them, with the exception of Sukhu, made statements before the Committing Magistrate which were diametrically

* Criminal Appeal No. 793 of 1898.

(1) 12 B.L.R. App. 15. (2) 12 M. 123. (3) 7 A. 862.

opposed to those made in the Court of Session. The learned Sessions Judge purporting to act under s. 288 of the Code of Criminal Procedure, admitted in evidence the statements made by the witnesses in the Court of the Committing Magistrate, and has convicted the accused on that evidence alone. I must observe that, beyond the evidence which was so admitted, there was no other evidence before the learned Sessions Judge which proved the guilt of the accused. It is contended that the learned Sessions Judge was not justified in convicting the appellant on the evidence given by the witnesses in the Court of the Committing Magistrate and retracted in the Court of Session. The contention of the learned vakil is supported by the ruling of the Calcutta High Court in *The Queen* v. *Amanulla* (1), which was followed by the Madras High Court in *Queen-Empress* v. *Bharamappa* (2), and by this Court in *Queen-Empress* v. *Dhan Sahai* (3). In the case last mentioned, it was observed by Straight, J., that " s. 288 was never intended to be used so as to enable a Court trying a case to take a witness' deposition bodily from the Magistrate's record, as the Judge has done here, and treat it as evidence before himself." With these observations I fully concur. As remarked by Morris, J., in *Queen* v. *Amanullah* (1), a Court of Session may admit in evidence the statements made by witnesses before the Committing Magistrate when such evidence " is to a certain extent corroborated by independent testimony before himself." There was no such testimony in the present instance. It is true that the attention of the witnesses was called to the statements made by them before the Committing Magistrate, and that those statements were read to them ; but the fact of that being done was not alone sufficient to justify the learned Sessions **[113]** Judge in basing the conviction solely upon evidence no part of which was given before him. Further, having regard to the fact that the witnesses had in two Courts made diametrically opposite statements, it was unsafe to found a conviction on their testimony. I accordingly allow the appeal, and setting aside the conviction and sentence, I acquit the appellant of the offence of which she was convicted, and direct that she be at once released.

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21 A. 113 = 18 A.W.N. (1898) 197.

APPELLATE CRIMINAL.

Bfeore Mr. Justice Banerji.

QUEEN-EMPRESS *v.* MUHAMMAD SAEED KHAN.*

[7th September, 1898.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 463 *et seq*—*Forgery*—*Meaning of the term "fraud" discussed.*

A Police head-constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing remarks unfavourable to the head-constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head constable.

Held, that this interpolation amounted to forgery witnin the meaning of s. 463 of the Indian Penal Code, but that inasmuch as it was not proved that the head-constable himself prepared and inserted the false page in his character roll, he was

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* Criminal Appeal No. 711 of 1898.

(1) 12 B.L.R. App. 15. (2) 12 M. 123. (3) 7 A 862.

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21 A. 113 = 18 A.W.N. (1898) 197.

rightly convicted of abetment only. *Queen-Empress* v. *Shoshi Bhushan* (1), *Queen-Empress* v. *Vithal Narayan* (2) and *Lolit Mohan Sarkar* v. *The Queen-Empress* (3), referred to.

[R., 38 C. 75 (90) = 12 C.L.J. 312 = 14 C.W.N. 1076 = 11 Cr.L.J. 505 = 7 Ind. Cas. 629; 28 M. 90 (97); 10 P.R. 1902 (Cr.) = 75 P.L.R. 1902; 1 P.R. 1907 (Cr.) = 32 P.L.R. 1907; 4 L.B.R. 315 (316).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Wallach*, for the appellant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

BANERJI, J.—The appellant, Muhammad Saeed Khan, has been convicted of having been in dishonest possession of stolen property and of having abetted the offence of forgery. He has been sentenced for these offences to a total term of ten years' rigorous imprisonment.

[114] He was a head-constable stationed at a police station in the city of Agra. Upon information received by the District Superintendent of Police that Saeed Khan had received a bribe in marked rupees, the District Superintendent searched his quarters, and found in a box belonging to him, of which he produced the key, certain books and papers. Among these were eleven "character and service roll" books of the N.-W. P. and Oudh Constabulary, five of which were blank. These books are Government property, and, with the exception probably of one, were kept either in the Police office at Agra or in the office of the Inspector-General of Police. They must have been stolen from the place where they were kept, and as the accused has not given any explanation of his possession of them, it is clear that he knew that they were stolen property. He has therefore been rightly convicted under s. 411 of the Indian Penal Code.

Mr. *Wallach*, the learned counsel for the appellant, addressed his argument chiefly to the second branch of the case, namely, that relating to the abetment of forgery. He does not dispute the facts as found by the learned Sessions Judge, which are as follows:—In the character and service roll of the accused (Ex. 14), page 11 has been substituted for some other page, very probably Ex. 12, which contained remarks apparently unfavourable to the accused made by several District Superintendents of Police as to the general conduct and Police work of the accused, and the entries in p. 11 of Ex. 14 are undoubtedly false entries, in which the unfavourable remarks contained in Ex. 12 do not find place. A glance at the entries on p. 11 of Ex. 14 leaves no room for doubt that they are false. Mr. *Wallach* contends that, accepting the entries to be false, they do not amount to forgery as defined in s. 463 of the Indian Penal Code. He urges that the fabrication of p. 11 was not made dishonestly or fraudulently, and therefore the said page is not a false document within the meaning of s. 464, and that even if it is a false document, it was not made with any of the intents mentioned in s. 463, and is consequently not a forgery. Two questions thus arise for **[115]** determination. First, whether the document is a false document; and second, whether it was made with one or more of the intentions specified in s. 463. In reference to the first point, it may be conceded that the document was not made "dishonestly;" but was it made "fraudulently," that is, "with intent to defraud?" If the document was made "with intent to defraud," as stated in s. 25, and "with intent to commit fraud or that fraud may be committed," as stated in s. 463, it

(1) 15 A. 210. (2) 13 B. 515. (3) 22 C. 313.

is a forgery. The terms "fraud" and "defraud" are not defined in the Indian Penal Code. Sir James FitzJames Stephen in his History of the Criminal Law of England, vol. II, p. 121, observes that "whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury, or to a risk of possible injury by means of that deceit or secrecy." "This intent," he adds, "is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. * * * A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this:—Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and if so, there was fraud." Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery. This was held by this Court in *Queen-Empress* v. *Shoshi Bhushan* (1). A somewhat wider interpretation has been placed on the word 'fraud' by the Bombay High Court in *Queen-Empress* v. *Vithal Narayan* (2), which was followed by the Calcutta High Court in *Lolit Mohan Sarkar* v. *The* [116] *Queen-Empress* (3). In the case in the Bombay High Court the learned Judges accepted the interpretation of Le Blanc, J., in *Haycraft* v. *Creasy* (4), that "by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from ill-will towards the other is immaterial." Whatever interpretation of fraud may be adopted, the false entries in the character roll of the accused were made with the intention of committing fraud. The intention was to deceive the superior officers of the accused, and by means of such deception to secure his advancement in the service, and thus to gain an advantage for him at the sacrifice of others. The entries were therefore a forgery within the meaning of s. 463. As it has not been shown that the forgery was committed by the accused himself, he has been rightly convicted of the abetment of that offence.

It is next urged that the sentence passed on the accused is unduly severe. The learned Judge has inflicted on him the highest penalty to which he could be liable under ss. 411 and 466. In my opinion this was not such a gross case as to call for such severe punishment. The stolen character books, of which the accused was in possession, were of little value, and had his object in retaining possession of them not been to obtain facilities for the perpetration of the forgery, his offence would not have justified a heavy sentence. The forgery also was not of a very heinous character, although fabrication of the writing and signatures of several superior officers of the Police was a most impudent act. In my opinion it will be sufficient for the ends of justice to sentence the appellant to two years' rigorous imprisonment for the offence under s. 411, and to three years' rigorous imprisonment for the other offence, and altogether to a term of five years' rigorous imprisonment. While, therefore, I confirm the convictions, I reduce the sentence to the extent stated above.

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(1) 15 A. 210. (2) 13 B. 515. (3) 22 C. 313. (4) (1801) 2 East 92.

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21 A. 117=18 A.W.N. (1898) 201.

21 A. 117=18 A.W.N. (1898) 201.

[117] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

JAMNA DAS AND ANOTHER (*Defendants*) *v.* UDEY RAM AND OTHERS (*Plaintiffs*).* [11th November, 1898.]

Procedure—Appeal—Appeal by defendants against whom specifically no decree was made but whose defence to the suit was necessarily disposed of by the decree.

Certain plaintiffs sued as second assignees of a debt to recover the debt, and made defendants to the suit their assignors, the original debtors, and certain persons whom they alleged to have been prior assignees of the debt, but whose assignment, according to them, had become void through non-fulfilment of the conditions upon which it was made. The Court of first instance gave a decree to the plaintiffs against the original debtors. An appeal by the first assignees was dismissed by the lower appellate Court, on the ground that there being no decree against the appellants their appeal would not lie. On second appeal it was *held* that the appeal would lie, inasmuch as the decree, though not a decree against the appellants by name, necessarily implied a finding that the assignment to the appellants, upon the basis of which they resisted the plaintiffs' claim had become void.

[R., 10 C.L.J. 80=10 Cr. L.J. 287=3 Ind. Cas. 393 (394); 9 C.W.N. 584; 9 M.L.T. 39 (40)=8 Ind. Cas. 337; 84 P.L.R. 1904=56 P.R. 1904; **Doubted**, 57 P.R. 1907=66 P.W.R. 1907; **D.**, 21 M.L.J. 947 (951)=10 M.L.T. 291=(1911) 2 M.W.N. 303 (305)=12 Ind. Cas. 167 (168).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellants.

Mr. *T. Conlan* (for whom Mr. *A. H. C. Hamilton*), for the respondents.

JUDGMENT.

BURKITT and DILLON, JJ.—This suit was one to recover a debt alleged to be due by the defendants Nos. 1 and 2 to one Sri Kishan Das, defendant No. 3, in the array of parties, by virtue of an assignment from the said Sri Kishan Das. The debt had originally been assigned by Sri Kishan Das to the defendants Nos. 4 and 5, Jamna Das and Lachmi Narain, the present appellants; but it was alleged that these defendants Nos. 4 and 5 had failed to perform the conditions upon which the assignment to them had been made, that the assignment was thereupon cancelled and a new assignment in favour of **[118]** the plaintiffs was substituted. The material issues framed by the Court of first instance upon the pleadings of the parties were:—(1) Upon what condition was the debt assigned to the defendants Nos. 4 and 5? (2) Had that assignment become void by reason of any default on the part of the defendants Nos. 4 and 5? The Munsif found that the assignment had been made to these defendants upon certain conditions; that they had not fulfilled those conditions, and that therefore the assignment to them had become void. The Munsif accordingly, in pursuance of those findings, gave a decree in favour of the plaintiffs against the defendants Nos. 1 and 2, whose debt had been assigned to the plaintiffs by Sri Kishan Das, the third defendant. The decree drawn up in pursuance of the judgment containing the findings mentioned above was as

* Second Appeal No. 723 of 1896, from a decree of Syed Muhammad Tajammul Husen, Additional Subordinate Judge of Cawnpore, dated the 11th August 1896, confirming a decree of Lala Banke Behari Lal, Munsif of Cawnpore, dated the 24th December 1895.

follows :—"It is ordered and decreed that the claim for Rs. 790-3-0, with future interest at 8 annas per cent. per mensem, be decreed against the defendants Nos. 1 and 2. The plaintiffs and the defendants Nos. 1 and 2 shall recover their costs from Sri Kisben Das, defendant No. 3. The other defendants Nos. 4 and 5 shall bear their own costs." The defendants Nos. 4 and 5 appealed against that decree, but the lower appellate Court (Subordinate Judge of Cawnpore), on a preliminary objection raised before it by the respondents, refused to hear and dismissed the appeal, on the ground that no portion of the claim had been decreed against the appellants. He held in effect that the decree as drawn up did not damage the appellants. These appellants have now come to this Court in second appeal, contending that the lower appellate Court was wrong in holding that they had no right of appeal.

For the respondents it has been contended, as before the lower appellate Court, that the appellants should have made an application to the original Court under s. 206 of the Code of Civil Procedure, and should have procured an entry in the decree of the finding that their assignment had become void.

[119] In our opinion the decision of the lower appellate Court which gave effect to that contention is wrong. We are unable to perceive any variance between the decree and the judgment which the appellants could have asked the Munsif to remedy. The decree as it stands does, in our opinion, fully and necessarily imply a finding that the appellants' assignment had become void, inasmuch as, but for the existence of such a finding, a decree could not have been given in favour of the plaintiffs, who admittedly were but subsequent assignees of the debt originally assigned to the appellants.

Under these circumstances we think the decree of the lower appellate Court was wrong. We allow this appeal. We set aside the decree of the Subordinate Judge, and, as his decree proceeded upon a preliminary point and as we have overruled his decision upon that point, we remand the case for trial upon the merits under s. 562 of the Code of Civil Procedure. The appellants will have their costs of this appeal in any event.

Appeal decreed and cause remanded.

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21 A. 119 = 18 A.W.N. (1898) 202.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

MUJIB-ULLAH (*Plaintiff*) *v.* UMED BIBI AND ANOTHER (*Defendants*).* [12th November, 1898.]

Pre-emption—Muhammadan Law—Wajib-ul-arz—Pre-emptor disentitled by his own conduct to pre-empt part of the property sold—Pre-emptor not entitled to pre-empt any portion thereof.

Where a pre-emptor sued for possession by right of pre-emption of certain property sold by one and the same sale-deed, claiming as to one portion of the property sold under the Muhammadan law and as to another under the *wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Muhammadan

* Second Appeal No. 806 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 13th June 1896, confirming a decree of Pandit Bansidhar, Subordinate Judge of Gorakhpur, dated the 30th March 1896.

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law applied, it was *held* that the pre-emptor was not entitled to pre-emption in respect of any portion of the property covered by the said sale-deed. *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) followed.

[120] THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *T. Conlan* and *D. N. Banerji*, for the appellant.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BURKITT and DILLON, JJ.—This is an appeal brought by a plaintiff in a pre-emption suit. The sale-deed, in respect of which the suit has arisen, was dated the 7th of May 1894, and purported to convey to the vendee shares in some 47 villages, 3 pacca houses and a mortgage-deed. In the Court of first instance (Subordinate Judge of Gorakhpur) the suit was dismissed on the ground that the document upon which the suit was founded was not a sale-deed, but was a deed of gift. On the appeal on that point to the District Judge it is not easy to say what the opinion of the lower appellate Court was. The learned Judge disagreed with the finding of the Court of first instance, that the document was a deed of gift, but at the same time seems to have held that it was not a sale, that it was only a "family arrangement," and finally affirmed the decree of the Court of first instance, on the ground that there were "no materials for determining the plaintiff's share of the Rs. 15,500 set forth in the sale-deed, and it passes the wit of man to devise a decree which should assign to the plaintiff his proper share of the contingent liabilities imposed on the transferee." With respect to the judgment of the lower appellate Court we desire it to be understood that we do not concur in any proposition of law laid down therein, but as the question as to the nature of the deed and the manner in which the sum payable by the pre-emptor should be calculated have not been fully discussed on both sides in this case, we refrain from saying any more on that matter. On behalf of the respondent Pandit *Moti Lal* contended that this case was exactly on all fours with the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1). In that case, as in the present case, two properties were claimed by right of pre-emption, one property being claimed under the Muhammadan law and the other by virtue of the provisions of the *wajib-ul-arz*. **[121]** Such is also the case here, the three houses being claimed under the Muhammadan law, and 8 out of the 47 shares sold being claimed under the provisions of the *wajib-ul-arz*. In the case just cited the plaintiff-pre-emptor failed to prove that he had fulfilled the conditions required by Muhammadan law as preliminaries to the institution of a claim for pre-emption. So here also it has been found as a fact by both the lower Courts that the plaintiff here failed to perform these preliminaries. The result is that the plaintiff-appellant, being shown to be disqualified from claiming to pre-empt these houses under the Muhammadan law, cannot possibly get a decree for the whole of that which by law, but for his own laches, he would be entitled to pre-empt. In the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1), cited above, the late Chief Justice of this Court, whose opinion on such a matter is entitled to every weight and respect, remarked as follows:—"The question then arises, can there be any difference between the case of the plaintiff coming into Court and claiming a portion of the property sold, and the

(1) 11 A. 108.

case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us that there can be no difference in principle, and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court and has claimed a part only when he was entitled to claim the whole." The case now before us and the case just cited are admittedly on all fours. No attempt has been made, or indeed could be made, to show any distinction between them. It is contended that we should not follow the rule laid down in that case. We, however, fully concur in the rule laid down therein and in the reason given for it. We agree with the learned Judges who decided that case, that an intending [122] pre-emptor who has placed himself in the position occupied by the plaintiff here and by the pre-emptor in the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) must be considered to have, by his own act as a matter of law, forfeited his right to pre-empt any portion of the property. We follow the rule of law laid down in that case and for the reasons given above, and not because we agree with the lower appellate Court, with whose judgment, as a matter of fact, we disagree, we dismiss this appeal with costs.

Appeal dismissed.

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21 A. 122=18 A.W.N. (1898) 208.

APPELLATE CRIMINAL.

Before Mr. Justice Knox, Acting Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* TIMMAL AND OTHERS.* [18th November, 1898.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 96 *et seqq*—*Right of private defence*—*Act No. I of* 1872 (*Indian Evidence Act*), *s.* 105—*Presumption*—*Pleadings.*

Held, that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. *Queen-Empress* v. *Prag Dat* (2), referred to.

[F., 32 A. 451 (455)=7 A.L.J. 438=11 Cr. L.J. 374=6 Ind. Cas. 589 (591); R., A.W.N. (1904) 113; 10 Cr. L.J. 102 (106).]

THE facts of this case are fully discussed in the judgmentof the Court.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the appellant.

Babu *Bishnu Chandar*, for the respondents.

JUDGMENT.

KNOX, ACTING C. J., and BANERJI, J.—This is an appeal presented under directions of the Local Government from an appellate order of acquittal passed by the Sessions Court of Mirzapur. The Magistrate of the 1st class at Mirzapur, before whom the case originally came, had

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* Criminal Appeal No. 1007 of 1898.

(1) 11 A. 108.

(2) 20 A. 459.

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found five persons guilty of offences under ss. 147 and 325 read with s. 149 of the [123] Indian Penal Code; but had passed sentences upon the five only for offences under s. 147. The learned Sessions Judge arrived at the following conclusions upon the evidence, namely, first, that the appellants before him had acted in exercise of the right of private defence of property; secondly, that there was no evidence that the same accused formed an unlawful assembly. He accordingly acquitted them of the charge under s. 147, and apparently omitted to take any notice of the conviction under s. 325 read with s. 149 of the Indian Penal Code. Holding the views he did, the learned Sessions Judge should have in terms recorded an acquittal upon this charge also.

The facts found by the Magistrate were that Timmal, one of the respondents before us, considered he possessed a right to gather the fruit of certain mahua trees. That fruit was being peaceably gathered by certain persons on behalf of one Altaf Husain. With a view of enforcing Timmal's right or supposed right, the five accused came upon the spot and with clubs assaulted five men. The injury caused to two was, according to the medical evidence, which has not been rebutted, "grievous hurt." The Magistrate added to the above recital of facts the words:—"Timmal's party cannot claim that they were defending the enjoyment of a right actually in possession." The appeal as presented sets out that the respondents have not made out their defence that they acted within their right of private defence of property. This ground is not happily worded. We have, with the assistance of the learned vakil who appeared for the respondent, examined the defences raised by the various respondents before the Magistrate. Timmal says that he never beat any one and that he saw no assault. Badan does not say, so far as he is concerned, that he hit any one; he says, on the contrary, that he was hit. The other three respondents all say that they were not on the spot at the time when the disturbance took place. The only hint that such a plea was ever in contemplation as a plea in defence [124] is to be found in the examination of Badan, and of Badan alone. We need not go into the question whether Badan, an accused, can, in his statement, raise a plea on behalf of the co-accused, which those co-accused never raised for themselves, and which they virtually repudiated in the statements made by them. In appeal before the Court of Session all the five respondents, who were then appellants, did put forward as one of the grounds of appeal that they had acted as they did in exercise of the right of private defence of property.

The learned Government Advocate contended that the respondents were precluded from raising this plea by the very nature of the defences which they had set up. He drew our attention to an unreported case, and further to the case of *Queen-Empress* v. *Prag Dat* (1). It was laid down in both these cases, more particularly in the latter case, that the law in India is that, when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, is upon the accused, and it is directed by that law, as enacted in s. 105 of the Indian Evidence Act, 1872, that the Court shall presume the absence of such circumstances. He pointed out that not only had the accused not set up the plea that they had acted in the exercise of the right of private defence of property, but further that there was no evidence on the record upon which any circu mstance could be inferred which would substantiate such a plea.

(1) 20 A. 459.

We followed the learned vakil very carefully in his answer to this part of the Government case. Taking all that he said as being matter proved, we found it amounted to this, namely, that Timmal and his party had been put into possession of the mahua trees in dispute before any lease of the same trees had been given to the persons on whose behalf the persons assaulted were on the day in question collecting the mahua fruit, and that the fact of possession having been given to **[125]** Timmal and his party had, at the time possession was given, been proclaimed in the village. At this point the learned vakil stopped, and rightly stopped; he had no evidence upon which to set up a case that any one of his clients had struck a single blow or committed any assault. No blows having been struck and no assault committed, the exercise of the right of private defence fell at once to the ground. The learned vakil made some attempt to show that a conviction under s. 147 was not justified by the evidence, and he referred us to the case of *Pachkauri* v. *Queen-Empress* (1), and *Queen-Empress* v. *Narsang Patha Bhai* (2). Neither of those cases is in point here. In *Pachkauri* v. *Queen-Empress* the accused were at the time the assault was committed on the spot, and exercising their rights over the property claimed by them. In the present case the circumstances were the very reverse; the persons before us, who were assaulted, were picking up the mahua fruit peaceably and under cover of a lease; the assailants came upon them while so employed, and commenced the attack with a view of enforcing the right which they considered rested with them. In *Queen-Empress* v. *Narsang Patha Bhai* the assault was commenced by the complainant and not by the persons assaulted by the complainant. In the case before us the respondents did form an unlawful assembly, and in using force committed rioting; they could not plead as a justification for their act that the persons picking the mahua were in so doing guilty of theft, mischief or criminal trespass. They were acting throughout in the *bona fide* belief that they had a right to the mahua, and the element of dishonesty was wanting. Hence there could be no theft or mischief. When they went upon the land they did not go on it with the intention of committing any offence, hence there was no criminal trespass. From every point of view the plea of private defence of property was one which could not have been raised in this case, and was in fact never raised by the accused until they went before the appellate Court. There being no evidence on the **[126]** record, the learned Sessions Judge was distinctly in error, and that error an error of law, when he presumed the presence and not the absence of circumstances which would form any basis for the plea of private defence of property.

The learned vakil, probably feeling the weakness of this portion of his argument, commenced his defence by urging that the appeal before us was one which should never have been put forward by the Local Government. He referred us to the cases of *Queen-Empress* v. *Gayadin* (3), *Queen-Empress* v. *Chotu* (4), and *Queen-Empress* v. *Robinson* (5). All these cases were considered by this Court in the recent case of *Queen-Empress* v. *Prag Dat*, to which we have already referred. It is true that the right vested in the Local Government is a right which should be advanced with care and caution. In two of the cases cited by the learned vakil the errors which the Local Government sought to have rectified were errors on questions of fact. In the case before us the learned Sessions

(1) 24 C. 686.
(2) 14 B. 441.
(3) 4 A. 148.
(4) 9 A. 52.
(5) 16 A. 212.

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Judge erred upon a question of law, and he was at the time sitting as a Court of Appeal, and his error of law led him to set aside the conclusion of the Magistrate upon facts that he himself would probably have accepted but for the error of law into which he had fallen. A riot in the jungles of Mirzapur, where it is not easy to have recourse to the protection of the police, is an offence which wounds public security, and very often leads to fatal results. We cannot therefore agree with the learned vakil in holding, as he wishes us to do, that we ought not to exercise the powers vested in us in this particular case. We set aside the finding of acquittal, restore the conviction recorded by the Magistrate, and pass the sentence which was in the first instance passed by him. In computing the term of imprisonment any portion of the imprisonment already undergone will be deducted. Subject to the above the sentences will run from to-day's date.

21 A. 127=18 A.W.N. 1898) 205.

[127] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MATHURA PRASAD.* [19th November, 1898.]

Act No. XLV *of* 1860 (*Indian Penal Code*), *ss.* 21, 161—"*Public servant*"—*Manager employed under the Court of Wards.*

Held that the manager of an estate employed under the Court of Wards is a "public servant" within the meaning of s. 21 of the Indian Penal Code. *Queen-Empress* v. *Arayi* (1) referred to.

[**Diss.**, 28 C. 344=4 C.W.N. 798 (800); **R.**, 1 S.L.R. 30 (31).]

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *C. Ross Alston*, *A. H. C. Hamilton*, and Babu *Satish Chandar* for the applicant.

The Government Pleader (Munshi *Ram Prasad*), with whom Babu *Satya Chandar Mukerji*, for the Crown.

JUDGMENT.

AIKMAN, J.—This is an application asking this Court to exercise the powers of revision conferred on it by s. 439 of the Code of Criminal Procedure.

The applicant, Mathura Prasad, was an employ of the Court of Wards on an estate under the Court in the Shahjahanpur district. He was charged with and tried before a Magistrate of the 1st class for nine different offences, six of which were under s. 409 of the Indian Penal Code, namely, Criminal breach of trust by a public servant, and three under s. 161 read with s. 114 of the Indian Penal Code, abetting the receipt of illegal gratification by a public servant. Objection was taken before the Magistrate to all these offences being tried together. The Magistrate was under the erroneous impression that the provisions of s. 234 of the Code of Criminal Procedure empowered him to try at one time any number of offences, provided no more than three offences of one kind were charged. Although he found the accused guilty of all the nine offences, he considered therefore that he complied with the law by convicting him of three only of the six offences under s. 409 of the Indian [128] Penal Code. He also convicted him of the three charges under s. 161

* Criminal Revision No. 548 of 1898.

(1) 7 M. 17.

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21 A. 127 = 18 A.W.N. (1898) 205.

read with s. 114 of the Indian Penal Code. In the result he sentenced him to an aggregate punishment of four years' rigorous imprisonment and a fine of Rs. 120. On appeal the learned Sessions Judge sustained one of the convictions under s. 409 and one of the convictions under s. 161 read with s. 114 of the Indian Penal Code. The convictions and sentences under the other charges were set aside.

Before this Court the first plea urged by the learned counsel, who appears in support of the application, is that an employee under the Court of Wards is not a public servant. So far as the charges of criminal breach of trust are concerned, this question is of little importance, for on the facts found the applicant was guilty, if not under s. 409, at least under s. 408 of the Indian Penal Code, and the sentences imposed on him are within the limit of punishment prescribed for offences under the latter section. But the question is of importance with regard to the charge of abetment of the taking of an illegal gratification, for if the manager of the Court of Wards, whom the appellant is said to have abetted in taking illegal gratifications, cannot be held to be a public servant, the offence charged was not committed. The learned Counsel relies, in the first place, on the decision in the case *The Queen-Empress* v. *Arayi* (1). In that case it was held by TURNER, C. J., that a peon employed by a manager of an estate under the Court of Wards is not a public servant within the meaning of that term in the Penal Code. Counsel were not instructed in that case, and no reasons are given for the view taken. Whether the learned Chief Justice would have held that the manager of an estate under the Court of Wards was not a public servant, does not appear.

Reference was next made to the provisions of s. 12, sub-s. (ii) of Act No. XVII of 1885, which is entitled "An Act to make better provision for the Superintendence of Government Wards in the Central Provinces." That Sub-section **[129]** is as follows :—"Every manager, or other servant of the Court of Wards, shall be deemed a 'public servant' within the meaning of ss. 161, 162, 164 and 165 of the Indian Penal Code ; and in the definition of 'illegal remuneration' contained in the said s. 161 the word 'Government' shall, for the purposes of this sub-section, be deemed to include the Court of Wards." It was argued that if the Legislature found it necessary to make this provision in the Act for the Central Provinces, it was clear that the provisions of s. 21 of the Indian Penal Code, which section defines what persons fall under the description of "public servant," were not sufficient to cover the case of a Court of Wards' employee.

As neither Act No. XIX of 1873 (The North-Western Provinces Land Revenue Act), nor any other Act applicable to these Provinces, contains any provision similar to that quoted from s. 12 of Act No. XVII of 1885, it is clear that a Court of Wards' employee cannot be held to be a "public servant," if he cannot be brought within one or other of the ten clauses of s. 21 of the Indian Penal Code. Reference was also made to s. 35 of the North-Western Provinces Land Revenue Act, which contains the following provision :—"Every kanungo and patwari and every person appointed temporarily to discharge the duties of any such officer shall be deemed to be a public servant within the meaning of the Indian Penal Code." It was contended with much force that if the Legislature had intended that

(1) 7 M. 17.

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Court of Wards' employees should be held to be public servants, some provision similar to that quoted above would have appeared in Chapter VII of Act No. XIX of 1873, which contains the law as regards the Court of Wards. I must say that I was much impressed with the force of this reasoning: but after full consideration I have arrived at the conclusion that the provisions of the 9th clause of s. 21 of the Indian Penal Code are wide enough to include the case of Court of Wards' employees. The material words of that clause are—"Every officer whose duty it is as such officer to take, receive, keep or spend any property on behalf of [130] Government." Now the Board of Revenue, which is a department of Government, is the Court of Wards for these Provinces, and as such is in charge of the estates of proprietors who are held disqualified to manage their own lands. It is true that s. 202 of Act No. XIX of 1873, which lays down the duties of a manager, says that the manager "shall in every respect act to the best of his judgment for the proprietor's interest as if the property were his own." But while the disqualification of a proprietor lasts he has no power to collect any rents from his own estates. If he does receive rents he cannot give a good discharge to tenants. The collection of rents is taken from him by the Court of Wards, that is, by the Government, and although the Government may ultimately be accountable to the proprietor for the money which it has realized, it is none the less Government which receives the money. Therefore it seems to me that an officer of the Court of Wards does, when he realizes money from a Court of Wards' estate, realize that money "on behalf of Government." The provisions referred to above from the Central Provinces Act may have been enacted with the object of removing any doubts; but as the words of the Penal Code seem to me to be wide enough to cover the case of Court of Wards' servants I overrule the objection which the learned counsel urged with so much ingenuity and force.

The next point taken on behalf of the applicant is, that the defect in the trial which has been referred to at the outset of this judgment, is a defect which, *ipso facto*, renders the whole proceedings void. In support of this reliance is placed on a dictum of Petheram, C. J., in the case *in the matter of Lachmin Narain* (1). At page 131 of the judgment the learned Chief Justice says:—"It is clear from the terms of that section (s. 234 of the Code of Criminal Procedure), that a man can only be tried for three separate offences of the same kind at the same trial, and, speaking for myself, I think that if a man were tried for four specific offences at one trial it would not only be an [131] irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless it were cured by some subsequent proceeding by striking out some portions of the charge, and as to the propriety or legality of such a proceeding, we do not at present express any opinion." There is no doubt that this dictum is clearly in favour of the applicant, but it must be taken to be *obiter*, for it was not necessary for the decision of the case then before the Court. S. 233 of the Code of Criminal Procedure provides that, with certain exceptions therein specified, for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately. I think there is much force in the view taken by Petheram, C.J., that a breach of the provisions of this section is something more than a mere irregularity, but, in my opinion, it is not open to me to adopt that

(1) 14 C. 128.

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view, inasmuch as I find that not only in this Court but in the Calcutta and Bombay High Courts a breach of the provisions of s. 233 or of the corresponding s. 453 of the former Code, has been treated as an irregularity, and not as an illegality rendering the whole proceedings void.

That a grave irregularity was committed there cannot be any doubt, and I have to consider whether the irregularity has in fact occasioned a failure of justice. In the explanation appended to s. 537 of Act No. V of 1898, it is said that in determining whether any error, or omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. It is clear from the Magistrate's own record that the accused did take objection before him, and I am informed that immediately after the accused had been furnished with a copy of the charges and when his objection before the Magistrate was overruled, he had recourse to the Court of Session by a petition presented on the 7th of June, the charges having been framed on the 2nd of June, in which the same objection to the trial of so many offences **[132]** together was urged. The Court of Session, however, declined to interfere at that stage of the case. The object of the law which enacts that, with the exceptions specified, there must be a separate trial for each offence, is framed no doubt, as well to prevent the cumulative effect upon the mind of the Court of a number of charges being brought forward together as in the interest of the accused, who cannot but be harassed and bewildered by having to meet in one trial a number of separate charges, Now in this case the accused had not only to meet nine separate charges but in reality as much larger number. For instance, charge No. 8 includes not only a charge of abetting the manager in the receipt of a bribe of Rs. 10, but a charge against the accused of accepting one for himself. Again, it appears that in charge No. 9, in which the applicant is accused of having accepted on behalf of the manager a sum of Rs. 175, this sum was made up of a number of small sums realized from a number of tenants as an illegal gratification for allowing them to continue in their holdings. Although the amount is said to have been handed over to the manager in a lump sum, the evidence of a number of tenants was called to prove the payments of separate sums by them to the applicants. The result was that the record swelled to an enormous length, to upwards of 300 closely written pages. To meet all these different accusations at one trial must, it appears to me, have seriously prejudiced the applicant in his defence, and that the bringing forward of so many different charges must have influenced the mind of the Magistrate is equally clear. It is further argued with reference to the 9th charge, the conviction under which has been sustained by the learned Sessions Judge, that the accused was prejudiced by the manner in which it was drawn up. In it the offence is said to have taken place in the "month of *Magh*" last year. Evidence was called on behalf of the defence which the Sessions Judge seems to hold has the effect of proving that the offence could not have taken place in that month, inasmuch as the manager is said to have been during the whole of that month absent from Shahjahanpur, where the offence is alleged **[133]** to have been committed. It is to be noted that the charge is not worded "in or about the month of *Magh*," and it is contended that the accused was prejudiced by being called on to meet only a charge for that month. The Sessions Judge is of opinion that the offence may have been committed in the following month of *Phagun*. If so, the accused

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ought to have had an opportunity of calling evidence to prove that the offence was not committed by him in *Phagun*. The result of the above examination of the record is, that I am constrained to come to the conclusion that the irregularities committed in the Court of the Magistrate are such as are not covered by the provisions of s. 537 of the Code of Criminal Procedure. It is to be regretted that the Magistrate, who seems to have gone into the case before him very patiently, should have, by neglect of the provisions of the Code of Criminal Procedure, rendered the interference of this Court necessary. But, in my opinion, I have no alternative but to set aside the convictions and sentences, and direct that the accused be re-tried according to law. The fines, if paid, will be refunded; the sentence of rigorous imprisonment will cease. Accused will be detained in custody until the District Magistrate makes arrangements for the re-trial of the accused, which he will proceed to do forthwith. In the event of a fresh trial resulting in conviction, the term of imprisonment which the applicant has already undergone ought to be taken into account.

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21 A. 133 (F.B.) = 18 A.W.N. (1898) 204.

FULL BENCH.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite party*) *v.* JILLO (*Applicant*).* [10th November, 1898.]

Civil Procedure Code, s. 409 -*Application for leave to sue* in forma pauperis—*Decree—Appeal.*

Held that no appeal will lie from an order rejecting an application for leave to appeal *in forma pauperis*. *Baldeo* v. *Gula Kuar* (1) and *Lekha* v. *Bhauna* (2), referred to.

[R., 28 A. 72 = 2 A.L.J. 749 = A.W.N. (1905) 191; 13 C.L.J. 688 = 15 C.W.N. 879 (881) = 11 Ind. Cas. 65 (66); 12 O.C. 381, U.B.R. (1910) 28 (29) = 8 Ind. Cas. 475.]

[134] THIS was an application for leave to sue *in forma pauperis*. The applicant, Musammat Jillo, came into Court alleging that she had been married to the defendant, Chand Khan, on the 13th of October 1886, on a prompt dower of Rs. 10,000; that she had lived with her husband up to 1895, but that in January 1895 her husband had turned her out and refused to pay her dower. She prayed for a decree for Rs. 10,000 and costs of suit. On presentation of this application in the Court of the Subordinate Judge of Moradabad the applicant's statement was recorded, the application was registered and notice was issued fixing the 26th October 1895 for the further hearing. The case was adjourned from time to time until the 4th of January 1896, on which date the Subordinate Judge recorded the following order:—"The applicant's pleader stated that he "was not directed to conduct the case, and he did not produce any evi- "dence as to (the applicant's) poverty. The defendant's pleader also is "absent. As the application is rejected for want of prosecution, the Gov- "ernment Pleader also is not entitled to any costs. Order: The application

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* First Appeal, No. 101, of 1896, from an order of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 4th January 1896.

(1) 9 A. 129.

(2) 18 A. 101.

"be rejected with costs." This order was followed by a decree, the operative part which was in the following terms:—"It is, therefore, ordered "that the application be rejected with costs in default of prosecution." Against this order an appeal was preferred to the High Court by the Government, claiming its costs on the application.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

KNOX, Acting C. J., BANERJI and BURKITT, JJ.—Musammat Jillo, the respondent to this first appeal, presented in the Court of the Subordinate Judge of Moradabad an application praying for permission to institute a suit *in forma pauperis*. She was examined and her deposition recorded. After that a date was fixed, and notice given to the Government Pleader, as required by s. 408 of the Code of Civil Procedure. Upon the day on which inquiry was to be made as to whether Musammat Jillo was or was not a pauper we find the Court recording **[135]** an order, which is both extraordinary and in its terms contradictory. The order runs as follows:—"The applicant's pleader stated that he was not directed to conduct the case, and he did not produce any evidence as to (the applicant's) poverty. The defendant's pleader also is absent. As the application is rejected for want of prosecution, the Government Pleader also is not entitled to any costs. Order:—"The application be rejected with costs." We examined the original order, as we found it difficult to believe that the translation before us was a correct translation. We find that the order has been correctly translated and is as above. We next examined the decree: we find the language of that equally, if not more, unsatisfactory. The effective order of the decree is in these terms: "It is therefore ordered that the application be rejected with costs in default of prosecution." There is nothing whatever to indicate by which of the parties and in what proportion the costs are to be paid, or to whom they are to be paid. It would be a matter of regret if we found a decree like this passed by the most junior Munsif in these Provinces. From this decree the present appeal before us has been filed by the Secretary of State for India in Council, contending that the appellant is entitled to his costs, inasmuch as he appeared to protect the revenue, and, it might have been added, after he had received notice from the Court calling on him so to appear.

A preliminary objection was raised to the hearing of the appeal, on the ground that the order under consideration was not a decree within the meaning of the Code of Civil Procedure, and that the order was not one appealable under s. 588 of the Code of Civil Procedure. We are of opinion that the objection taken is a sound one and must prevail. The learned Government Advocate attempted to support the appeal upon the authority of the case *Baldeo* v. *Gola Kuar* (1). That case is one not entirely on all fours with the present, still it very much resembles it, and was certainly one on which the learned Govern- **[136]** ment Advocate was entitled to rely in support of his contention. If the learned Judges who pronounced that decision intended to lay down that an order like the one in appeal here was a decree within the meaning of the Code of Civil Procedure, we find ourselves unable

(1) 9 A. 129.

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to concur with them. The order before us was not an adjudication in any stage of a suit. It was passed upon an application which, if granted, would, after the order granting it, and only then, have matured into a plaint in a suit. It was not therefore an adjudication deciding a right claimed in a suit. It is true that the definition given for the word "decree" goes on to say that an order rejecting a plaint, or directing accounts to be taken, or determining questions mentioned or referred to in s. 244, is, under certain circumstances, within the definition of a decree. The only part of this portion of the definition which bears at all upon the present case are the words "an order rejecting a plaint." We have, however, pointed out above that in the case before us the stage had not been reached in which the application filed by Musammat Jillo could be deemed a plaint. A similar point to that before us was considered by this Court in the Full Bench Ruling in the case of *Lekha* v. *Bhauna* (1) in which the Court held that an order under s. 549 of the Code of Civil Procedure, was not a final expression of an adjudication upon any right claimed or defence set up within the meaning of the first paragraph of the definition clause relating to decrees and was not an order appealable as a decree. We therefore dismiss this appeal, but without costs. The order passed by the Subordinate Judge is so extraordinary that we direct this case to be treated as a case in revision under s. 622 of the Code of Civil Procedure, and that it be taken up on a further date so as to allow Musammat Jillo, if she be so advised, to be heard.

Appeal dismissed.

[137] Under the above order the case was taken up in revision on the 27th of February 1899,* when the following order was passed :—

KNOX, BANERJI and BURKITT, JJ.—We have in previous proceedings commented upon the extraordinary nature of the order passed by the learned Subordinate Judge. There is no question whatever that in passing the order he did on the 4th of January 1896, he acted with material irregularity. We accordingly set aside that order, whatever it may be, for its terms are so ambiguous and contradictory that it is impossible to interpret it, and in lieu of it we pass this order. We direct that the application of Musammat Jillo for permission to sue *in forma pauperis* be dismissed with costs, which will be paid by Musammat Jillo. The Secretary of State will get his costs both in the lower Court and in these proceedings.

* Civil Revision No. 49 of 1898.
(1) 18 A. 101.

21 A. 137=18 A.W.N. (1898) 210.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

KUNJI BEHARI LAL AND ANOTHER (*Plaintiffs*) *v.* PARSOTAM NARAIN (*Defendant*).* [25th November, 1898.]

21 A. 137=18 A.W.N. (1898) 210.

Act No. XIX of 1873 (*N.W.P. Land Revenue Act*), *ss.* 185 *and* 186—*Sale for arrears of revenue—Disposal of surplus proceeds—Distribution amongst creditors of defaulter—Suit by one of such creditors against another—Cause of action.*

An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid therewith one of the mortgogees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The [138] action of the Collector in contravention of the exprsss provisions of s. 185 of Act No. XIX of 1873 gave the plaintiffs no cause of action against the other mortgagee.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Munshi *Ratan Chand*, for the appellants.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BURKITT and DILLON, JJ.—We are unable to agree with any of the reasons given by either of the two lower Courts for their decisions in this case. Put very briefly, the facts are as follows:—

A certain estate, which had been mortgaged separately to the plaintiffs and to the defendant, was sold to pay arrears of Government revenue. The effect of that sale was to wipe off all incumbrances theretofore existing on the estate, though of course leaving untouched the mortgagee's personal remedies, if any, against the mortgagor. The estate, when sold, produced a much larger sum than was necessary to discharge the arrears of revenue. When such an event occurs, the duty of the Collector is distinctly laid down by s. 185 of the Land Revenue Act of the North-Western Provinces (Act No. XIX of 1873). That section directs the Collector to pay the surplus to the person whose land has been sold, and s. 186 further directs that the surplus shall not be paid to any creditor of the person whose land is sold except under the order of a Civil Court; and further that, except under such order, the money shall not be retained in the Government treasury. It is admitted here that no order of any Civil Court was passed in the matter or served on the Collector. The Collector's duty therefore, as laid down by the sections referred to above, was to have paid the money forthwith to the person whose land had been sold. That person, it seems, did apply to the Collector for the money, and the two mortgagees, the plaintiffs and defendant in this case, also applied. The Collector, disregarding the provisions

* Second Appeal No. 688 of 1896, from a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 11th June 1896, reversing a decree of Babu Ishri Prasad, Munsif of Mainpuri, dated the 24th September 1894.

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21 A. 137 = 18 A.W.N. (1898) 210.

of ss. 185 and 186 of the Revenue Act, refused to [139] pay the money to the person whose land had been sold, and, disregarding the claim of the latter, he handed the money over to creditors, thereby paying off the whole of the amount alleged to be due to one creditor and part of the money alleged to be due to the other creditors. The latter thereupon, alleging that their mortgage had priority over the former creditor's mortgage, have instituted the suit against the creditor whose debt the Collector had paid in full, and claim from the latter a sum of money sufficient to pay off the balance of their own debt.

The two lower Courts, for reasons into which it is unnecessary to enter, as they are absolutely wrong from beginning to end and have failed to touch the real point in the case, have decided, one in favour of the plaintiffs and the other in favour of the defendant.

In our opinion, the plaintiffs have failed to show any cause of action in this case. According to their plaint they seem to be of opinion that they and the other creditors had a right by law to call on the Collector to discharge their debts in order of priority. That is an entirely erroneous and unfounded position. The Collector not only was not bound to discharge their debts, but he was forbidden by law to adopt such a course. In the absence of any order from a Civil Court, the Collector's duty was to have forthwith paid the surplus proceeds of the sale to the person whose land had been sold, and to no one else. He has chosen to disregard the provisions of the Act by discharging the debts of the creditors according to his own notions of equity. Such an unauthorized, and, we may call it, voluntary payment by him in violation of his duty did not, in our opinion, create any cause of action in the plaintiffs as against the defendant. In illustration of our meaning we would take the case, say, of a wealthy and philanthropic individual who, hearing of these debts, was good enough to pay off one in full and the other in part. Can it be said that such payment of one debt in full created a cause of action in the other creditor to have the balance of his debt made good, because of its priority, by the other creditor? We think not, and we [140] regard the payment of this sum to this creditor by the Collector as nothing more than a voluntary act of the Collector, who, disregarding the law he was bound to administer, thought fit to divide the money in his hands, which was payable to the defaulter only, between the two creditors of the latter.

In our opinion this suit fails, there being no cause of action. For that reason, and not for the reasons given by the lower appellate Courts, which, in our opinion, are completely erroneous, we dismiss this appeal with costs.

Appeal dismissed.

21 A. 140=18 A.W.N. (1898) 212.

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REVISIONAL CIVIL.

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21 A. 140=18 A.W.N. (1898) 212.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.

HARBANS LAL *(Decree-holder.)* *v.* KUNDAN LAL AND OTHERS *(Opposite Parties).** [7th December, 1898.]

Civil Procedure Code, ss. 311, 312—*Execution of decree—Sale in execution—Application to set aside sale—Court limited to grounds mentioned in* s. 311.

A Court to which an application under s. 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale and consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. *Tassaduk Rasul Khan* v. *Ahmad Husain* (1) and *Shirin Begam* v. *Agha Ali Khan* (2) referred to.

[Rel., 9 Ind. Cas. 816 (817)=102 P.L.R. 1911; **R.**, 11 P.L.R. 1907=132 P.R. 1906; **D.**, 9 O.C. 289 (291).**]**

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the applicant.

Pandit *Madan Mohan Malaviya*, for the opposite parties.

JUDGMENT.

KNOX, Acting C. J., and DILLON. J.—On the 22nd of September 1897, certain property, the property of the judgment-debtor Kundan Lal, was sold by auction in execution of a decree held by Harbans Lal. After the sale had been held the judgment-**[141]** debtor put in an application which he termed an application under s. 311 of the Code of Civil Procedure. He alleged that no sale notification had been issued and no proclamation duly and properly made; that owing to these irregularities he had sustained great loss, and he asked that the sale might be set aside. The Court found that there had been an irregularity in publication, but it also distinctly found that no loss had accrued to the applicant by reason of the irregularity. Having so found, the course which the Court should have taken, in our opinion, was, that it should have disallowed the objections and passed an order confirming the sale. So far as we can see, s. 312 of the Code of Civil Procedure gave the Court no other alternative. Instead, however, of so acting, the Court came to the conclusion, it does not appear at whose instance or on whose application, that there had been no sale, as there had been no attachment of the property sold, and it proceeded to set aside the sale. On appeal the learned Judge took the same view and confirmed the order of the Court of first instance setting aside the sale. We are asked in revision to hold that as no irregularities in the conducting or publishing of the sale had been found and as the judgment-debtor had sustained no injury, the Court had (and here we must have recourse, not to the petition, but to the argument before us) no jurisdiction to set aside the sale on an application under s. 311 of the Code of Civil Procedure. This contention is undoubtedly

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* Civil Revision, No. 35 of 1898.

(1) 20 I.A. 176.

(2) 18 A. 141.

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supported by a ruling of this Court in the case of *Shirin Begam* v. *Agha Ali Khan* (1), a case which can in no way be distinguished from the present. It was, however, contended by the learned vakil for the opposite party that there were a number of rulings, which he proceeded to lay before us, in which this Court had held that where the question complained of was not a mere irregularity, but an illegality, Courts had jurisdiction, under s. 311 of the Code of Civil Procedure, to set aside a sale, even though it had not been proved that substantial loss had resulted to the applicant by reason of such irregularity. Those [142] cases were *Mahadeo Dubey* v. *Bhola Nath Dichit* (2), *Jasoda* v. *Mathura Das* (3), *Raghu Nath Das* v. *Raj Kumar* (4), *Ganga Prasad* v. *Jag Lal Rai* (5), *Sant Lal* v. *Umrao-un-nisa* (6); he also referred us to the case of *Mohendro Narain Chaturaj* v. *Gopal Mondul* (7). With reference to all these cases one remark applies, namely, that they were all decided before the case of *Tassaduk Rasul Khan* v. *Ahmad Husain* (8), in which their Lordships of the Privy Council ruled very positively as to the object and purport of s. 311 of the Code of Civil Procedure. We find nothing in s. 311 which allows a Court to go into any question over and above that of material irregularity in the publication and conduct of the sale. Before the Court can set aside a sale under s. 311, the applicant must prove a material irregularity and substantial injury sustained thereby. He cannot come into Court upon these allegations, and when he has failed, as in the present case, to make them out, then ask the Court to pray in aid some further ground which he considers would entitle him to the relief asked for, and, as was pointed out before, the Court cannot do this of its own motion. When put in motion under s. 311, it must either find the irregularities complained of established, or, if it does not find this, it must pass an order confirming the sale. We accordingly reverse the orders setting aside the sale, and direct that the sale held on the 22nd of September 1897 be confirmed. The petitioner will get his costs throughout.

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21 A. 143=18 A.W.N. (1898) 213.

APPELLATE CIVIL.

[143] *Before Mr. Justice Burkitt and Mr. Justice Dillon.*

RAM SUKH AND OTHERS (*Defendnts*) *v.* GOKUL CHAND (*Plaintiff*)*
[7th December, 1898].

Jurisdiction—Civil and Revenue Courts—Act No. XII of 1881 (*N.W.P. Rent Act*); *s.* 34 et seqq, 95 (*d*) and 206 et seqq—*Landholder and tenant—Suit to eject a tenant on the ground that the tenant had denied the landholder's title.*

The reason which a landholder may have for desiring to eject a tenant of agricultural land has nothing to do with the procedure to be adopted for the tenant's ejectment. Where the procedure laid down in s. 36 *et seqq* of the North-Western Provinces Rent Act, 1881, is available, the landholder must adopt that procedure, and the mere fact that the landholder's alleged cause of action is the denial by the tenant of the landholder's title will not give the landholder a right to sue for ejectment in a Civil Court.

[F., 4 A.L.J. 253-N; R., 1 Ind. Cas. 665.]

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* Second Appeal No. 831 of 1896, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 26th May 1896, confirming a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 18th June 1895.

(1) 18 A. 141. (2) 5 A. 86. (3) 9 A. 511. (4) 7 A. 876.
(5) 11 A. 333. (6) 12 A. 96. (7) 17 C. 769. (8) 20 I.A. 176.

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THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. Simeon*, for the appellants.

Mr. *Roshan Lal* and Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

BURKITT and DILLON, JJ.—In the suit out of which this appeal has arisen the plaintiff, a zamindar, sued to eject the defendants, who were his tenants. The suit was brought in a Civil Court, and the appeal before us is one from the Court of the Subordinate Judge of Saharanpur. The suit is founded on the allegation that the defendants, being tenants without rights of occupancy, have denied the landholder's title and have set up a title as owners in themselves. The landholder therefore sues to eject them. A great part of the judgment of the lower Court is occupied in discussing the question as to whether a tenant of agricultural land who denies his landlord's title thereby renders himself liable to ejectment. We do not mean to enter into that question further than to say that neither of us—one of us having had a very long experience at the bar, and the other having had **[144]** a very long experience as a revenue officer—are aware of the existence in these Provinces of the common law respecting that matter upon which the Subordinate Judge has founded his decision. But, putting that matter aside, the suit, in our opinion, fails and must be dismissed for two reasons. Firstly, because it violates the provisions of clause (*b*) of s. 34 of the North-Western Provinces Rent Act. That section distinctly lays down that "no tenant shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." The defendants here were admittedly tenants. The plaintiff is the landlord. Secondly, the defendants, according to the plaintiff's showing, are tenants without a right of occupancy. To such a state of things the opening words of s. 95 of the Rent Act apply, which say that:—"No Courts other than Courts of revenue shall take cognizance of any dispute or matter on which any application of the nature mentioned in this section might be made." Now one of the applications mentioned in clause (*d*) of s. 95 is an application by a landholder to have a notice of ejectment issued and served under s. 38. Section 38 supplies the machinery under which the provisions of s. 36 are put into action, and s. 36 provides that if a landlord desires to eject a tenant not having a right of occupancy, he shall have a notice of ejectment served on such tenant. Then follow ss. 37, 38, 39 and 40, which provide the subsidiary machinery for giving effect to a notice issued under s 36. Now the defendants in this case being, according to the respondent, tenants without right of occupancy, and being tenants whom the landholder desired to eject, it is perfectly clear that this is a case in which an application might be made under s. 95, clause (*d*) of the Rent Act. The reason which the landholder may have for desiring to eject the tenant is perfectly immaterial. The law does not require him to state any reason. All that s. 36 requires is that he should be desirous of ejecting the tenant. He is not bound to give any reason for that desire, whether he wishes to eject the tenant as a troublesome person, as one who denies his title, or for any other **[145]** reason. It therefore follows, in our opinion, that this suit is one the cognizance of which by a Civil Court is absolutely forbidden by s. 95, the matter of the suit being one in which an application might be made under clause (*d*) of s. 95 of the North-Western Provinces Rent Act. We quite fail to understand why the respondent, having at his disposal the

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summary procedure provided by s. 36 and the following sections of the Rent Act, should have preferred to take his case into a Civil Court. This is not a case in which we can proceed under the provisions of s. 206 and the subsequent sections of the North-Western Provinces Rent Act. As has been frequently held, these sections contemplate those cases only in which a suit would lie in the Rent Court: but the procedure in the present case in the Rent Court would be by application and not by suit. It therefore follows that we cannot apply to the proceedings in this case the sections mentioned above. For the above reasons we allow this appeal. We set aside the judgment and decree of the lower appellate Court, and we direct that this suit do stand dismissed with costs in all Courts.,

Appeal decreed.

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21 A. 145=19 A.W.N. (1899) 12.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

FIDA HUSAIN (*Defendant*) *v.* MAULA BAKHSH (*Plaintiff*).*
[12th December, 1898.]

Execution of a decree—Civil Procedure Code, s. 268—Attachment of debt—Payment of debt attached out of Court.

Where a debt, which had been attached under s. 268 of the Code of Civil Procedure, was paid out of Court to the only person who, had the money due been paid into Court as required by the terms of the said section, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was *held* that such payment amounted to a sufficient compliance with the requirements of s. 268.

THE facts of this case are fully stated in the judgment of the Court.
Mr. *Amiruddin*, for the appellant.
Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

[146] BANERJI, J.—This appeal arises out of proceedings relating to an application for an order absolute for sale under s. 89 of Act No. IV of 1882. Certain property which belonged to the appellant Fida Husain and to other persons was mortgaged by them to one Ulfat Rai in 1886. The same property was subsequently mortgaged in 1887 to Ulfat Rai and Murlidhar, the father of one Atma Rai. The second mortgage fell by partition into the share of Atma Rai, and was assigned by him to the respondent, Maula Bakhsh, so that Maula Bakhsh became the holder of the second mortgage over the property. Before the assignment to Maula Bakhsh, Ulfat Rai brought a suit for sale upon his first mortgage and obtained a decree. It is alleged that he did not make Atma Rai, who, as I have said above, was at that time, jointly with Ulfat Rai, the holder of the second mortgage, a party to that suit. In execution of the decree which Ulfat Rai obtained on his first mortgage, he caused the mortgaged property to be sold by auction, and himself became the purchaser. He then sold the property so purchased to Fida Husain, and for a portion of the amount of the consideration for

* Second Appeal, No. 876 of 1897, from an order of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Saharanpur, dated the 13th August 1897, modifying an order of Pandit Mohan Lal, Munsif of Deoband, dated the 11th January 1897.

the sale he took a bond from Fida Husain. Maula Bakhsh brought a suit for sale upon the mortgage of 1887, of which he was the assignee, and in that suit he offered to redeem the first mortgage in favour of Ulfat Rai, the benefit of which had been acquired by Fida Husain by virtue of his purchase from Ulfat Rai. On the 13th of April 1896, a decree was passed in favour of Maula Bakhsh. The decree directed that Maula Bakhsh should pay to Fida Husain or into Court within three months of the date of the decree Rs. 250, the amount due on the first mortgage, and that upon his doing so he, Maula Bakhsh, would be entitled to bring to sale the whole of the mortgaged property for the realization of the said sum of Rs. 250, as also of the amount due upon the mortgage of 1887. After the decree was passed, Ulfat Rai brought a suit against Fida Husain upon the basis of the bond executed in his favour by Fida Husain for a part of the consideration for the sale effected by Ulfat Rai in favour of Fida Husain. In that suit he obtained an order on the 3rd **[147]** of June 1896 for attachment of the money payable by Maula Bakhsh to Fida Husain under the decree of the 13th of April 1896. This was an order passed, before judgment, under s. 484 of the Code of Civil Procedure. Under s. 486 a prohibitory order in the terms of s. 268 of the Code was issued to and served upon Maula Bakhsh. On the 11th of July 1896, that is, before the expiry of the three months fixed in the decree of the 13th of April 1896, Maula Bakhsh paid into Court Rs. 85-8-0, and informed the Court that he had paid the balance of Rs. 164-8-0 to Ulfat Rai in pursuance of the attachment. I may here observe that before the date last mentioned Ulfat Rai had obtained a decree in the suit brought by him against Fida Husain. On the 12th of November 1896 Maula Bakhsh presented the application which has given rise to this appeal, on the allegation that he had complied with the requirements of the decree passed in his favour, and that, as the amount of that decree had not been paid, he was entitled to an order absolute for sale under s. 89 of the Transfer of Property Act. The application was opposed by Fida Husain, who contended that the payment of Rs. 164-8-0 to Ulfat Rai was not equivalent to a payment to him, and was in violation of the terms of the decree of the 13th of April 1896. The Court of first instance overruled this contention, but the lower appellate Court allowed it and held that Maula Bakhsh had not performed the obligation which lay on him under the terms of the decree referred to above. That Court, however, for the reasons stated in its judgment, granted Maula Bakhsh an extension of time for payment of Rs. 164-8-0. From the order granting extension Fida Husain has preferred this appeal. Maula Bakhsh has taken objection under s. 561 of the Code of Civil Procedure, contending that there was a sufficient compliance on his part with the decree passed in his favour. After the case for the appellant had been stated, the objection under s. 561 was allowed to be first argued, because if it prevailed it would not be necessary to consider the appeal. In my judgment the objection under s. 561 must be allowed. Under the decree made in **[148]** favour of Maula Bakhsh he was no doubt liable to pay to Fida Husain or into Court Rs. 250 within three months from the date of the decree. There is no question that he has paid Rs. 85-8-0 out of that amount within the time fixed in the decree. It is also not disputed, and indeed the Courts below have found, that he paid Rs. 164-8-0 to Ulfat Rai within the three months. Now the question is, whether such payment was a payment in compliance with the decree. After the prohibitory order under s. 486 (read with s. 268) of the Code of Civil Procedure had been

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issued to Maula Bakhsh, he was not competent to pay the amount for which the prohibitory order had been issued to Fida Husain. If he had made such payment to Fida Husain he would have been guilty of non-compliance with the order of the Court which issued that prohibitory order. Under s. 268 a debtor, prohibited to pay the debt due by him, might pay the amount of the debt into Court, and such payment would discharge him as effectually as payment to the party entitled to receive the debt. If the sum of Rs. 164-8-0, to which the prohibitory order related, had been paid into the Court which issued the prohibitory order, such payment would undoubtedly have absolved Maula Bakhsh from liability to Fida Husain for payment of the amount. In this case, instead of paying the amount into Court, he paid it to the person who would have been entitled to withdraw it from the Court if it had been paid into Court. The fact of the payment to Ulfat Rai appears to have been certified to the Court, so that although in fact the payment was made to Ulfat Rai, it was in reality a payment which, by reason of the certification of it into Court, was equivalent to a payment into Court within the meaning of s. 268. The lower appellate Court seems to think that payment to a creditor who has obtained an attachment from the Court is the same thing as payment to an ordinary creditor. This view of the Court below is, in my opinion, erroneous. No creditor other than a creditor who had obtained an attachment of a debt due to his debtor could enforce payment of such debt. After the issue of the order of [149] attachment Maula Bakhsh could not have paid the sum of Rs. 164-8-0 to Fida Husain without being called upon by the Court, which had forbidden him to make the payment, to answer for his conduct. The only way in which he could have obtained immunity from liability was by paying the amount mentioned in the attachment order into Court. In order to reap the fruits of the decree obtained by him, he was also bound to make the payment within the three months allowed in the decree, and as he made the payment to the person who, as I have said above, was the only person who could withdraw it from Court, the payment to such person was equivalent to payment into Court, and consequently to a payment made to Fida Husain. That being so, Maula Bakhsh complied with the decree, and was entitled to an order absolute for sale under s. 89. The fact that after the order of the lower appellate Court allowing the objections of Fida Husain, Maula Bakhsh deposited the Rs. 164-8-0 over again, does not preclude him from maintaining his present objection. I allow the objection, and, setting aside the order of the lower appellate Court with costs, restore the order of the Court of first instance.

The appeal must necessarily fail, and I dismiss it with costs.

Appeal dismissed.

21 A. 149=18 A.W.N. (1898) 214.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

ISHAQ ALI KHAN (*Plaintiff*) *v.* CHUNNI AND OTHERS (*Defendants*).* [12th December, 1898.]

Act No. IV of 1882 *(Transfer of Property Act), s.* 85—*Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.*

Held, that s. 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit.

IN this case one Moti Singh, who was the owner of a certain share in mauza Muhammadpur Ghiror, mortgaged, on the 12th **[150]** of September, 1881, one-half of his share in favour of Chunni and Kharagjit. On the 31st of January, 1884, Chunni and Kharagjit brought a suit for sale of the mortgaged property, for interest on their mortgage, against Moti Singh. On the 24th of April, 1884, Moti Singh caused the mortgaged property to be recorded in equal shares in the names of Bhup Singh, his son, and Zabar Kunwar, his wife. Moti Singh died in 1884, and the names of Bhup Singh and Zabar Kunwar were recorded as defendants to the suit of the mortgagees then pending. The mortgagees obtained a decree in that suit on the 15th of May, 1885. Bhup Singh subsequently to the filing of the suit, namely, on various dates between the 15th of July, 1884, and the 2nd of November, 1885, mortgaged a half share of the property, which Moti Singh had caused to be entered in his name in 1884 to Imam Ali Khan, the father of Ishaq Ali Khan. On the 22nd of July 1886, Chunni and Kharagjit filed a second suit for recovery of interest by sale of mortgaged property against Bhup Singh, and obtained a decree on the 5th August, 1886. Neither in this suit nor in the former suit of the 31st of January, 1884, was the subsequent mortgagee Imam Ali Khan made a party. On the 19th of April, 1895, Ishaq Ali Khan (his father, the subsequent mortgagee, having died) brought the present suit against Chunni and Kharagjit, the original mortgagees, Bhup Singh and another person alleged to be in possession of a portion of the mortgaged property, in which he asked for a declaration that unless the defendants Chunni and Kharagjit obtain as against the plaintiff such decrees as they have obtained as against Bhup Singh and Zabar Kunwar (dated the 15th of May, 1885), and against Bhup Singh (dated the 5th of August, 1886), and get the property entered in the name of Zabar Kunwar to be charged, they cannot take out execution of those decrees for sale of the share of the village Muhammadpur Ghiror entered in the revenue papers against the name of Bhup Singh and mortgaged to the plaintiff.

The Court of first instance (Subordinate Judge of Mainpuri) dismissed the plaintiff's suit *in toto*.

[151] On appeal by the plaintiff the lower appellate Court (District Judge of Mainpuri) confirmed the decree of the first Court, though upon different grounds. The District Judge found as follows:—"The lower Court has pointed out that appellant's deeds were executed *pendente lite* and are therefore void as against the first suit. As regards the second

* Second Appeal, No. 825 of 1896, from a decree of H. W. Lyle, Esq., District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.

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suit, however, the deeds were prior to its institution, and the lower Court has got out of the difficulty by finding that the deeds were not proved. This reason will not stand. The deeds were never denied, and no issue was framed as to whether they were valid or not. Under the circumstances no proof was adduced with regard to them, and none was necessary. It seems to me, nevertheless, that the deeds are bad in respect to both suits. Both suits are for interest on the same deed, it having been apparently stipulated that interest should be separately sued for. I cannot hold that deeds which were void owing to having been executed while the first suit was pending are valid with regard to a second suit for interest on the same deed but for a subsequent period. One suit must be regarded as a continuation of the other, and appellant's deeds are void with regard to both."

The plaintiff thereupon appealed to the High Court.

JUDGMENT.

The Court (STRACHEY, C.J., and KNOX, J.) allowed the appeal so far as it related to the decree against Bhup Singh, dated the 5th of August, 1886, but dismissed it so far as it related to the decree against Bhup Singh and Zabar Kunwar of the 15th of May, 1885, observing that it was not necessary for the mortgagees of 1881 to have made Imam Ali Khan a party to their first suit, inasmuch as the earliest of his mortgages was not executed until after that suit was filed.

Decree modified.

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21 A. 152=19 A.W.N. (1899) 1.

[152] REVISIONAL CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

ABDUL SADIQ AND OTHERS (*Defendants*) *v.* ABDUL AZIZ (*Plaintiff*).*

[16th December, 1898.]

Civil Procedure Code, s. 622—Revision—Discretion of Court in exercising revisional powers—Civil Procedure Code, s. 623 et seqq—Review of judgment.

A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to s. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's appellate order it was *held* that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results.

[F., 9 A.L.J. 348=14 Ind. Cas. 810.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Baldeo Ram Dave*, for the applicants.

Pandit *Moti Lal Nehru*, for the opposite party.

STRACHEY, C.J. (KNOX, J., concurring).—The suit out of which this application has arisen was originally heard by a Munsif, and one of the pleas taken by the defendants was that the suit was barred by limitation.

* Civil Revision No. 37 of 1898.

The Munsif, holding that a period of twelve years' limitation applied, overruled this plea, and on the merits decreed the suit. The defendants subsequently applied to the Munsif for review of judgment on the ground that there had not been brought to the notice of the Court a certain decision of the Full Bench of this Court, according to which a period of six years', and not twelve years', limitation was applicable to the suit. This decision of the Full Bench had been pronounced previously to the passing of the original decree, but, either because it had not then been published, or for some other reason, had not been brought to the notice of the Munsif. The Munsif considered the Full Bench ruling, thought it applicable, reviewed his decree, and dismissed the suit as barred by limitation. **[153]** In giving his reasons for granting the review the Munsif refers to that portion of s. 623 of the Code of Civil Procedure which speaks of the discovery of new and important matter or evidence, and to the question whether, at the original hearing, the applicant or his pleader knew, or had means of knowing, of the existence of the Full Bench ruling. That portion of s. 623 can have no application. The words "new and important matter or evidence, which after the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decree was passed," have never been held to apply to the non-production of a ruling in force when the decree was passed. They refer to evidence or other matter in the nature of evidence, and not to legal authority in existence, but not brought to the Court's notice. Apparently the Munsif himself had misgivings on this point, for he did not rest his decision on this ground alone, but also expressly referred to the other words in s. 623 of the Code, which allow a review of judgment "for any other sufficient reason." Although he does refer to the earlier part of the section about the discovery of new matter, still the real meaning and substance of his judgment on the review is, in our opinion, that by reason of his having been unaware of the Full Bench ruling, his original decision was based on a mistake in law; whether that was a proper ground for review of judgment we need not consider.

The plaintiff appealed to the District Judge, not from the decree dismissing the suit, but from the order granting the review. The Judge had no power to entertain an appeal from that order except under s. 629 of the Code of Civil Procedure. The only part of s. 629 which, it has been suggested, would have been applicable in this case is cl. (*b*), namely, if the admission of the application for review is in contravention of the provisions of s. 626. The only part of s. 626 of which any contravention was suggested was cl. (*b*). If s. 626, cl. (*b*), had no application, s. 629, cl. (*b*), also could not apply. In our opinion s. 626, cl. (*b*), had no application to the appeal **[154]** before the Judge. What it says is, in effect, that an application for review on the ground of discovery of new matter or evidence must not be granted without strict proof of the allegation that the applicant was ignorant of the matter or could not have adduced the evidence when the decree or order was passed. But that could no more apply to the discovery of a Full Bench ruling, than could the corresponding words of s. 623 about the discovery of new and important matter or evidence; and hence it was impossible to say that there was any contravention of s. 626, cl. (*b*), or that the Munsif ought to have put the applicant to strict proof of his allegation that, when the decree was passed, he and his pleader were ignorant of the ruling. Nor does the District Judge express any such view. He does not in his judgment make any reference to s. 626, cl. (*b*), or discuss

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the question whether there has been any contravention of it. The only question which he discusses is whether the Munsif was right in holding that the discovery of a High Court ruling was a sufficient ground for review: he comes to the conclusion that the Munsif was wrong in so holding, and he accordingly sets aside the order as passed on insufficient grounds. Whether the Judge's view was correct, is a question upon which we need express no opinion. It is sufficient to say that he overlooked the provisions of s. 629, and that he had no power to set aside the order on the ground that he thought it unreasonable, or on any ground not mentioned in the section.

Now, a Judge who, in contravention of s. 629, entertains an appeal from an order admitting a review undoubtedly acts with material irregularity within the meaning of s. 622 of the Code. But orders for revision under s. 622 are discretionary, and Mr. *Moti Lal* contends that here we ought not to interfere. He contends that, although the Judge may have acted irregularly in setting aside the Munsif's order, still he was right in his objections to that order, and in holding that if a review might be granted whenever a ruling was overlooked or afterwards discovered, applications for review would be endless. Mr. *Moti* [155] *Lal* therefore argued that the result arrived at by the learned Judge was substantially right and ought not to be disturbed in revision. But in deciding whether or not we should interfere with the Judge's irregular order, we must look a little further into the matter and consider what would be the consequences of interfering or not interfering. If we refuse to interfere, the result is that the suit stands decreed. If we interfere, the result is that the suit stands dismissed. The reason why the Munsif ultimately dismissed the suit was that, according to the Full Bench ruling, it was barred by limitation. The Judge does not hold that the Munsif was wrong in this view. It has not been disputed that, assuming the Full Bench ruling to be applicable, the suit was barred. Although the question whether the Full Bench ruling was applicable has not been argued before us, it seems at least probable that it did apply. The Judge appears to assume that it did, but says that it is to the same effect as earlier rulings, and that its discovery was no ground for review. In one of the two memoranda of appeal to the Judge from the two connected orders of the Munsif there was no plea that the ruling was inapplicable. The result of our refusing to interfere with the Judge's order would therefore be that a suit which the Munsif dismissed is barred by limitation, which has not been shown to be within time, and which was probably beyond time, would stand decreed. We allow this application for revision, set aside the order of the Judge, and restore that of the Munsif with costs.

Application allowed.

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APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

21 A. 155=19 A.W.N. (1899) 6.

JIT MAL AND OTHERS (*Decree-holders*) *v.* JWALA PRASAD (*Judgment-debtor*).* [21st December, 1898.]

Execution of decree—Limitation—Civil Procedure Code, s. 230—Warrant of arrest—Warrant not exhausted if on one occasion the serving officer is unable to find the judgment-debtor.

The holders of a decree for money, dated the 2nd of December, 1885, after various infructuous applications for execution, applied, on the 4th of August, [156] 1897, for a warrant for the arrest of the judgment-debtor. That application was granted, but the peons sent to arrest the judgment-debtor reported that he had concealed himself, and the Court in consequence struck off the application for execution. On the 29th of November, 1897, the decree-holders again applied for the arrest of the judgment-debtor, but that application also was struck off without the arrest having been made. Against the order striking off this latter application the decree-holders appealed to the High Court, where, on objection made that the decree could no longer be executed, having regard to s. 230 of the Code of Civil Procedure, it was *held* that the warrant of arrest issued on the decree-holders' application of the 4th of August, 1897, still subsisted and ought to be executed. *Anwar Ali Khan* v. *Phul Chand* (1) followed.

[F., 6 Ind. Cas. 490=6 P.L.R. 1910=125 P.W.R. 1910; R., 9 Ind. Cas. 240; 27 P. R. 1905=79 P.L.R. 1905; D., 5 Ind. Cas. 815 (816)=20 P.L.R. 1910=22 P.W.R. 1910=17 P.R. 1910; 11 O.C. 57 (59).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ratan Chand*, for the appellants.

Babu *Satish Chandar Banerji*, for the respondent.

JUDGMENT.

BLAIR and AIKMAN, JJ.—This is an appeal on behalf of certain decree-holders, who, on the 2nd of December, 1885, got a money decree against the respondent, Jwala Prasad, for a sum of Rs. 8,228. The lower Court rejected the application filed on the 29th of November, 1897, for the arrest of the judgment-debtor. That application was presented within twelve years from the date of the decree. The decree-holders come here in appeal. The history of the case set forth by the lower Court in its finding of the 28th of September, 1898, is a melancholy and forcible illustration of the truth of the saying that a successful suitor's troubles only begin when he has obtained his decree. The decree, as stated above, was passed in December, 1885. On the 9th January, 1886, the unfortunate decree-holders began their attempts to recover the money which had been found due to them. From that time onwards they have made one attempt after another to have the decree executed, with the result that only an insignificant portion of the decretal amount has been realized, and that the sum still due under the decree, with interest thereon, amounts to upwards of Rs. 10,000. The judgment-debtor has by one device or another succeeded in evading up to now payment of the money which was found due from him. That the satisfaction of the judgment-[157] debt was delayed by the poverty of the judgment-debtor, we cannot believe. The history of what has taken place during the past twelve

* First Appeal, No. 85 of 1898, from an order of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 15th January 1898.

(1) 18 A.W.N. (1898) 137.

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years is sufficient to show that it is not from want of means that he has not paid his debts. He has blocked the execution by transfers made in the names of his sons and son-in-law. Property, which was on the point of being attached, was removed. When warrants of arrest were issued, the ministerial officers of the Court sent to execute the warrants seem to have been seized with sudden blindness and incapacity to discover the whereabouts of this judgment-debtor. On one occasion only is he said to have been found, and then, according to the report, he managed, with the help of his friends, to make his escape from the custody of the peons. On the 4th of August, 1897, the decree-holders applied for and obtained an order of the Court for the judgment-debtor's arrest. As usual the peon reported that the judgment-debtor had concealed himself; and thereupon the Court lost no time in striking off the case. What impresses us in these proceedings is the singular want of sympathy exhibited by the Court towards the decree-holders. We should have thought that in a case like this the lower Court would have taken some pains to see that its order was carried out, and not have hastened to strike off the case on the mere report of its peons that the judgment-debtor had concealed himself. The last application was made on the 29th of November, 1897. In this also the decree-holders asked that the judgment-debtor should be arrested. The judgment-debtor filed an objection. That objection was allowed by the Court on grounds which appear to us, looking to the past history of the case, to be quite inadequate, and the case was struck off on the 20th February, 1898. When the appeal was last before us, a difficulty presented itself to us, arising out of the wording of s. 230 of the Code of Civil Procedure, namely, that even if we were of opinion that the Court was wrong in striking off the application of the 29th of November, 1897, it would be impossible to grant it now, looking to the fact that upwards of twelve years has elapsed since the date of the decree sought to be enforced and that previous applications [158] for execution have been granted. The learned vakil for the appellants contended, with reference to this difficulty, that his clients were entitled to the benefit of the proviso contained in the last paragraph of the section just quoted, namely, that notwithstanding the lapse of twelve years, they were still entitled to execute their decree owing to the fact that previous applications for execution had been defeated by the judgment-debtor through fraud or force. In order to enable us to dispose of this plea, we asked the lower Court for a finding on the issue as to whether execution had been prevented by the fraud or force of the judgment-debtor. The return to this order of reference is, that no fraud or force on the judgment-debtor's part, preventing the execution of the decree, has been established. To this finding objections have been taken. In the view, however, which we now take of the case, we deem it unnecessary to express any opinion whether or not the finding is warranted by the evidence. We have the fact that in August, 1897, the Court issued an order that the judgment-debtor should be arrested, and that order has not yet been carried out. With reference to this we may quote the following passage from a recent judgment of this Court in the case of *Anwar Ali Khan* v. *Phul Chand* (1) :—" The mere fact that a warrant issued and came back unexecuted is not, in our opinion, sufficient evidence of the proceeding for execution in pursuance of which it issued being exhausted and thereby determined." With this view we are in entire accord. The

(1) 18 A.W.N. (1898) 137.

learned vakil for the respondent argues that the application of the 29th of November, 1897, is in terms a fresh application under s. 235 of the Code of Civil Procedure. We do not think that this is material. In our judgment that application is merely ancillary to the previous application. To yield to the contention of the learned vakil for the respondent, we should have to hold that the order passed on the application of August, 1897, is exhausted by the return of the warrant, stating that the peons had been unable to find the judgment-debtor. **[159]** That is a position which, as stated above, cannot, in our opinion, be maintained. For the above reasons we allow the appeal with costs, and, setting aside the order of the lower Court, we direct the execution to proceed. We must, in conclusion, express a hope that the Judge of the lower Court will devote his personal and particular attention to the execution of this decree, and will see that trustworthy men are sent to carry into effect the order for arrest.

Appeal decreed.

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21 A. 159 = 19 A.W.N. (1899) 5.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

QUEEN-EMPRESS *v.* ZAKIR HUSAIN.* [21st December, 1898.]

Act No. XLV of 1860 (*Indian Penal Code*), *ss.* 192 *and* 193—*Fabricating false evidence – False entry made by a Police officer in a special diary.*

Held that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in s. 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress* v. *Gouri Shankar* (1) and *Kailasum Putter* (2), referred to.

[R., P.L.R. (1900) 63 (66) (Cr).]

THE facts of this case sufficiently appear from the order of the Court.

Alston, for the applicant.

The Officiating Government Advocate (*Ryves*), for the Crown.

ORDER.

BANERJI, J.—The applicant, Zakir Husain, has been convicted, under s. 193 of the Indian Penal Code, upon the two following charges :—

First, that on or about the 30th July 1898, he fabricated the special diary of July 29th, in the case of *Queen-Empress* v. *Balla and others*, so as to make it appear that the list of stolen property was furnished on that date ; and, secondly, that **[160]** on or about the 4th of August, in the Court of the District Magistrate, in the same case, he stated that the list of stolen property was furnished before the search and arrest of the accused.

The conviction and sentence have been affirmed by the learned Sessions Judge on appeal. It is urged that the conviction on each of the two charges is bad in law. In my opinion the contention is valid.

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* Criminal Revision No. 600 of 1898.

(1) 6 A. 42.

(2) 5 M.H.C.R. 373.

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The facts found are these:—The house of one Ranjit was broken into by burglars, who carried away some of his property. He made a report of the burglary at the Etah Police Station. The applicant, who was the second officer at that station, suspected Balla and others, and searched their houses. He discovered certain property, and after having done so, caused Ranjit to give him a list of the property stolen from his house, so as to make it correspond with the articles found in the houses of Balla and others. This was on the morning of the 30th July 1893; but in his special diary of the previous day, the 29th, he entered a list of stolen property as given to him on that date before the search. It is in respect of this entry in the special diary that the applicant has been held guilty of having fabricated false evidence as defined in s. 192 of the Indian Penal Code.

In my opinion the conviction for that offence cannot be maintained. In order to constitute the offence of fabricating false evidence, three things must exist:—First, that the entry or document in question is false; second, that the false entry or document was made with the intention that it may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator; and, third, that so appearing in evidence it may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion upon a material point. Where any of these elements is wanting, the offence is not that of fabricating false evidence. As two of the elements of the offence are that [161] the false document is intended to appear in evidence, and that when it so appears in evidence it should cause a judicial officer, or other public servant, or an arbitrator, to form an erroneous opinion upon a material point, it is clear that the document must be capable of being used in evidence. The offence of fabricating false evidence cannot therefore be committed in respect of a document which is not admissible in evidence. This view is supported by the ruling of this Court in *Empress* v. *Gauri Shankar* (1) and that of the Madras High Court in *Keilasum Putter* (2) to which the learned counsel for the applicant has drawn my attention. The document which the applicant, Zakir Husain, is said to have fabricated is a Police special diary, which under s. 172 of the Code of Criminal Procedure, is not evidence. It was held by a Full Bench of this Court in *Queen-Empress* v. *Mannu* (3) that "entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained." The diary may, it is true, be used by a Police officer for the purpose of refreshing his memory, or it may be used for the purpose of contradicting the Police officer who made the entries which it contains; but the entries by themselves are not evidence, and therefore a special diary is not a document which is capable of being used in evidence. The learned Sessions Judge is wrong in holding that the entry in the diary could be referred to in support of the allegation that the list of the stolen property was produced before the discovery of the property. The entry could not be used as corroborative evidence, and this is conceded by the learned Government Advocate. He contends that it is the intention of the accused which is the *gravamen* of the charge, but he loses sight of the fact that not only must the accused intend that the document may appear in evidence, but the document must be such as may appear in evidence before the officer who is to form an opinion upon the evidence. [162] A document which is inadmissible in evidence can never be produced for the purpose of enabling

(1) 6 A. 42. (2) 5 M. H. C. R. 373. (3) 19 A. 390.

an officer to arrive at any conclusion, erroneous or otherwise, upon a relevant point. A special diary, which can never be used as evidence, cannot be produced for the purpose mentioned above, and therefore the offence of fabricating false evidence cannot be committed in respect of it. Whether the accused in this case committed the offence punishable under s. 218 of the Indian Penal Code, or any other offence, it is unnecessary at present to decide. But I am of opinion that his conviction for the offence of fabricating false evidence cannot be sustained.

The conviction of the accused upon the second charge, namely, that of giving false evidence, is equally unsustainable. The charge itself as drawn is very defective. It does not set out the particular statement in respect of which the accused is charged with perjury. It only states the substance of what the accused is said to have stated in his deposition. As the accused pleaded not guilty to the charge, it was the duty of the prosecution to prove the particular statement which the accused was charged with having made falsely. For this purpose the deposition itself ought to have been put in evidence and formally proved. This was not done in this case, and there is absolutely no evidence on the record to prove that the accused made any statement on the 4th of August, and, if he made any, what that statement was. I am unable to follow the observation of the learned Sessions Judge that the "Court could take judicial notice" of the deposition, and that the accused "did not, and could not, deny having made it." When the accused pleaded not guilty he did deny everything. If by the judicial notice to which the learned Judge referred he meant the provisions of s. 80 of the Indian Evidence Act, he was clearly in error. Even if the alleged deposition of the 4th of August 1898 had been produced in evidence, it would not have been admissible against the accused unless it was proved that it was he who gave the deposition and made the statement **[163]** which was the subject of the charge. The mere production of the deposition would not, under s. 80, have made it admissible. As the deposition was not produced and the identity of the accused with the person who gave the deposition was not proved, the charge of giving false evidence was not established. I may observe that the learned Government Advocate very properly abandoned this part of the case against the applicant.

The result is, that the application is allowed, the conviction and sentence are set aside, and the applicant is acquitted of the offences with which he was charged. I direct that he be at once released.

The learned Government Advocate has asked me to order the trial of the applicant for the offence punishable under s. 218 of the Indian Penal Code. I do not deem it desirable to make any such order at present; but I may observe that this decision will not preclude the Magistrate of the District from taking any proceedings justified by law against the accused for any other offence with which the accused may be lawfully charged.

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MISCELLANEOUS CIVIL.

21 A. 163 = 19 A.W.N. (1899) 4.

21 A. 163=19 A.W.N. (1899) 4.

MISCELLANEOUS CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KALIAN MAL (*Plaintiff*) *v.* RAM KISHEN AND OTHERS (*Defendants.*)* [22nd December, 1898.]

Regulation No. 1 of 1877 (Ajmere Courts), ss. 18 et seqq.—Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.

Held that where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under s. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not; but its functions are limited to pronouncing an opinion on any point which may be so referred to it.

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *W. K. Porter* and Babu *Devendro Nath Ohdedar*, for the opposite party.

ORDER.

[164] BLAIR and BURKITT, JJ.—This matter comes before us upon a reference by the Commissioner and District Judge of Ajmere under the provisions of s. 18 of Regulation No. I of 1877. By that Regulation the Commissioner is empowered to ask from this Court a ruling upon a question of law, or, amongst other things, upon the construction of any document. The point at issue is a narrow one. The plaintiff in the suit is the representative of a mortgagor who mortgaged with possession a house and its appurtenances in suit in 1828. Several documents purporting to be sub-mortgages with possession were executed. In the series of mortgagees and sub-mortgagees and assignees the defendants in the suit are the last. Their names are Ram Kishen and Kishori Mal. To the mortgagor's suit for redemption they set up the protection of art. 134, sch. II of Act No. XV of 1877. It was contended on behalf of the plaintiff that the case fell within the operation, not of art. 134, but of the general rule provided for by art. 148 of the same Act. Article 134 is in the following words :—"To recover possession of immoveable property conveyed or bequeathed in trust, or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration." The question put to this Court is, whether the transfer made to the present defendants by their predecessor in title, Raj Mal, as evidenced by the deed dated the 9th of April, 1883, was a sale of proprietary rights, or only an assignment of the limited rights held by the vendor in the property transferred. It is to be observed that the vendees set up a protection limiting the mortgagor's right of suit to 12 years in place of the period provided by art. 148, which is 60 years. It is manifest, and there is abundant authority for the proposition, that it is incumbent upon them to bring themselves strictly within the provision of art. 134. They must first of all show that the document which confers title upon them is one which purports to convey an absolute proprietary right, and they must then show that an absolute proprietary right, and nothing less is what they believed that they were buying. If they fail to establish either of these

* Miscellaneous No. 37 of 1898.

conditions, they fail to bring themselves within the [165] protection of art. 134. We have had the sale deed translated and have heard arguments upon its terms, and we are unable to discern in that document any single provision or any single expression which would be applicable only to a sale of full proprietary interest. The vendor nowhere asserts that he himself possesses such full proprietary rights. Indeed there are provisions in the document granting in express words the right to inhabit, the right to let to tenants, and the right to alienate, which would be superfluous if the preceding provisions of the document had conveyed an absolute title in full. We are satisfied then that the defendants cannot claim the benefit of art. 134.

We have been invited by Mr. *Porter* to consider the question whether the matter upon which our ruling is sought did really arise in the case. We are of opinion that we should be exceeding our functions if we entered upon such an inquiry. The provisions of the Regulation are, that a certain judicial officer may ask from us a ruling on a specific point or points of law arising out of an appeal which has been heard by him and upon which he has expressed his own opinion. We have no roving commission to enter upon the merits of the case in any other respect.

Our answer to the question put to us is, that the transfer made by Raj Mal, dated the 9th of April 1883, was not a sale of proprietary rights, and can therefore only have been an assignment of the more limited rights possessed by the vendor as sub-mortgagee. The costs of this hearing will be costs in the appeal.

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21 A. 165 = 19 A.W.N. (1899) 8.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

ANWARI BEGAM (*Defendant*) *v.* NIZAM-UD-DIN SHAH (*Plaintiff*).*
[23rd December, 1898.]

Muhammadan Law—Gift—Possession—Gift of property attached by the Collector for arrears of revenue—Act No. XIX of 1873 (*N.W.P. Land Revenue Act*), *s.* 154.

Held that it was possible to make a gift, which should be valid under the Muhammadan law, of property which had been attached by the Collector for [166] arrears of revenue under s. 154 of Act No. XIX of 1873. All that was necessary to a valid gift was that the donor should transfer possession of such interest as he had at the time of the gift : it was not necessary that he should transfer possession of the corpus of the property. *Mullick Abdool Guffoor* v. *Muleka* (1), *Mahomed Buksh Khan* v. *Husseini Bibi* (2), *Rahim Bakhsh* v. *Muhammad Hasan* (3), and *Mohinudin* v. *Manchershah* (4) referred to.

[R., 13 Bom. L.R. 717 (736) = 12 Ind. Cas. 225 ; 8 Ind. Cas. 717 (718) ; D., 36 P.L.R. 1902.]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *T. Conlan* and *S. Amiruddin* and Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid* and Maulvi *Ghulam Mujtaba*, for the respondent.

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* First Appeal, No. 149 of 1896, from an order of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 5th February 1896.

(1) 10 C. 1112. (2) 15 C. 684. (3) 11 A. 1. (4) 6 B. 650.

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APPELLATE CIVIL.

21 A. 165 = 19 A.W.N. (1899) 8.

JUDGMENT.

BLAIR and AIKMAN, JJ.—This is an appeal arising out of a suit brought by Nizam-ud-din, a minor, through his mother and certified guardian, to set aside a deed of gift which was executed by Ghulam Jilani, the grandfather of the minor, in favour of the appellant Anwar Begam, daughter of Ghulam Jilani, and to recover possession of one-half of the property covered by the deed, of which, it is said, the donee assumed possession on Ghulam Jilani's death. Mesne profits are also claimed. Two transferees of separate portions of the property from the donee are made defendants to the suit. One of these, Behari Lal, who purchased a portion of the property from Anwari Begam, has filed a separate appeal. The other transferee defendant was a mortgagee of another part of the property and has not appealed.

* * * * * * *

The deed, which it was sought to set aside, was executed by Ghulam Jilani on the 21st of October, 1891, and was registered by him at the office of the Sub-Registrar of Agra on the following day. The deed is printed at page 18 of the appellant's book. In it the executant sets forth that he is the absolute owner of certain property detailed in the deed, situated in the city of Agra and in certain villages of the Agra district; that "he is about seventy years of age and has now become feeble and weak, and **[167]** that owing to the death of his three grown-up sons he has become much dejected, and that there is no certainty of this precarious life." The deed goes on:—"Therefore I have of my free will and without any coercion or compulsion, while in a sound state of body and mind, made a gift of the whole of my property detailed below to my daughter, Anwari Begam, and put the donee in possession of the whole of the aforesaid property. I have removed and severed my possession and proprietary connection from the said property." The deed goes on to provide that the donee shall pay the executant one hundred and twenty rupees annually for his maintenance, either in monthly or half-yearly instalments as may be convenient to the parties. Failing payment of this annual amount the donor is empowered to recover it through the Court. The property conveyed by the deed consists of a share in the village of Basaiya, in the Agra district, a share in the village of Pingri, in the Muttra district, and certain house property in the city of Agra. As stated above, the deed was executed on the 21st of October, 1891. The donor died on the 31st of August, 1892, that is upwards of ten months after the execution of the deed. Ghulam Jilani's three sons had died in their father's lifetime. Only one of them had left issue, namely, the present plaintiff. It is admitted that, failing the deed of gift, Ghulam Jilani's property would on his death have been divided equally between his grandson, the plaintiff, and his daughter, the defendant. The learned Subordinate Judge has decreed the plaintiff's claim upon grounds both of fact and law, which are impugned in this appeal. The argument urged upon us on behalf of the appellant divides itself into two main branches. The first disputes the conclusions of fact arrived at by the learned Subordinate Judge, that the donor was not of "disposing mind" at the date of executing the deed, and that he executed it under "undue influence." The second branch of the argument is a mixed one of fact and law. The Subordinate Judge has found that, as a matter of fact, possession had not in the lifetime of the donor been given to, and accepted **[168]** by, Anwari Begam of the properties purporting to be conveyed to her in the deed of gift.

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[After discussing the first of the contentions mentioned above and coming to the conclusion that there was no evidence of mental incapacity or undue influence, the judgment thus continued :—]

We come now to the second branch of the argument which impeaches the finding of the Subordinate Judge upon the question whether, in relation to the several properties purporting to be given by the deed, possession had or had not, in fact and law, been given to the donee. The property conveyed by the deed of gift consisted in the first place of shares in two villages, namely, Pingri in the Muttra district and Basaiya, in the Agra district. The property in the village of Pingri was, prior to and at the date of the deed of gift, and, for all we know, during the remainder of the lifetime of the donor held under attachment by the Collector of the district for arrears of revenue under s. 154 of Act No. XIX of 1873. Upon that ground it was contended that the donor had himself no possession of this property, and was therefore, according to Muhammadan law, incapable of making a valid gift of it. The share in Pingri being thus in the hands of the Collector it was possible and legal for him, if the arrears had not up to that time been cleared by the usufruct, to retain possession of it for the maximum period of five years, from the 1st of July next after the attachment—*vide* s. 156 of Act No. XIX of 1873. It is clear that, although the donor had not actual possession, the ownership of the village had not passed away from him. It was open to him at any period to pay off the arrears and regain absolute possession of the property, and in any case he could not be kept out of possession for a longer period than five years. It was strenuously argued by the learned counsel for the respondent that under the Muhammadan law a gift could not be made of a share in a village which was the subject of such attachment. The decision of this point brings us to the consideration of the question, what property can form the subject of a gift according to **[169]** Muhammadan law? In Grady's Hamilton's Hedaya, a work of considerable, but not infallible, authority on Muhammadan law, we find, at page 482 of the edition of 1870, the following definition under the title of *hiba* or gift :—"*Hiba* in its literal sense signifies the donation of a thing from which the donee may derive a benefit. In the language of the law it means a transfer of property made immediately and without any exchange." Again, in Baillie's Digest of Muhammadan Law, second edition, page 515, gift is defined as "the conferring of a right of property in something specific without any exchange." It is to be noted here that the word *property* is used by these two authorities without any limitation and is conterminous with what, according to the definition which is given of *hiba* in its literal sense, may form the subject of a gift, namely, something from which the donee may derive a benefit. There is nothing, therefore, in that definition to show that a Muhammadan cannot make a valid donation of a reversionary right. In Volume I of Ameer Ali's Muhammadan Law, second edition, page 58, it is said by that learned writer that "anything over which the dominion or the right of property may be exercised, or anything which can be reduced to possession, or which exists as a specific entity, or as an enforceable right, or anything in fact which comes within the meaning of the word *mal*, may form the subject of a gift." It was admitted in argument that property can, under the Muhammadan law, be validly conferred by gift, though it be not in the actual, or what is known as *khas*, possession of the donor, as, for instance, a share in a village in the occupation of tenants or held in farm by a lessee. It was not, however, admitted that property in the possession

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of a usufructuary mortgagee was capable of such donation. We fail entirely to understand how any distinction can be drawn between the case of a lessee and of a usufructuary mortgagee. It is equally difficult to detect any legal principle upon which a right to property held under attachment by the Collector differs from a right to property held by a lessee or usufructuary mortgagee.

[170] From page 31 of Baillie's Digest it appears that a valid gift may be made of a debt in favour of a person other than the debtor. In the case of *Mullick Abdool Guffoor* v. *Muleka* (1), a gift of *malikana* rights, *i.e.*, the right to receive an annual allowance, was upheld. In the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) the Privy Council upheld a gift of property which was not at the time of the gift in the donor's possession. It was held in that case that as the donor "had done all that she could to perfect a complete gift which was attended with complete publicity, and as the donee had afterwards obtained possession, the fact that the donor had been out of possession and therefore had not delivered possession did not of itself invalidate the gift in favour of the respondent." There is a decision of the Bombay High Court in the case of *Mohinudin* v. *Manchershah* (3), in which two Judges held that the owner of property which was in the possession of a mortgagee could not, under the Muhammadan law, make a gift of it. Kemball, J., dissented from this view. With reference to this case it was remarked by Mahmood, J., in the case of *Rahim Baksh* v. *Muhammad Hasan* (4): —"I may respectfully say that it probably carries the rule as to seisin too far." Mr. Ameer Ali, at page 61 of the aforesaid volume, says, with reference to the case of *Mohinudin* v. *Manchershah*:—"The view taken by the majority of the Judges is founded upon an erroneous impression of Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing to preclude the mortgagor from granting his equity of redemption to another."

There is no doubt that the principle of Muhammadan law is that possession is necessary to make a good gift; but the question is, possession of what? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our **[171]** judgment, nothing in the Muhammadan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers, what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives. Now as to the village Pingri, we find that within a fortnight after the gift the donor went to Muttra, in which district the village of Pingri is situated, and stated on oath before the Assistant Collector as follows:—"I have transferred my share in the village Pingri to Musammat Anwari Begam, under a deed of gift dated the 21st of October, 1891, and have put her in possession of the said property like myself. I wish that by removal of the name of me, the donor, the name of the donee may be entered in the Government papers." The usual proclamation and inquiry followed, and it is admitted that in January, 1892, the donor's name was removed

(1) 10 C. 1112. (2) 15 C. 684. (3) 6 B. 650. (4) 11 A. 1 (10).

and the donee's name entered in the Government records as proprietor of the share in Pingri. The donor could not give actual possession of the share, as it was at the time held under attachment by the Collector. But it appears to us that, so far as he could, he took the steps necessary to put Anwari Begam in his shoes, and she, in point of fact, took his place.

We now come to consider the case as it relates to the giving of possession of the share in the village Basaiya. The learned counsel for the respondent laid stress upon the fact that proceedings were not taken to obtain mutation of names in respect of this share until the 14th of April, 1892. The fact, however, remains that those proceedings were taken at the instance of the donor, and in order expressly to give effect to his gift, and were completed in his lifetime. We consider that where possession is transferred by a donor to a donee in pursuance of the deed of gift previously executed, the provisions of the Muhammadan law are [172] satisfied and delay is immaterial. The delay which took place was explained by the learned counsel for the appellant as to some extent referable to the fact that the deed of gift had been filed in the Muttra proceedings which did not terminate until January 1892, and there was consequently a delay in getting the document from that district for the initiation of proceedings in relation to the village in the Agra district. It is not to be forgotten that the decision of the Revenue Court in mutation proceedings is based upon a transfer of possession effected before mutation takes place. Upon the weight to be attached to the decision of the Revenue Courts in such proceedings, the following observations of the Privy Council in the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1), may be quoted :—"But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari, made during the lifetime of Zahur, as to the execution of the deed of gift and of the transfer of possession under it, which had been adopted by the tahsildar, was also adopted and acted upon by the Deputy Collector."

We will now consider the documentary evidence relied on by the plaintiff as showing that, notwithstanding the deed of gift and the assertions contained in it as to the donor having put the donee in possession of the property, the donor himself continued in possession, exercising all the rights of ownership. In the first place copies are filed of plaints and decrees in suits brought by Ghulam Jilani against tenants in the village of Basaiya for arrears of rent. All these plaints were filed on the 1st of February, 1892, and were for the recovery of the arrears of rent for the kharif instalment of the year 1299 F. In them the cause of action is described as arising on dates ranging from the first to the 10th of November, that is, by far the major portion of the rent had accrued before the date of execution of the deed of gift. We note also that in all the plaints Ghulam Jilani describes himself, not as zamindar but as lambardar, and we have no [173] information as to the date upon which he ceased to be lambardar. Another circumstance is, that all these suits were instituted before the mutation of names had been made, at a time when Ghulam Jilani's name still appeared in the revenue record. The same observation applies to certain ejectment proceedings taken by Ghulam Jilani against tenants in Basaiya. In this connection we may quote another passage from the judgment of their Lordships

(1) 11 A. 460 (477).

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of the Privy Council in the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, referred to above, most of the incidents of which bear a remarkable resemblance to those of the case now before us. At page 477 of the judgment their Lordships say:—"The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatima for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office, at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book." In this case also two receipts for revenue paid in the name of Ghulam Jilani are relied on. One of these for Rs. 200 is dated the 4th of May, 1892. The sum purports to have been received from Ghulam Jilani as lambardar and on account of the rabi instalment of 1291F. At the time of that payment Ghulam Jilani's name stood in the Government books as the proprietor of the share and also as lambardar. The second receipt is dated the 18th of July, 1892, and is for Rs. 24-14-3. The money purports to have been received from Ghulam Jilani, lambardar, on account of revenue; miscellaneous items. At the date of this payment mutation proceedings had terminated, Anwari Begam's name having been substituted for Ghulam Jilani's on the 23rd of June 1892; but the receipt does not show on account of what instalment the money was paid, and from the amount of the payment and its date we have little [174] doubt that it was on account of a balance due in respect of some instalment previous to the mutation of names.

Applying the criticisms of the Privy Council in the above case, we think that the above evidence does not negative the abandonment by the donor to the donee of his possession in the village of Basaiya. As to the positive evidence to prove the donee's possession of the above share in the lifetime of the donor, we attach great weight to entries in the diary of a deceased patwari, produced by his successor, one of which is dated the 28th of June, 1892. These show that the agent of the donee was on her behalf exercising proprietary rights in the village prior to the decease of the donor.

The above entries strongly corroborate the genuineness of certain leases granted by the donee's agent, on which doubts have been thrown —it appears to us on insufficient grounds—by the lower Court. We have examined these documents and are unable to agree with the opinion expressed by the learned Subordinate Judge regarding them. We find that transfer of possession of the share in Basaiya did take place in the donor's lifetime.

The third property, the subject of the deed of gift, is the house property in the city of Agra. It is contended on behalf of the respondent that a part of the property purporting to be conveyed by the deed of gift had been the subject of a suit brought by Ghulam Jilani upon the 19th of April, 1892, in which he claimed to be the owner in possession of the property sued for. We have examined all details and descriptions by metes and bounds, and a map of the house property in question, and the respondent has failed to satisfy us as to the identity of the property sued for in the plaint above mentioned with any part of the property covered by the deed of gift. A tenant of this property was called as a witness

and a number of endorsements upon the back of the lease to this tenant, purporting to be acknowledgments of receipts by the lessor of rent from him, were relied on. It is contended, and is no doubt true, that the oral statements made by the witness do not correspond therewith in relation to the amounts **[175]** due and payable by him in respect of this house property. We think there is possibly an explanation of the discrepancy, but we find it unnecessary to arrive at a conclusion upon that matter. In our opinion, if the receipts for rent had been forgeries or interpolations for the purposes of this case, they would have purported to be signed by some person on behalf of the lessor. We are also satisfied that if the story of the witness had been a concocted story, it would have been made to coincide accurately with the documentary evidence in possession of the party who called him. We therefore find that the gift of the house property is not invalid for lack of possession by the appellant here. The result is that the appeal is allowed, the decree of the lower Court is set aside, and the plaintiff's suit is dismissed with costs. The appellant will have her costs of this appeal.

Appeal decreed.

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21 A 175=19 A.W.N. (1899) 14.

APPELLATE CRIMINAL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

QUEEN-EMPRESS *v.* SONEJU AND OTHERS.* [3rd January, 1899.]

Criminal Procedure Code, s. 288—Admissibility of evidence—Statement of approver made before committing Magistrate and afterwards retracted in the Court of Session.

Pardon was tendered by a Magistrate to one of several persons who were being tried before him for dacoity. The pardon was accepted, and the person to whom it was tendered made a statement as a witness before the Magistrate. The case having been committed to the Court of Session, the approver in that Court totally repudiated his statement made before the Magistrate. *Held* that this repudiation did not prevent the Sessions Court from considering the evidence of the approver under the provisions of s. 288 of the Code of Criminal Procedure.

[R., 2 L.B.R. 214=1 Cr. L.J. 483.]

IN this case twenty persons were committed for trial to the Court of the Sessions Judge of Jhansi charged with dacoity under s. 395 of the Indian Penal Code. Out of these, twelve were convicted, of whom two were sentenced to transportation for life, and the remainder to rigorous imprisonment for ten years.

[176] In the course of the inquiry preceding the Sessions trial one of the accused, Jujhar Singh, was offered a pardon by the committing Magistrate. He accepted the offer, and made a statement at considerable length, naming all the accused, and giving a minute account of the manner in which the dacoity was carried out. This statement was repeated a few days later. In the Court of Session, however, Jujhar Singh absolutely denied his previous statements. He asserted that he had been induced to make them by torture practised upon him by the Police, and that even while he was in the midst of making his second statement before the committing Magistrate, a Police officer had taken him outside the Court-room and threatened him with a renewal of the treatment to which he had been formerly subjected.

* Criminal Appeal, No. 1059 of 1898.

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21 A. 175 = 19 A.W.N. (1899) 14.

Concerning the evidence of this witness the Sessions Judge recorded the following opinion :—" Although, however, the above testimony corroborates the statements made by Jujhar Singh and the confessions made by Mazbut Singh and Jaggat Singh in the committing Magistrate's Court, yet I am afraid that the former statements cannot be used as evidence against the accused in this Court. The ruling in *Queen-Empress* v. *Nagu* (1) very clearly lays down that where, in the Sessions Court, a person to whom a pardon has been tendered in the committing Court, in consequence of which he made a full confession implicating himself and another person of murder, retracts and disavows that confession, the latter is no evidence in the trial. Straight, J., in *Empress* v. *Nazzara* (2) says that he entertains the gravest doubts whether s. 288 of the Criminal Procedure Code was ever intended to apply to the case of an approver who has made a deposition before the Magistrate, but in the Sessions Court withdraws it *in toto* upon the allegation that it was not a voluntary but an enforced statement. In the light of those rulings I am unable to take upon myself the responsibility of admitting in evidence, under s. 288 of the Criminal **[177]** Procedure Code, the depositions made by Jujhar Singh in the preliminary inquiry, whatever my own opinion may be of their truth."

On appeal from the convictions under s. 395 of the Indian Penal Code the question of the admissibility of the statement of the accomplice Jujhar was discussed.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

JUDGMENT.

The Court (STRACHEY, C. J., and KNOX, J.) held that there was nothing in the previous rulings of the Court which would make inadmissible, under s. 288 of the Code of Criminal Procedure, the statement of the approver made before the Magistrate.

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21 A. 177=19 A.W.N. (1899) 15.

REVISIONAL CRIMINAL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

QUEEN-EMPRESS *v.* LALIT TIWARI AND OTHERS.* [4th January, 1899.]

Rules of Court of the 18th January 1898, rule 83—Finality of judgment or order of the High Court—Judgment or order not complete until sealed.

Held that a judgment or order of the High Court is not complete until it is sealed in accordance with rule 83 of the Rules of Court of the 18th January 1898, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

[F., 27 A. 92 (94)=A.W.N. (1904) 195 ; Rel., 38 C. 828=13 Cr. L.J. 120=13 Ind. Cas. 776 ; D., 10 C.L.J. 80 (81)=3 Ind. Cas. 393.]

A reference asking for an enhancement of sentence being before a Judge of the High Court, the Judge wrote an order declining to interfere, and signed and dated it. Subsequently, on the same day, the Judge reconsidered that order and erased it, substituting therefor an order calling upon certain convicts to show cause why the sentences passed upon them should not be enhanced. When the case came up for disposal

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* Criminal Reference, No. 656 of 1898.

(1) 11 A.W.N. (1891) 184.

(2) (1881) 2 Leg. Rem. 170.

on the return of the notice to show cause, Mr. *Amiruddin*, for the persons called upon, contended that the Judge had no power to change the order which had been originally written and signed by him, except on [178] application for review of such order.

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21 A. 177 = 19 A.W.N. (1899) 15.

JUDGMENT.

On this point the Court (STRACHEY, C. J., and KNOX, J.) held that, having regard to the rules of the Court, a judgment was not complete until it was sealed, and that until a judgment was sealed it might be altered by the Judge concerned without the necessity of having recourse to any formal procedure by way of review of judgment.

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21 A. 178 = 19 A.W.N. (1899) 23.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

BALLI RAI AND OTHERS (*Defendants*) *v.* MAHABIR RAI (*Plaintiff*).*
[5th January, 1899.]

Court-fee – Act No. VII of 1870 (*Court-Fees Act*), *s.* 5; *sch. ii, art.* 11—*Letters Patent, s.* 10—*Appeal from an order of remand under s.* 562 *of the Code of Civil Procedure.*

Held that in an appeal under s. 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under s. 562 of the Code of Civil Procedure the proper Court fee is Rs. 2.

THIS was a reference to the Taxing Judge of the Court under s. 5 of the Court Fees Act, 1870. An appeal had been filed under s. 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under s. 562 of the Code of Civil Procedure, and the memorandum of appeal was stamped with a Court fee stamp of Rs. 2. On this memorandum of appeal being laid before the stamp reporter of the Court, the following report was made:—

"1 stamp Rs. 2.

"In time up to 15th September 1898.

"This is an appeal under s. 10 of the Letters Patent from the judgment of the Hon'ble Mr. Justice Banerji remanding the Second Appeal No. 531 of 1897, under s. 562 of the Code of Civil Procedure.

"The appellants pay Rs. 2 only as court fee. The question is, whether a court fee of Rs. 2 paid is sufficient. The valuation of this appeal is Rs. 240, so also was that of the Second Appeal, on which an *ad valorem* fee of Rs. 18 was paid.

[179] "There have been similar appeals under s. 10 of the Letters Patent from the judgments remanding cases under s. 562 of the Code of Civil Procedure, on which an *ad valorem* fee has always been paid. A new question has arisen now. Mr. *Haribans Sahai*, vakil for the appellant, contends that as Rs. 2 is paid on an appeal to this Court from an order passed by lower Courts under s. 562 of the Code of Civil Procedure, the fee of Rs. 2 paid on the same principle is sufficient.

"I am really in doubt, but beg to submit the following two points for the consideration of the Taxing Officer:—

"(1) That the Civil Procedure Code makes a distinction between orders and decrees, and hence when appeals are filed from orders

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* Appeal No. 25 of 1898 under s. 10 of the Letters Patent.

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21 A. 178=19 A.W.N. (1899) 23.

under s. 588 of the Code of Civil Procedure, Rs. 2 is paid, but under the Letters Patent appeals are filed from judgments and not from orders or decrees.

"(2) That since the establishment of the High Court, the same amount of fee as paid in Second Appeals has hitherto been paid on appeals under the Letters Patent, whether the judgments appealed from dismissed the Second Appeals in default or remanded them under s. 562 of the Code of Civil Procedure."

On this report the Taxing Officer made the following reference to the Taxing Judge:—

"In this case an appeal under s. 10 of the Letters Patent has been filed against the judgment of Mr. Justice Banerji in Second Appeal No. 531 of 1897. For the purposes of this reference I quote the words of the judgment which appear necessary:—'I set aside the decrees of the Court below and remand the case under s 562 of the Code of Civil Procedure, with directions to re-admit it under its original number on the register, and try it according to law on the merits."

"The appeal against this judgment has been filed on a Rs. 2 stamp, and the stamp reporter brings to notice that hitherto appeals such as these have always been presented on an *ad valorem* fee. The appellant's counsel contends that a Court fee [180] of Rs. 2 is sufficient, and that an appeal to this Court from an order passed under s. 562 of the Civil Procedure Code by a lower appellate Court can be filed on a Rs. 2 stamp. I am of opinion that the stamp of Rs. 2 is sufficient, and that the practice hitherto prevailing of realizing Court fees *ad valorem* in Letters Patent appeals against a judgment formulating an order under s. 562, Civil Procedure Code, is wrong.

"Under s. 588, Civil Procedure Code, cl. 28, the directing of a lower Court to re-admit a case under s. 562 is an 'order'. It is not a decree (*vide* s. 2 of the Civil Procedure Code). According therefore to sch. ii, art. 11 of the Court Fees Act, the present appeal being one not 'from an order rejecting a plaint, or from a decree or order having the force of a decree' a fee of Rs. 2 is sufficient.

"The language of s. 10 of the Letters Patent does not affect the matter in issue. It is provided in that section that an appeal shall lie against the 'judgment' of one Judge, (etc., etc.). A 'judgment' means the statement given by the Judge of the grounds of a decree or order, and in appeals for the purpose of determining jurisdiction, or the amount of Court fee payable, regard is had, not to the judgment as a judgment, but as to whether it embodies a decree or an order.

"I consider the matter one of general importance, and particularly so as the practice which has obtained hitherto seems to me to be wrong in law. I accordingly refer the case to the Taxing Judge under s. 5, Act VII of 1870."

On which this order was passed:—

ORDER.

BURKITT, J.—I think a Court fee of Rs. 2 is sufficient. That is the fee leviable on an appeal against an order of a District Court remanding a case under s. 562 of the Code of Civil Procedure. I know of no reason why a higher fee should be leviable on a memorandum of appeal against an order of a similar nature passed by a Judge of this Court. The wording of the Letters Patent does not affect the question.

21 A. 181=19 A.W.N. (1899) 15.

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REVISIONAL CRIMINAL.

21 A. 181=19 A.W.N. (1899) 15.

[181] REVISIONAL CRIMINAL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

IN THE MATTER OF THE PETITION OF MADHO RAM.*

[6th January, 1899.]

Act No. XVIII of 1879 (*Legal Practitioner's Act*), *s.* 36—*Order including a person's name in the list of touts—Revision—Statute* 24 *and* 25 *Vic., Cap. CIV, s.* 15—*Powers of superintendence of the High Court.*

Held that in the case of an order passed under s. 36 of Act No. XVIII of 1879, the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by s. 15 of the Indian High Courts Act, 1861, and that it would not interfere even then, where the sole ground upon which its interference was asked for was that the decision of the District Judge was against the weight of the evidence.

[R., 31 A. 59=6 A.L.J. 22=A.W.N. (1908) 279=1 Ind. Cas. 143; 11 C.L.J. 513=11 Cr.L.J. 320 (322)=6 Ind. Cas. 327; 10 Cr.L.J. 443=3 Ind. Cas. 977=11 P.R. 1909=115 P.L.R. 1909=28 P.W.R. 1909 Cr.; P.L.R. 1900 17 (18) Cr.; 22 P.R. 1904 Cr.=108 P.L.R. 1904.]

IN this case, the committee of the local Bar Association at Saharanpur having represented to the District Judge that certain persons named by them were persons against whom action ought to be taken under s. 36 of the Legal Practitioners' Act, the Judge took evidence and heard such of the persons proceeded against as appeared and tendered evidence in their own exculpation, and finally recorded an order, the substance of which, so far as the present report is concerned, is as follows :—"As to the other four men, against Madho, Sri Ram, and Sajjad Husen, there is ample ground for concluding that they are touts. This would appear from the evidence of their own witnesses almost as clearly as from their general reputation as evidenced by members of the local Bar." * * * * * *

"The result is that I order that the following men be proclaimed as touts, *viz.*:—

"Bhura, age 35, Gujar, residence Chandanpur.

"Madho, age 35, son of Ganpat Rai, mahajan, of Saharanpur.

"Sri Ram, age 34, son of Parbhu Lal, mahajan, of Saharanpur.

"Sajjad Husen, age 28, son of Zulfikar Ali, Syed, of Saharanpur.

[182] "The names of these men will be posted in my Court and in every Court subordinate to mine in the Judicial Division, and I hereby order, under s. 36 (4), Legal Practitioners' Act (Act No. XVIII of 1879) as amended by Act XI of 1896), that the above-mentioned men be excluded from the precincts of each of the Courts above-mentioned."

Against this order Madho Ram applied in revision to the High Court.

Mr. *G. P. Boys*, for the applicant.

JUDGMENT.

STRACHEY, C. J. (KNOX, J. concurring) :—This is an application to the Court to set aside an order passed by the District Judge of Saharanpur, under s. 36 of the Legal Practitioners' Act, XVIII of 1879, as amended by s. 4 of Act No. XI of 1896. That order of the District Judge was an order including the name of this petitioner in the list of persons proved to the satisfaction of the Judge habitually to act as touts. The only ground stated in the petition to us is :—"Because the finding is against the weight of the evidence." We are of opinion that this Court ought not

* Miscellaneous No. 218 of 1898.

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to interfere, on any such ground as that, with an order passed by a subordinate Court under s. 36 of the Legal Practitioners' Act. The law gives no right of appeal to this Court from any such order. As regards revision, such cases are clearly not criminal proceedings to which the revisional powers of the High Court under s. 439 of the Code of Criminal Procedure, would apply. They do not fall within the powers of civil revision conferred by s. 622 of the Code of Civil Procedure. There remain only the powers of superintendence conferred by s. 15 of the High Courts Act. Under that section this Court has, no doubt, very wide powers of superintendence over the proceedings of subordinate Courts; and it is possible to imagine cases in which, in the exercise of those powers, it might be the Court's duty to interfere with an order passed under s. 36 of the Legal Practitioners' Act. Although under s. 36 the Courts have an extremely large discretion in framing lists of touts and including the [183] names of particular individuals in such lists, the conditions prescribed by the section must of course be observed: for instance, no person's name is to be included unless he has had an opportunity of showing cause against such inclusion, and in all cases the person must be proved to the Court's satisfaction habitually to act as a tout, and must be so proved by evidence, whether of general repute or otherwise. But in considering whether this Court should interfere in the exercise of its powers of superintendence, one must bear in mind, first, that the test prescribed by s. 36 is proof to the satisfaction of the Court framing the list and of no other tribunal; and, secondly, that it is settled that this Court is not competent, under s. 15 of the High Courts' Act, to interfere with the order of a subordinate Court, merely on the ground of error in law or error in fact. Its powers of superintendence are not applicable where the only question is whether the decision of the lower Court is against the weight of evidence. That is the only question raised by the present petition. It is admitted that there is evidence upon which the lower Court has acted —evidence on the one side and on the other. We must, therefore, decline to interfere, and must dismiss the application.

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21 A. 183=19 A.W.N. (1899) 22.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAGHUBANS KUNWAR AND ANOTHER (*Defendants*) *v.* BHAGWANT KUNWAR (*Plaintiff*).* [11th January, 1899.]

Hindu Law—Hindu widow—Maintenance—Suit for arrears of maintenance—Discretion of Court in allowing arrears.

Where a Hindu widow sues for maintenance from the family and estate of her deceased husband, with arrears of such maintenance, the allowance of arrears of maintenance is a question for the discretion of the Court, and the Court, if it allows arrears of maintenance at all, will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where the plaintiff has made serious delay in bringing her suit for maintenance.

[R., 16 C.P.L.R. 30; 1 N.L.R. 33.]

[184] THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal No. 206 of 1896, from a decre of Babu Prag Das, Officiating Subordinate Judge of Meerut, dated the 26th June 1896.

The Hon'ble Mr. *Conlan* and Munshi *Ram Prasad*, for the appellants.
Pandit *Bishambar Nath*, Pandit *Moti Lal Nehru* and Pandit *Baldeo Ram Dave*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The plaintiff respondent, who claimed to be the widow of Rao Partab Singh, brought the suit, which has given rise to this appeal, for a declaration of her right to maintenance out of the estate of the deceased, and for recovery of Rs. 10,480 as arrears of maintenance, and Rs. 7,016-6-6 as interest on those arrears. She prayed that her maintenance should be declared to be a charge upon the estate of Rao Partab Singh, which at the time of the suit was in the possession of the defendants appellants, who are the daughters of his adopted son, Rao Maharaj Singh. The plaint alleged that the plaintiff obtained her maintenance from Rao Maharaj Singh, and after him from his widow, up to 8th July 1883; that subsequently to that date the payment of her maintenance was stopped by Raja Ghansham Singh, who was appointed guardian of the minor daughters of Maharaj Singh and manager of the estate, and that in 1893 her right of maintenance was denied.

The suit was defended upon various grounds, the principal of which was that the plaintiff was not the widow of Rao Partab Singh. The defendants denied the right of the plaintiff, not only to future maintenance, but also to the arrears claimed by her, and they further disputed the rate at which maintenance had been claimed. The Court below held it established that the plaintiff was the widow of Rao Partab Singh, and granted a decree in her favour for future maintenance at the rate of Rs. 80 a month, and for the arrears of maintenance claimed by her. It dismissed the claim for interest upon the arrears. It also granted the prayer that the maintenance should be a charge upon the estate.

[185] The defendants have preferred this appeal, and the plaintiff has taken objection under s. 561 of the Code of Civil Procedure in regard to the dismissal of the claim for interest. In the memorandum of appeal to this Court the pleas taken in the Court below were reiterated, but the learned counsel for the appellants has conceded that upon the evidence on the record he cannot substantiate the first two pleas, which are to the effect that the plaintiff was not the wife, but was the concubine, of Rao Partab Singh. The learned counsel has not also disputed the rate at which future maintenance has been decreed to the plaintiff.

The principal contention before us was, that the Court below should not have decreed arrears of maintenance to the plaintiff. The main ground upon which this contention was based was that the plaintiff had advanced no claim in regard to the arrears for nearly eleven years, and that she had been living apart from her husband's relations, and was being maintained by her own relations. The learned counsel further contended that, even if the plaintiff was entitled to arrears of maintenance, those arrears should not be awarded at the rate decreed by the Court below.

There can be no doubt that a Hindu widow is entitled to maintenance out of her husband's estate, and is also entitled to claim arrears of such maintenance, even if she lives apart from her husband's relations. The grant of arrears is, however, a matter within the discretion of the Court and the Court may, for sufficient reasons, be justified in refusing to grant any arrear or arrears at the rate claimed. As authorities for this view we may refer to paragraph 417 of Mayne's Hindu Law, and page 466 of the Tagore Law Lectures for 1879, and the authorities therein cited. In

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21 A. 183=19 A.W.N. (1899) 22.

this case we find from the evidence of the brother of the plaintiff that she was residing since 1883 with him, and occasionally with Rao Umrao Singh, who, according to the Subordinate Judge, has been promoting this litigation. From the evidence of the brother of the plaintiff it appears that the [186] additional expense entailed on him by reason of his supporting the plaintiff was about Rs. 10 a month, so that the amount which has been decreed is far in excess of the sum which was necessary to meet the charges incurred for her support. Having regard to this fact, and to the fact that for nearly eleven years the plaintiff made no claim whatever for her maintenance, leaving probably the defendants under the impression that she had waived her claim for maintenance, we think that she is not entitled to be allowed arrears of maintenance at the rate at which maintenance has been fixed for her for the future. Having regard to the expense incurred by her brother in maintaining her, we think that if we allow arrears at the rate of Rs. 16 a month, that will be sufficient to meet the justice of the case. It has not been proved that the plaintiff incurred any debts for her maintenance, and we see no valid reason for awarding to her the large sum she claims. We entirely agree with the learned Subordinate Judge that the plaintiff is not entitled to any interest on the arrears. We accordingly vary the decree of the Court below by reducing the sum allowed for arrears from Rs. 10,480 to Rs. 2,096, and we declare the plaintiff entitled to maintenance at the rate of Rs. 80 a month, with effect from the 8th of June 1893, the said maintenance being a charge upon the estate. As for the costs of the suit, we are of opinion that as the defendants improperly denied the plaintiff's status as the widow of Rao Partab Singh, the defendants should bear their own costs and pay to the plaintiff her costs in the Court below in proportion to her success as now decreed. The defendants will bear their own costs of this appeal. We dismiss the objection under s. 561 with costs.

Decree modified.

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21 A. 187=19 A.W.N. (1899) 18.

[187] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Aikman.

MUHAMMAD ABDULLAH KHAN AND ANOTHER (*Plaintiffs*) *v.* KALLU AND ANOTHER (*Defendants*).* [12th January, 1899.]

Civil Procedure Code, s. 539—Suit for a declaration that a certain piece of land is a grave-yard—Jurisdiction.

Held that a suit for a declaration that a certain piece of land was a grave-yard dedicated to the use of such persons as had no grave-yards of their own, and asking the Court to appoint a mutawalli and settle a scheme for the management of the grave-yard, was not such a suit as fell within the purview of s. 539 of the Code of Civil Procedure. *Lakshmandas Parashram* v. *Ganpatrav Krishna* (1) and *Strinivasa Ayyangar* v. *Strinivasa Swami* (2) referred to.

[F., 33 A. 660 (664)=8 A.L.J. 710 (714)=11 Ind. Cas. 36 (37); 33 C. 789=10 C.W.N. 581; R., 2 C.L.J. 431 (439).]

THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal No. 237 of 1896, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 19th August 1896.

(1) 8 B. 365. (2) 16 M. 31.

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JAN. 12.

APPELLATE CIVIL.

21 A. 187 = 19 A.W.N. (1899) 18.

Maulvi *Ghulam Mujtaba*, for the appellants.
Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is an appeal by the plaintiffs to a suit which purported to have been brought under s. 539 of the Code of Civil Procedure, and was instituted in the Court of the District Judge of Meerut. The allegation was that a certain piece of land was wakf property, being a grave-yard dedicated to the use of persons who had no grave-yards of their own, that the defendants had taken wrongful possession of the land, and that one of the defendants had sold it to the other. The plaintiffs asked for a declaration that the land was endowed property, for the appointment of one of the plaintiffs or some other person as mutawalli of the property, for the framing of a scheme for the management of the property, for the ejectment of the defendant No. 1 from the land and for the making over of the land to the person who might be appointed mutawalli. The Court below has dismissed the suit on the ground that this was not a case to which s. 539 of the Code of Civil Procedure applied.

In our opinion the learned Judge was right in holding that this suit did not come within the purview of s. 539. **[188]** That section contemplates the existence of an express or constructive trust created for public, charitable, or religious purposes. In this case all that is alleged is that the land in question is endowed property, and it is not alleged that there was any express or constructive trust in favour of any one. S. 539 cannot, in our opinion, apply to the case of property from which it is sought to remove a trespasser. This view is supported by the ruling of the Bombay High Court in *Lakshmandas Parashram* v. *Ganpatrav Krishna* (1), and of the Madras High Court in *Srinivasa Ayyangar* v. *Srinivasa Swami* (2). It is clear therefore that the suit could not have been instituted in the Court of the District Judge under s. 539 of the Code of Civil Procedure.

The learned vakil for the appellants has contended that even in the view which we have taken of the case, and which was taken by the learned Judge of the Court below, the plaint ought to have been returned for presentation in the proper Court, and the suit should not have been dismissed. It may be that some of the reliefs claimed are such that an ordinary Civil Court may not be competent to grant; we do not decide this point; but there are certainly other reliefs claimed which are clearly within the cognizance of an ordinary Civil Court, and for this reason we are of opinion that the learned Judge of the Court below should, instead of dismissing the suit, have dealt with it under s. 57, cl. (*a*) of the Code of Civil Procedure, and returned the plaint to be presented to the proper Court. We therefore set aside the decree of the Court below dismissing the suit, and remand the case to that Court with directions to deal with the plaint in the manner which we have indicated above. The respondents will get their costs in this Court and in the Court below, as the appellants have substantially failed.

Appeal decreed.

(1) 8 B. 365.

(2) 16 M. 31.

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21 A. 189=19 A.W.N. (1899) 34.

21 A. 189=19 A.W.N. (1899) 34.

[189] REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* MUKUNDI LAL.* [20th January, 1899.]

Criminal Procedure Code, s. 263—Summary trial—Matters necessary to be stated in the record of a summary trial.

Where a Magistrate, invested with powers under s. 260 of the Code of Criminal Procedure, is trying a case summarily, it is desirable that he should set out under the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity.

The record of a summary trial contained in the column corresponding to cl. (*h*) of s. 263 of the Code of Criminal Procedure the following entry :—"The Police made a raid on information received and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan and Gulzari Lal involves the absurdity that the Police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukundi of keeping a common gaming-house,—s. 4, Gambling Act. I convict the other six defendants of gaming in a common gaming-house,—s. 3, Gambling Act."

Held, that this entry, though it should have been more explicit, was a sufficient compliance with the requirements of the law.

[F., 2 Cr.L.J. 375=3 L.B.R. 3; R., 2 S.L.R. 3 Cr.]

THE facts of this case are fully stated in the order of the Court.

Mr. *W. M. Colvin* and Pandit *Moti Lal*, for the applicant.

The Government Pleader, (Munshi *Ram Prasad*), for the Crown.

ORDER.

KNOX, J.—This is an appeal presented by one Mukundi Lal. Mukundi Lal has been convicted of keeping a common gambling house, and, so the Magistrate's order runs, sentenced under the provisions of s. 4 of the Gambling Act, to rigorous imprisonment for one month. S. 4 of Act No. III of 1867 prescribes no penalty for owning or keeping a gambling house; that offence is provided for by s. 3. The grounds on which I am asked to interfere are that the record of the summary trial does not comply with s. 263 of the Code of [190] Criminal Procedure, and it is urged that the formalities laid down in that section should be strictly observed for the protection of the public. Reference is here made to the entry required by law under s. 263, cl. (*h*), of the Code of Criminal Procedure under the head in the summary register relating to this case. The entry made is as follows :—The Police made a raid on information received and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan and Gulzari Lal involves the absurdity that the police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukundi of keeping a common gaming-house, —s. 4, Gambling Act. I convict the other six defendants of gaming in a common gaming-house,—s. 3, Gambling Act." Then follows the sentence. The contention is, that there is in the above passage no brief statement of the reasons given for the conviction. Certainly the letter of the law has been very scantily complied with, and it would have been well if the learned Magistrate, instead of recording his reasons in this telegraphic form, had expanded them so as to show that the reasons for

* Criminal Revision No. 747 of 1898.

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21 A. 189=
19 A.W.N.
(1899) 34.

conviction were founded upon evidence; that the Police had received information, as required by the Act, and that acting on the information, they had made a raid and found all the accused gambling with whatever were the instruments found on the spot. I am satisfied, however, that this is what the Magistrate meant by the words he has used, and they show me that he had his mind concentrated upon the evidence so far as it went to the important points of information followed by authority as required by s. 5 of the Act, and to the fact there had been gambling with instruments of gambling as laid down in s. 4, and that, finding this proved, he had looked to see whether the presumption thus created by law against the accused had been rebutted. The entry required by cl. (*g*) of s. 263 shows no rebutting plea and no proof of any such plea. At the same time the record made does show signs of want of full care and attention on the **[191]** part of the learned Magistrate. He would never have convicted Mukundi Lal under s. 4 and the other six accused under s. 3 if he had observed due care. Even when his attention had been drawn to the fact that his proceedings were impugned, he does not seem to have discovered the error into which he had fallen. Again, the reasons given for the conviction afford no ground for the conclusion that Mukundi Lal was the owner or occupier of the house. The only reference to this very material question is to be found in the prisoner's plea, and that plea, without evidence to the contrary, had to be accepted as it stood. Mukundi Lal said that the house belonged to his father and that he lived in the house opposite. My attention was drawn to the rulings in the case of *The Empress* v. *Panjab Singh* (1); *Yacoob* v. *Adamson* (2); *Queen-Empress* v. *Shidgauda* (3); *The Queen* v. *Johrie Singh* (4); *Empress* v. *Chotey Lal* (5); *Empress* v. *Girwar Dial* (6); *Empress* v. *Mohan* (7); *Empress* v. *Lachman* (8).

The cases of this Court reported in the Weekly Notes for 1883, 1885, and 1886, do not set out the entries made by the Magistrate in the column given for the findings. So far as these cases are concerned, I may take it that there was no statement of the reasons given. The case in the Weekly Notes of 1882 was a case under Act No. X of 1872, and the report given does not show what was the offence of which the accused were convicted. This was certainly a fatal defect, and the reasons given as there stated do not show that any offence under any section whatever had been committed. So far this case is clearly to be distinguished from the other cases of this Court which have been brought to my notice. I think it distinctly desirable that Magistrates should set out under the column reserved for the purpose so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the **[192]** ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that, while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. There is no question in my mind from the language used by the Legislature that the intention was that in cases of this kind the procedure should be summary and the record should contain the barest particulars. I am therefore not prepared, if I find compliance with these requisites, to interfere and to lay down that facts and reasons should be set out at such length as to make the Court of revision more or less also a Court of appeal so far as facts are concerned. The law intended the procedure to be summary, and it is not

(1) 6 C. 579. (2) 13 C. 272. (3) 18 B. 97.
(4) 22 W. R. Cr. R. 28. (5) 2 A.W.N. (1882) 242. (6) 3 A.W.N. (1883) 114.
(7) 5 A.W.N. (1885) 213. (8) 6 A.W.N. (1886) 181.

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21 A. 189=19 A.W.N. (1899) 34.

for this Court to lay down otherwise than the law has directed. In a previous case, I pointed out that the responsibility thrown on Magistrates entrusted with summary powers is very great, and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down. In this case after carefully looking into the whole record I am not satisfied on the Magistrate's own showing that, so far as the applicant is concerned, any offence beyond that provided for by s. 4 has been established. I alter the conviction to a conviction for being found in a gambling house gambling, and, under s. 4 of Act No. III of 1867, direct that Mukundi Lal pay a fine of Rs. 25, and that the fine be recovered from him in the manner prescribed by s. 388 of the Code of Criminal Procedure. The conviction and sentence imposed by the Magistrate are set aside.

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21 A. 193=19 A.W.N. (1899) 27.

[193] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

RAM NATH RAI AND OTHERS (*Plaintiffs*) *v.* LACHMAN RAI AND OTHERS (*Defendants.*)* [26th January, 1899.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 85—*Hindu law—Joint Hindu family—Suit on a mortgage executed by a Hindu father—Sons not made parties—Notice—Burden of Proof.*

Where the sons in a joint Hindu family come into Court seeking to get rid of the effect, as against their interests in the joint family property, of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, the burden of proof lies on them to establish that the mortgagee when he brought his suit had notice of their interests in the mortgaged property.

[R., 12 Bom. L.R. 940 (943)=8 Ind. Cas. 633 (634); 6 C.L.J. 719=11 C.W.N. 1078; 14 C.L.J. 530 (534)=12 Ind. Cas. 155 (157); 16 C.P.L.R. 169; 3 Ind. Cas. 570=5 N.L.R. 117.]

THIS was a suit brought by the sons in a joint Hindu family against their father and his mortgagee to obtain a declaration that their interests in certain property which they alleged to be ancestral property were not liable to sale in execution of a decree obtained in a suit for sale on a mortgage against the father. The plaintiffs had not been made parties to the suit for sale against their father.

The defendant mortgagee pleaded that the property in suit was not ancestral, but the personal property of the father, to whom he advanced the loan in good faith.

The Court of first instance (Munsif of Muhammadabad) found that the defendant mortgagee had no notice of the property in question being ancestral or of the plaintiff's interest therein, and accordingly dismissed the suit.

The plaintiffs appealed. The Lower Appellate Court (District Judge of Azamgarh) found that the property was ancestral; but that the plaintiffs had failed to discharge the burden, which lay on them, of proving

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* Second Appeal No. 883 of 1896, from a decree of H. D. Griffin, Esq., Officiating District Judge of Azamgarh, dated the 5th June 1896, confirming a decree of Pandit Guru Prasad Dube, Munsif of Muhammadabad Gohna, dated the 24th March 1896.

that the defendant mortgagee had notice of their interests in the property at the time when he brought his suit on the mortgage. That Court accordingly dismissed the appeal.

[194] The plaintiffs appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

STRACHEY, C.J. (KNOX, J., Concurring.)—We have come to the conclusion that the judgment of the lower appellate Court is correct. There is undoubtedly a clear finding of fact that the mortgagee had no notice of the interests of the present plaintiffs in the suit in which the mortgage decree was passed. There are, however, expressions in the judgment which indicate that in coming to that conclusion the learned Judge was influenced by his view that it was for the plaintiffs in this suit to establish that the mortgagee, when suing upon his mortgage, had notice of their interests, and that, as they were not made parties to that suit, the decree obtained under s. 88 of the Transfer of Property Act would not affect them. We think that the learned Judge was right.

We think that it was for the plaintiffs—Hindu sons trying to prevent, so far as their interests were concerned, a sale of an ancestral property in execution of a mortgage decree against their father only—to prove that the sale would not under the circumstances affect their interests. The property was undoubtedly ancestral property. It is found as a fact that no evidence was given by the plaintiffs in support of their allegation that the mortgage was executed for immoral purposes. The only ground which remained for them to show that their shares were not liable to sale under the mortgage decree was that there had been a neglect to comply with the provisions of s. 85 of the Transfer of Property Act, and that in consequence of such neglect, under the ruling in *Bhawani Prasad* v. *Kallu* (1) the sale could not affect their rights and interests. We think that, just as in the case of an allegation that the mortgage was executed for a debt tainted with immorality, the burden of proving that allegation and of showing that their interests were not liable to sale would rest on the plaintiffs, so the burden of proof [195] lies on them to establish the only other ground on which the effect of the sale against their rights and interests could be avoided. It was therefore for the plaintiffs to prove that the mortgagee had notice of their interests, and that his omission to make them parties to the former suit exempted their interests from liability to sale under the decree. This view is in keeping with the judgment of BANERJI and AIKMAN, JJ., in F. A. No. 213 of 1896, decided upon the 12th January, 1899.* That decision seems exactly in point, and we agree with it. We dismiss this appeal with costs.

Appeal dismissed.

(1) 17 A. 537.

* The judgment in this case was as follows:—

BANERJI and AIKMAN, JJ.—The respondents, Mewa Lal and Lachmi Narain, obtained a decree upon a mortgage, dated the 8th of February, 1886, executed by Ranbahadur Singh, the father of Bijai Bahadur Singh, plaintiff, Randhir Singh, the father of the other plaintiffs, and Hanwant Singh, a brother of Ranbahadur Singh and Randhir Singh. At the time of the suit Hanwant Singh was dead and his widow was made a defendant to the suit. The other defendants were Ranbahadur Singh and Randhir Singh. In execution of that decree, which is dated the 7th of December, 1892, Mewa

21 A. 196=19 A.W.N. (1899) 30.

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[196] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SIBTA KUNWAR (*Plaintiff*) *v.* BHAGOLI (*Defendant*).*
[28th January, 1899.]

Civil Procedure Code, s. 317—*Benami transaction—Suit against heir of certified purchaser—Interpretation of Statutes.*

Held that s. 317 of the Code of Civil Procedure would not preclude a suit against a person who claimed title through the certified purchaser based on the allegation that the certified purchaser was not the real purchaser, but only purchased benami for the person through whom the plaintiff claimed. *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall and Jokhee Lall* (1) referred to.

[Not F., 31 B. 61=8 Bom. L.R. 873; R., 28 P.L.R. 1904=4 P.R. 1904; 16 Ind. Cas. 449 (452)=8 N.L.R. 107 (112).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Messrs. *C. Dillon* and *Roshan Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This was a suit for the possession of certain shares in two villages, namely, Amirta and Nadeli, and of a share in a house in the village Amirta, which belonged originally to one Kishan Lal. The plaintiff is one of two daughters of Kishan Lal. The defendant is the daughter of a predeceased son of Kishan Lal, named Lokman. Lokman's widow was Musammat Natholi, who survived Kishan Lal, but is now dead. On the 19th of February 1884, Kishan Lal executed a deed of gift in favour of Musammat Natholi in respect of the village Nadeli and a house. In execution of a decree which a creditor of Kishan Lal

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Lal and Lachmi Narain caused the mortgaged property to be advertised for sale. Thereupon the present suit was brought on the 1st of February, 1896, for a declaration that the interests of the plaintiffs in the mortgaged property were not liable to sale. The sole ground upon which the suit was brought was that the plaintiffs had not been made parties to the mortgagees' suit. If the property was ancestral and the mortgagees had notice of the interests of the plaintiffs in the mortgaged property at the time they brought their suit upon the mortgage, the plaintiffs would, under the ruling of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (I.L R., 17 All., 537) be entitled to succeed. The Court below, however, has dismissed the suit upon the ground that it had not been established that the mortgagees had express or constructive notice of the interests which the plaintiffs claimed in the property. The learned Subordinate Judge, who has recorded a careful judgment in the case, was of opinion that it had not been proved that the mortgagee had any knowledge of the existence of the plaintiffs and that there had not been on the part of the mortgagees either wilful abstention from inquiry or gross negligence such as would bring the case within the definition of notice as given in s. 3 of Act No. IV of 1882. The learned counsel who has appeared for the plaintiffs-appellants has conceded that there was no express notice. He contends, however, that the mortgagees must be taken to have had constructive notice of the existence of the plaintiffs. We are of opinion that the reasons given by the learned Subordinate Judge for holding the contrary view are cogent. It has not been shown that any circumstances existed which ought to have put the mortgagees upon inquiry. The appeal is, in our opinion, untenable. We dismiss it with costs.

* First Appeal, No. 250 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 21st September 1896.

(1) 14 M.I.A. 496.

had obtained against him the share in the zamindari of Amirta was sold by auction on the 20th of June 1884, and was purchased in the name of Musammat Natholi. Upon the death of Musammat Natholi the property now in suit was taken possession of by her daughter, Musammat Bhagoli. Hence the present suit.

The plaintiff asserts that the deed of gift relating to the village Nadeli and the house property was a colourable transaction; that Kishan Lal purchased the share in the village Amirta with his own funds benami in the name of Musammat Natholi; that he continued in possession as owner of the whole property till his [197] death; that upon his death the plaintiff and her sister have succeeded to that property by right of inheritance, and that the plaintiff is thus entitled to a half share of it.

As regards the village Amirta, the suit was defended upon two grounds: first, that s. 317 of the Code of Civil Procedure bars the suit; and, secondly, that the share was purchased by Natholi with her own funds. As for the property covered by the deed of gift, the contention was that the gift was a real transaction, and that by it Kishan Lal intended to, and did actually, transfer his interest in the property to Musammat Natholi.

As regards the property covered by the deed of gift, we are of opinion that the appeal must fail. The deed itself affords internal evidence of the fact that the intention was that the property should go to Natholi. It is stated in it, as a condition attached to the gift, that Musammat Natholi would have power to transfer it to her daughters, Bhagoli and Jika, but that she would have no power to transfer it to any other person. It further provides that after Natholi's death the property should go to her daughters. If the gift was a mere paper transaction, we should not have expected clauses, like those to which we have referred, carefully limiting the right of the donee. We further find that on the date on which the deed of gift was executed Kishan Lal obtained a power of attorney from Musammat Natholi, evidently for the purpose of managing the property on her behalf. It is natural to expect that he would wish to make some provision for his widowed daughter-in-law and her children, and it seems to us in the highest degree probable that it was with that intention that he executed the deed of gift. The plaintiff's own witness, Ram Dial, said that "Kishan Lal made the gift for the maintenance of his daughter-in-law, Natholi. He made the gift for the maintenance of of his son's widow, thinking that she might be put to trouble after him." We agree with the Court below in thinking that the plaintiff has failed to show that the gift was a nominal transaction and did not convey to Musammat Natholi the property to which it relates. So far the appeal must fail.

[198] As for the village Amirta, the learned Subordinate Judge has held that s. 317 of the Code of Civil Procedure precludes the plaintiff from maintaining the present suit, as Musammat Natholi was the certified purchaser of that village at auction. Had Natholi herself been the defendant to the suit, we should have seen no reason to differ from the conclusion of the learned Subordinate Judge; but the suit was not brought against the certified purchaser but against a person who derives title from her. Section 317 forbids the maintenance of a suit "against the certified purchaser," which the defendant in this case is not. Why the Legislature stopped here and did not bar a suit against persons claiming through a certified purchaser, we are unable to say; but, as was

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observed by their Lordships of the Privy Council in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall and Jokhee Lall* (1), "where the Legislature has stopped the Court must stop." As the provisions of s. 317, as they now stand, are in restraint of an ordinary right of suit and preclude a suit against a certified purchaser only, we do not think we should be justified in extending the scope of the section beyond what the language of the section warrants. We are therefore unable to agree with the learned Subordinate Judge in holding that that section bars the maintenance of the present suit.

We have now to consider whether the village Amirta was purchased at auction by Kishan Lal with his own funds, or, as alleged on behalf of the defendants, with the funds of Musammat Natholi. This was an issue which the pleadings in the case raised. The evidence conclusively proves that the purchase-money was paid by Kishan Lal, and there is not a particle of evidence before us to rebut the evidence to that effect. We have further the fact that mutation of names did not take place after auction-purchase in favour of Musammat Natholi, and that up to the time of his death Kishan Lal continued to be the recorded owner of the share in question and in possession thereof. The learned Subordinate Judge has found that it was the intention of **[199]** Kishan Lal to give this property also to Natholi. In the first place, this view is opposed to the pleadings. It is certainly not borne out by the evidence of the witness Brij Lal, to which the learned Subordinate Judge refers, and it is not supported by any other evidence upon which we can rely. If it was the intention of Kishan Lal that this property also should go to Natholi, we should have expected to find that he had given expression to that intention by a proper deed, as he did in the case of the other village. If such was ever his intention, he died without giving effect to it. We therefore hold that, so far as the suit relates to the share in the village Amirta, the plaintiff is entitled to a decree; but as regards that portion of the claim which relates to the property covered by the deed of gift, her suit has been rightly dismissed.

The plaintiff also claimed a moiety of 214 bighas 18 biswas of khudkasht land in Amirta and some *sir* land in the same village. The Court below has granted her a decree in respect of the *sir* as an ex-proprietary tenant. In the view which we have taken of the case the plaintiff is entitled to a decree for possession of the *sir* land as such. Her father could not be regarded as an ex-proprietary tenant of the *sir* land, inasmuch as we have held that he was the purchaser and proprietor of the zamindari to which the *sir* appertained down to the date of his death. As for the khudkasht land, we hold that Kishan Lal held it *qua* zamindar, and it must go to his heirs along with the zamindari to which it appertained. The defendant has no title in respect of that land superior to that of the plaintiff.

The result is that we allow the appeal and vary the decree below by making a decree in favour of the plaintiff for possession of 3 biswas $6\frac{3}{4}$ biswansis share in mauza Amirta, and a moiety of 214 bighas 18 biswas of khudkasht land, and of 12 bighas of *sir* land and mesne profits in respect of the said share and lands for three years preceding the date of the suit, with future mesne profits up to the date of delivery of possession, or the expiry of three years from this date, whichever event first occurs, such

(1) 14 M.I.A. 496.

mesne profits to [200] be determined in execution. *Quoad ultra* we affirm the decree of the Court below. The parties will pay and receive costs both here and in the Court below in proportion to their failure and success.

Decree modified.

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21 A. 196 = 19 A.W.N. (1899) 30.

21 A. 200 = 19 A.W.N. (1899) 32.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GIRDHARI LAL AND ANOTHER (*Plaintiffs*) *v.* RAM LAL AND ANOTHER (*Defendants*).* [30th January, 1899.]

Civil Procedure Code, s. 539—Trust—Suit to compel trustees to account—Court fee—Act No. VII of 1870 (Court Fees Act), sch. ii, art. 17, cl. (vi)—Suit for removal of trustees.

The mere fact that the plaintiffs in a suit under s. 539 of the Code of Civil Procedure, may ask for an account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of art. 17, cl. (vi) of the second schedule to the Court Fees Act, 1870, and rendered the plaintiffs liable to pay an *ad valorem* Court fee on that part of their plaint. *Thakuri* v. *Bramha Narain* (1) referred to.

A suit for the removal of an old trustee who has committed a breach of trust and for the appointment of new trustees may properly be brought under s. 539 of the Code of Civil Procedure. *Huseni Begam* v. *The Collector of Moradabad* (2) approved. *Rangasami Naickan* v. *Varadappa Naickan* (3) dissented from.

[**Rel.**, 14 C.W.N. 932 (935) = 7 Ind. Cas. 93 (96); **R.**, 2 C.L.J. 431 (439); 2 C.L.J. 460 (468); 3 O.C. 299 (303) 5 O.C 110 (112).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, and Pandit *Moti Lal*, for the appellants.

Mr. *W. M. Colvin* and Munshi *Gokul Prasad*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—A preliminary objection was raised on behalf of the respondents to the hearing of this appeal, on the ground that the plaint in the Court below and the memorandum of appeal in this Court were not sufficiently stamped. The principal ground of this contention is that the claim embraces a prayer for an account, and that the Court fees ought to have [201] been paid with reference to that prayer under clause (*f*) of sub-section 4 of s. 7 of Act No. VII of 1870.

The facts are these:—The plaintiffs, who are two in number, brought the suit under s. 539 of the Code of Civil Procedure, on the allegations that one Maharaj Kallu Mal had created a trust for the maintenance of a school and a charitable institution; that the first defendant was appointed superintendent of the trust, and that the other trustees had not performed the duties which lay upon them in connection with the trust. The following reliefs were asked for in the plaint:—

(*a*) that for the purpose of the management of the endowed property and fulfilment of the object of the endowment, new superintendents may

* First Appeal. No. 251 of 1896 from a decree of J. E. Gill, Esq., District Judge of Cawnpore, dated the 7th October 1896.

(1) 19 A. 60. (2) 20 A. 46. (3) 17 M. 462.

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21 A. 200=19 A.W.N. (1899) 32.

be appointed, and the whole of the endowed property, detailed at the foot of the plaint, may be taken out of the possession of the defendants and placed in that of the new superintendents;

(*b*) that the defendants may be made to render an account of the income and expenditure from Sambat 1940, when Kallu Mal died, up to the present time, and all the money which the defendant No. 1 should fail to prove had been spent for the purposes of the endowment, according to the terms of the deed of endowment, may be awarded against him to the superintendents, appointed by the Court, and added to the funds of the endowment;

(*c*) that proper and necessary instructions and rules regarding the management of the endowment and its income and expenditure may be issued.

The plaintiffs paid a Court fee of ten rupees in the Court below, alleging that the subject-matter in dispute was not capable of valuation, and that the case came under clause (vi) of art. 17 of sch. ii of Act No. VII of 1870. In this Court a further sum of ten rupees was received on the plaint and also on the memorandum of appeal, on the report of the office, the report being to the effect that ten rupees were payable for each of the two reliefs (*a*) and (*b*) claimed in the plaint. It is not stated, **[202]** and we do not understand, under what provision of the Court Fees Act the second fee of ten rupees was realized in this Court.

Are the plaint and the memorandum of appeal insufficiently stamped? If it is not possible "to estimate at a money value the subject-matter in dispute, and if there is no other provision in the Court Fees Act for a suit of this description," the plaintiffs were right in paying a Court fee of ten rupees under cl. vi of art. 17 of sch. ii of Act No. VII of 1870. We have therefore to consider what the subject-matter in dispute is. The plaintiffs claim nothing for themselves personally. As persons interested in a trust for charitable purposes, they come into Court asking for the removal of a trustee who, they allege, has committed a breach of trust, and who has in his hands funds belonging to the trust. They also ask for the appointment of new trustees and for the vesting of the trust property in the new trustees. That is the real relief which the plaintiffs seek in this case. Such a relief is not capable of being estimated at a money value. It is true that the value of the property, which is the subject-matter of the trust, is stated in the plaint, but that is not the value of the subject-matter in dispute. We think that this case cannot be distinguished from the principle of the judgment in *Thakuri* v. *Bramha Narain* (1). We pointed out in that judgment the difficulties which would arise if it were held that a suit for the removal of a trustee and the appointment of new trustees were to be looked upon as a suit in which Court fees had to be paid with reference to the value of the trust property. Mr. *Colvin*, on behalf of the respondents, does not contend that this suit should be regarded as a suit for possession of the trust property. He frankly conceded that if the plaintiff had not asked for an account he would be unable to distinguish this case from the ruling to which we have referred. He argues that the plaintiffs having in their plaint asked for the taking of an account, they were bound to pay Court fees on that portion of their plaint. **[203]** We are unable to agree with this contention. The prayer for an account is only ancillary to the substantive prayer in the plaint for the

(1) 19 A. 60.

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removal of the trustee-defendant, the appointment of new trustees, and the vesting of the trust property, now in the possession of the old trustee, in the trustees to be appointed by the Court. Reading clause (*f*) of sub-s. 4 of s. 7 of Act No. VII of 1870 with s. 11 of the same Act and the penultimate paragraph of s. 50 of the Code of Civil Procedure, it is quite clear to what that clause refers. We therefore overrule the preliminary objection taken on behalf of the respondents.

21 A. 200=
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(1899) 32.

As regards the appeal, we are of opinion that it must prevail. The Court below has dismissed the suit on the ground that it is one for the removal of a trustee, and is not therefore a suit to which s. 539 of the Code of Civil Procedure applies. If this were so the learned Judge erred in dismissing the suit; he ought to have returned the plaint for presentation to the proper Court. We are of opinion, however, that the learned Judge was wrong in the view he took of the case. That view is, it is true, supported by the ruling of the Madras High Court in *Rangasmi Naikan* v. *Varadappa Nickan* (1), but that ruling has been dissented from in this Court in *Husini Begam* v. *The Collector of Moradabad* (2). The High Courts of Calcutta and Bombay have taken the same view of the question as was adopted by this Court, and even the Judges of the Madras High Court have held divergent opinions. We have no hesitation in concurring with the ruling of this Court to which we have referred above. Section 539 of the Code of Civil Procedure provides for cases of an alleged breach of trust for public charitable or religious purposes, and enables two or more persons having an interest in the trust to institute a suit to obtain a decree "appointing new trustees under the trust." Those words are, in our opinion, wide enough to include a claim for the removal of an old trustee who has committed a breach of trust, and for the appointment of new trustees. The ruling of **[204]** the Madras High Court based on decisions of English cases on Lord Romilly's Act does not commend itself to us. That Act provides a summary procedure for obtaining relief by petition and not by suit as provided in s. 539 of the Code of Civil Procedure, and the provisions of the English Statute differ materially from those of s. 539.

We allow this appeal, and setting aside the decree of the Court below, remand the case under s. 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to try it on the merits. The appellants will get their costs of this appeal. Other costs hitherto incurred will abide the result.

Appeal decreed and cause remanded.

(1) 17 M. 462.

(2) 20 A. 46.

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LATE
CIVIL.

21 A. 204=
19 A.W.N.
(1899) 36.

21 A. 204=19 A.W.N. (1899) 36.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

DALIP RAI (*Defendant*) *v.* DEOKI RAI (*Plaintiff*).*
[31st January, 1899.]

Act No. XII of 1881 (*N.W.P. Rent Act*), *s.* 95 (*n*)—*Land-holder and tenant—Dispossession of tenant—Effect on tenant's right of his neglecting to apply under s.* 95 *to be restored to possession.*

Held, that the failure of a tenant to apply under s. 95 (*n*) of the North-Western Provinces Rent Act, 1881, for the recovery of the occupancy of land, of which he has been wrongfully dispossessed, within the period of six months after the date of dispossession prescribed for such applications by s. 96 (*e*) has the effect not only of barring the tenant's remedy, but of extinguishing the tenant's right to the occupancy of the land.

[R., 27 A. 372=2 A.L.J. 69=A.W.N. (1904) 281; 7 A.L.J. 303 (310)=2 Ind. Cas. 456 (458); 6 C.L.J. 621 (636); 14 C.L.J. 292 (297)=16 C.W.N. 351 (354)=11 Ind. Cas. 465 (468); 2 Ind. Cas. 848 (850); 9 Ind. Cas. 51 (52).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

STRACHEY, C.J. (KNOX, J., concurring).—The question raised by this appeal is whether the failure of a tenant to apply under s. 95 (*n*) of the North-Western Provinces Rent Act, 1881, for the recovery of the occupancy of land, of which he has been wrongfully dispossessed, within the period of six months after the date of the dispossession, prescribed for such applications by s. 96 (*e*) has the effect of [205] extinguishing his title or only of barring his remedy. The facts as found by the lower appellate Court are these: The plaintiffs are zamindars, and the land in suit forms part of their *sir*. Previous to the year 1892 the defendant was in possession of the land as the plaintiff's tenant-at-will. In that year the plaintiffs, without taking any of the steps necessary under the Rent Act for the defendant's ejectment, wrongfully dispossessed him of the occupancy of the land and assumed the cultivation of it by a shikmi tenant whom they put in possession and whose name was entered in the settlement papers. The defendant made no application under s. 95 (*n*) for the recovery of the occupancy of the land. In 1895 he forcibly entered upon the land and resumed possession. In 1898 the plaintiffs brought the present suit in the civil Court, claiming his ejectment from the land as a trespasser, and damages. The defendant pleaded that he had never ceased to have the rights of a tenant in respect of the land, and that the suit was not cognizable by a civil Court. The Court of first instance dismissed the suit, but the lower appellate Court decreed the appeal and the suit, holding that the defendant's tenancy became extinguished on his failure to apply under s. 95 (*n*) within six months from the date of the wrongful dispossession, and that when, in 1895, he obtained possession, he did so as a trespasser. On appeal by the defendant to this Court Mr. Justice

* Appeal No. 27 of 1898 under s. 10 of the Letters Patent.

Blair took the same view, (see I. L. R., 20 All. 471) and in this further appeal under the Letters Patent we have to consider whether it is correct.

The question is not altogether free from difficulty. There appears to be no reported case in point. The position of the defendant, when he obtained possession in 1895, was this. On the one hand, he had clearly no remedy by legal proceedings. By virtue of the opening words of s. 95 of the Rent Act he never had any remedy in a civil Court. His only remedy in a revenue Court, namely, an application under s. 95 (*n*), was barred by s. 96 (*e*). On the other **[206]** hand, s. 96 (*e*) in terms enacts only that an application under s. 95 (*n*) shall not be brought after six months from the date of the wrongful dispossession; it contains no provision similar to s. 28 of the Limitation Act, to the effect that at the determination of the prescribed period the tenant's right to the occupancy of the land shall be extinguished. S. 28 of the Limitation Act itself obviously does not affect applications under the Rent Act. The view expressed in *Mazhar Rai* v. *Ramgat Singh* (1) that the tenancy of a tenant of agricultural land can only be determined in one or other of the manners mentioned in the Rent Act, applies to tenants-at-will, who, like other tenants, are protected by s. 34 from ejectment otherwise than in execution of a decree or order under the Act; and among the manners specially mentioned, extinction by lapse of the period prescribed by s. 96 (*e*) is not one. If within the six months' period the defendant had, without the assistance of the revenue Court, regained possession of the land, there can be no doubt that he would have held it under his original tenancy, which, in that case, would have undergone no legal determination or interruption. The pleader for the appellant contended that it is a general principle of law that in the absence of express words to the contrary a statute of limitation only bars the remedy and does not extinguish the right, and that, as the Rent Act contains no such express words, the defendant's title, notwithstanding the lapse of the prescribed period, still existed at the time when he regained possession.

The nearest analogy available upon the question is afforded by the Indian enactments relating to limitation prior to Act No. IX of 1871, s. 29 of which first introduced the rule now contained in s. 28 of the present Act. The old Bengal Regulations of Limitation, III of 1793 and and II of 1805, in reference to suits for the recovery of immoveable property, in terms limited the remedy only and did not on the lapse of **[207]** the prescribed period expressly extinguish the title. Again, s. 1 of Act No. XIV of 1859 only provided that no suit should be maintained in any Court of Judicature unless the same were instituted within the period of limitation made applicable to a suit of that nature, and of such suits cl. 12 of the section specified suits for the recovery of immoveable property, or of any interest in immoveable property. Notwithstanding the terms of these enactments it was clearly settled that upon the expiry of the prescribed period for such a suit, not only was the claimant's remedy barred, but his title extinguished in favour of the party in possession, however wrongfully that possession might have originated; see *Ganga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnahs* (2), and the other cases mentioned by Westropp, C. J., in *Sitaram Vasudev* v. *Khanderav Balkrishna* (3). In *Bindrabun Chunder Roy* v. *Tarachand Bundopadhya* (4), decided under Act No. XIV

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(1) 18 A. 290 (294).
(2) 11 M.I.A. 345.
(3) 1 B. 286.
(4) 11 B.L.R. 237,

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of 1859, Mr. Justice Markby said that it was "an accepted doctrine in our Courts that if a party who has been twelve years out of possession and whose suit is therefore barred should again get into possession, he is not (to use an English phrase) remitted to his old title; our Courts adopting, as pointed out by Sir Lawrence Peel in *Sibchunder Doss* v. *Sibkissen Banerjee* (1), the English rule that there is no remitter to a right for which the party had no remedy by action at all." In the same case Mr. Justice Birch said:—"I apprehend it to be now well established that, when his remedy is barred, the right and title of the claimant is extinguished and transferred to the person in possession." The only authorities for the contrary view which have been cited to us are two Madras cases, in one of which, *Doe d' Kullammal* v. *Kuppu Pillai* (2), decided in 1862, it was held that "the Indian Law of Limitation bars the remedy only, but does not extinguish the right," and in the other, *Govindan* **[208]** *Pillai* v. *Chidambara Pillai* (3), decided in 1862, it was held that s. 12 of Act No. XIV of 1859 did not extinguish the right at the lapse of the statutory period. Both these cases, however, were decided before the decision of the Privy Council in the case reported in 11 M.I.A., 345, upon which the Bengal judgments were chiefly based. The later cases support, we think, the view expressed by Mr. Mitra that where a law of limitation regarding the possession and dispossession of immoveable property in terms limits the suit only, its effect is nevertheless generally to extinguish the title, unless there co-exists with it a statute such as Bombay Regulation V of 1827, fixing a longer period for the acquisition of title by positive prescription: see Mitra's Law of Limitation and Prescription in British India (3rd ed.), pp. 3, 13, 35, 36, 52, 325, and *Rambhat Agnihotri* v. *The Collector of Puna* (4). It is true that in all these cases there was no question of landholder and tenant. The question was not whether, under a special law prescribing a period of limitation, a tenant's right was extinguished in favour of a landholder wrongfully dispossessing him, but whether, under the general limitation law, an original owner's right was extinguished in favour of a wrongful occupant holding adversely for the prescribed period. The cases, however, so far assist us that they establish, first, that a provision as to limitation which in terms merely bars the remedy may have the further effect of extinguishing the right, and, secondly, that as regards the possession and dispossession of immoveable property or an interest therein, the latter effect generally follows. If this view is correct, the presumption appears to be that, on the lapse of the six months' period prescribed by s. 96 (*e*) of the Rent Act, the defendants' right to the occupancy of the land in suit was extinguished, and that the possession which he afterwards forcibly obtained was not that of a tenant who could only be ejected through a revenue Court, but that of a trespasser who might be ejected through a **[209]** civil Court. If, on the other hand, this view is not correct, the result would seem to be that there is no limit of time within which the defendant might not forcibly re-occupy the land and assert the continuance of his tenancy. Such a state of things would lead to great insecurity in the occupancy of land by tenants holding under the landholder in good faith and in ignorance of the dispossessed tenant's claim, and to the substitution of irregular and violent methods of recovering possession for the methods which the Legislature has provided for a dispossessed tenant's benefit. We do not think that a construction

(1) 1 Boul. 70.
(2) 1 M.H.C.R. 85.
(3) 3 M.H.C.R. 99.
(4) 1 B. 592 (599).

of s. 96 (*e*) of the Rent Act which involves these consequences can be correct. We think that the lower appellate Court and Mr. Justice Blair have rightly construed the section, and we dismiss this appeal with costs.

Appeal dismissed.

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PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey and Sir R. Couch.

[*On Appeal from the High Court for the North-Western Provinces.*]

MICHAEL MACAULIFFE, (*Plaintiff-Appellant*) *v.* CHARLES WILSON (*Defendant Respondent.*)

[17th, 21st, 22nd June, and 26th November, 1898.]

False representation alleged against vendor by purchaser—Inducement not proved—Shareholder buying shares from a Director of the Company.

To maintain a suit for damages upon a false representation alleged by purchaser against vendor, it must be established that the plaintiff was induced by the misrepresentation to enter into the contract.

Shares in a Banking Company which shortly afterwards went into liquidation, were sold by a Director to the plaintiff, a shareholder. The latter now sued the vendor, alleging inducement to buy the shares by the vendor's false representations as to the state of the Bank's affairs.

Both the Courts below concurred in finding that oral representations as to the latter alleged to have been made by the defendant to the plaintiff were not proved. Those Courts, however, had concurred in finding that the defendant, though he was not responsible for false balance-sheets issued before 1890, **[210]** was well aware of the falseness of the one issued for the half-year ending on the 30th June 1890. The Judicial Committee saw no reason for interfering with these concurrent findings.

The plaintiff, in this appeal, relied on the issue of the false balance-sheet of 1890, the issue of a false report by the Directors, and a wrongful payment of dividend, for the period above mentioned, acts in which the defendant had taken part; these acts, as a series, constituting false representations, the Bank having in fact been insolvent at the time.

But it was not shown by the evidence that the plaintiff had been induced to buy the shares, which he had contracted to buy in two sets, one in September, the other later on in 1890, by any of the representations so made; regard being had to the dates, respectively, and to his own knowledge. The dismissal of the suit was, therefore, maintained.

APPEAL from a decree *C. Wilson* v. *M. Macauliffe* (1) (1st August 1895) of the High Court, reversing a decree (31st July 1893) of the Subordinate Judge of Debra Dun.

The plaintiff-appellant sued the defendant-respondent on the 15th April 1893 for damages, the alleged consequence of the defendant's false representations. The claim was for Rs. 20,950; the price of shares, with Rs. 1,670, interest thereon, in the Himalaya Bank, a Bank limited by shares, registered and carrying on busines until 1891, when it failed, at Masuri. In 1890 the plaintiff, who already held shares in the Bank, purchased one hundred shares, at Rs. 110 a share, on the 10th September in that year, and forty-seven more on the 27th November following.

(1) 18 A, 56.

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The Bank stopped payment on the 8th July 1891 and went into liquidation.

The plaintiff alleged that he had been induced to buy by the false representations of the vendor, who was then a Director of the Company, and had misrepresented to him the state of the Bank's affairs.

The question raised, and decided on this appeal in the negative was, whether the plaintiff had been induced to buy by the defendant's falsely representing to him that the Bank was sound.

The facts are stated in their Lordships' judgment.

[211] The plaintiff's grounds were that he had been induced to buy the defendant's shares, on the faith in his statements, made both as a director and as a private person, to the purport that the Bank was earning profits and had a large reserve fund. The plaint alleged that the defendant, having with his co-directors issued half-yearly reports and balance-sheets, had with them issued a balance-sheet and report for the half-year ending on June 30th, 1890, which he knew to be false, and that on the strength of these last, when laid before the shareholders, a dividend was declared and paid, though the Bank was insolvent.

The defendant denied the representations attributed to him personally by the plaintiff. But did not deny that he knew that the last-mentioned balance-sheet was false. He asserted that, before the period to which it related, the accounts had been made up by a manager whom he and his co-directors, trusted; *Queen-Empress* v. *Moss and others* (1). The plaintiff had known, he urged, that there were rumours current as to the real state of the Bank at the time when he bought; and that he had bought the shares at his own risk, after making enquiries. The issues were whether the defendant by fraud or false representation, induced the plaintiff to enter into the contract in question, and to what damages he was entitled.

The Subordinate Judge found as a fact that false balance-sheets had been issued since 1886; but he found that there was no evidence to show that the defendant had been a party to the fraud and misrepresentation prior to the issue of the balance-sheet relating to the half-year ending on June 30th, 1890. The Judge doubted not that the latter was known by the defendant to be false at the time, and that he well knew of the unsecured debts due to the bank, and knew that the liabilities exceeded the assets. It was necessary for the plaintiff to establish fraud, and nothing short of it; *Derry* v. *Peak* (2). But, in dealing with his shares, a Director of a Company was in a position not, in itself, different from that of other shareholders as regarded sales. *Gilbert, in re* [212] *The National Provincial Marine Insurance Company* (3). The oral misrepresentations charged had not been proved. The judgment concluded in favour of the plaintiff for a reason apart from the fraud on which the case was founded. The reason was that the defendant had, when asked about the purchase of shares, mentioned a person whom he believed to be willing to sell some. This the Judge regarded as a fiction to bring on the sale of his own shares, and thereupon decreed the claim for Rs. 18,055.

The High Court (KNOX, Officiating C. J., and AIKMAN, J.) reversed the decision of the Subordinate Judge, and dismissed the suit. The ground of decision below had been taken in contravention of the well-known rule, referred to in *Abdul Hossein Zenail Abadin* v. *Turner* (4) that a charge of fraud must be substantially proved as laid; and that ground was also

(1) 16 A. 88.
(2) L.R. 14 Ap. Ca. 337.
(3) (1870) L.R. 5 Ch. D. 559.
(4) 11 B. 620.

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insufficient in itself. On the findings of the Subordinate Judge the suit should have been dismissed.

There was the authority of *Le Lievre* v. *Gould* (1) for holding that negligence does not of itself constitute fraud. Distinguishing the present case from the *Leeds Building and Investment Company* v. *Shepherd* (2) the O. C. J. added:—"I have most carefully and anxiously considered "all the evidence bearing on the question, and in my opinion there is no "warrant for a finding that the negligence, great as it was, amounted to "evidence of fraud. There remains the balance-sheet for the half-year "ending 30th June 1890, which we have found was false to appellant's "knowledge, and was directly issued by him. The question which arises "for consideration in connection with this balance-sheet is whether it "was in any way a material inducement which led to the purchase of "the shares by the respondent. It could not have led to the purchase "made by him of 100 shares on the 10th September 1890, for, according "to his own statement, it was not till October 1890 that he received it, "and he himself allows, that it in no way induced him to make the "**[213]** purchase. But he alleges that the publication of the balance "sheet of the half-year ending the 30th June 1890, was one of the "considerations that led him to purchase the remaining 47 shares. It "becomes therefore necessary to look at the evidence which bears on the "sale of these 47 shares. In a letter dated 3rd October 1890, we find the "proposal made by the respondent to buy 47 more shares in the bank "from the appellant at the same price, provided that money could be "lent him by the Himalaya Bank at 8 per cent. On the 3rd November "1890, the transaction reached a further stage, and respondent asked the "appellant to deposit with the Manager of the Mussoorie Bank the scrip "for these 47 shares. From this it is evident that the negotiations for "the purchase of the 47 shares had been completed by the time the letter "was written."

The O. C. J. added that, although the plaintiff had said that in purchasing these shares he was influenced by the report for the half-year ending on the 30th June 1890, it was impossible to accept his statement. The proposal to buy the shares, and the acceptance of the proposal, must have taken place before the 31st October 1890, although payment was delayed. The issue of the balance-sheet could in no way have operated on the defendant's mind to induce him to make the purchase.

The judgment then dealt with the payment of the dividend at 10 per cent. advertised in a newspaper of the 24th July 1890, and showed that this also could not have had effect to lead the plaintiff to enter into the transaction.

After referring to the principles stated in *Smith* v. *Chadwick* (3), and in *Gerhardt* v. *Bates* (4), the O. C. J. added:—"All this admits of no "question; but my difficulty is in believing that the issue of the balance-"sheets, reports, and advertisement of dividend did, or any one of them did, "induce the plaintiff to purchase the shares. In fact my finding is that "it did not. After fully considering all the evidence, I am satisfied that "the **[214]** respondent purchased the shares as being in his eyes a specula-"tion which would probably be a profitable one. While it is our duty to "relieve persons who have been deceived by false representations, it is

(1) (1893) L.R. 1 Q.B. 491.
(2) (1887) L.R. 36 Ch. D. 787.
(3) (1882) L.R. 20 Ch. D. 27.
(4) (1853) 2 El. and B. 476 = L.J. 22 Q.B. 364.

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"equally our duty, as pointed out by Lord Justice Turner in *Jennings* v. "*Broughton* (1) to be careful that in 'our anxiety to correct frauds,' we "do not enable persons who have joined with others in speculation 'to "convert their speculations into certainties at the expense of those with "whom they have joined.' This would, in my opinion, be the effect of "giving the relief for which he asks."

The rest of the judgment dealt with an argument of counsel that in the present case the appellant stood to the plaintiff, in a confidential relation, as a director, having special knowledge. A full report of that part of the judgment is given in the I.L.R. 18 All. 56.

AIKMAN, J., in concurriug, after referring to *Scott* v. *Dixon* (2) said :—"It appears that a balance-sheet and report for the half year ending "30th June 1890, were published, and to this publication the defendant "was a party. There is no doubt that that balance-sheet and report were "false and misleading, and had it been shown that this balance-sheet and "report were inducements which led the plaintiff to purchase the shares "from the defendant, I think plaintiff would have been entitled to recover. "But this balance-sheet and report did not reach the plaintiff until he "had bought the first parcel of 100 shares, and engaged to buy the "remaining 47 shares; he cannot therefore rely on any misrepresenta-"tions therein contained; as to previous balance-sheets, it has not been "proved that the appellant Wilson had any part in publishing them. "It is true that he was a Director from 1885, but up to 1890, when "the Manager Moss went away on leave, the Directors appear to "have taken no active part in the management of the bank, everything "being left to Moss. In thus acting Wilson and his fellow-Directors were "most culpably [215] negligent; but as is shown in the case of *Le "Lievre* v. *Gould*, (3) mere negligence is not sufficient to establish fraud. "Although it is not set forth in his plaint, the plaintiff in his evidence "refers to a copy of *The Pioneer* which was received by him on the 25th "or 26th July 1890, that is, before the purchase of his shares. In that "*Pioneer* the payment of a 10 per cent. dividend on the bank shares was "advertised. I do not, however, think that this would entitle the plaintiff "to recover in an action for deceit, unless it was shown that the "defendant intended by this advertisement to get his shares sold. That "has not been made out to my satisfaction. The defendant is not shown "to have advertised his shares for sale, or to have taken any active "steps to dispose of them, and when the bank failed he owned 98. "The impression which I derive from the perusal of the evidence is, "that it was Macauliffe who expressed a wish to purchase the shares, "not the defendant who offered them for sale. Much argument was "addressed to us with a view of showing that the defendant as Director "of the Bank stood in a fiduciary relation to the plaintiff, and that "his mere silence as to the state of the Bank was sufficient to render "him liable in an action for deceit. As to this I think the conclusion "arrived at by the learned Subordinate Judge is correct, and that the "case he refers to, *i.e.*, *Gilbert's* case, (4) is an authority for the view "which he took."

On this appeal, Mr. *J. D. Mayne* for the appellant, argued that there was error in the judgments below, both in fact and in law. The judges

(1) (1854) 5 De G. Mac. and G. 126.
(2) (1859) 29 L. J. Exch. 62; in note, Q. B. Hil. T. 1859.
(3) (1893) L.R. 1 Q.B. 491.
(4) (1870) L.R. 5 Ch. D. 559.

had regarded the contract to buy the forty-seven shares as concluded before the balance-sheet for the half-year ending on June 30th, 1890 was issued in the October following. But in fact the contract was not completed until December 1890. The High Court had also erred in its inference as to the false representation, and had not given due weight and effect to the cumulative statements in the false documents, followed by the dividend paid though not earned. Regarding the balance-sheets issued [216] before 1890, there had been a fraudulent use of them as a basis for the later misrepresentation in the issue of the balance-sheet above specified. However, there having been actual false representation found against the defendant, there was also error in the High Court's not having held him responsible for it to the plaintiff, who in buying more shares, had acted upon it:—this act, the buying more shares, having been the natural and proximate result of the belief which the defendant had brought about. The true view was that the defendant had made a fraudulent representation with intent to make the plaintiff believe in the soundness of the bank, with the result of his having been induced to buy the defendants' shares:—no remote result from what he was led to believe. This should have been held to support the suit. Where a fraudulent representation was made, though not made solely to the person who had acted upon it to his detriment, if made with intent to produce the false impression acted upon in a way that was reasonable, probable, and natural, then the author of that misrepresentation should be held responsible in damages to the person deceived. Therefore, there was error in the judgment in its absolving the defendant from liability on the ground that the aim, or object, of the false representation was not so much to induce any purchase of shares as to keep up the bank. And it was another mistake in the judgment to relieve the defendant from liability on the ground that the plaintiff had chosen the investment as a speculation of his own, voluntarily undertaking the risk, with knowledge of the state of affairs.

The following cases were referred to in connection with the relation between fraudulent misrepresentation and a consequential damage, as cause and effect—*Peek* v. *Gurney* (1), *Scott* v. *Dixon* (2), *Bedford* v. *Bagshaw* (3), *Barry* v. *Crosskey* (4), *Clarke* v. *Dickson* (5), *Smith* v. *Chadwick* (6).

[217] Mr. *H. H. Asquith*, Q. C., Mr. *W. H. Upjohn*, Q. C., and Mr. *J. Roskill*, for the respondent. The right to recover on the alleged fraudulent misrepresentation had not been made out by the evidence. In order to maintain a suit founded upon a false representation it was essential that the plaintiff should have been induced thereby to act, to his detriment. The balance-sheets from 1886 were false, but, except for the one issued in October 1890, the respondent had been found by the Courts below not to be responsible. The evidence was referred to at length to show that the Court below was right in finding that, though this balance sheet was false and the report also, they were not inducements, in fact, leading the plaintiff into the transaction; as he had, in fact, bought the first parcel of shares, and had engaged to buy the remaining forty-seven, before either of these documents had reached him. The case for the defence rested on the facts established by the evidence. But, in regard to the law, it was also contended on behalf

(1) (1873) L.R. 6 Ap. Ca. H.L. 377.
(2) (1859) 29 L.J. Exch. 62 in note.
(3) (1859) 29 L. J. Exch. 59.
(4) (1861) 2 J. and H. 23.
(5) (1859) 6 C. B. N. S. 453 = 28 L.J. C. P. 453.
(6) (1882) L. R. 20 Ch. Div. 443. In Appeal (1884) 9 Ap. Ca. 187.

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of the respondent, that too wide a range of consequential damage had been suggested by the counsel for the appellant for cases of false representation. There must be a limit in respect of what would be legally included among the consequences entitling a person to sue on the ground of false representation made. If here the immediate object of its being made was to keep up the bank, then the sale of shares by a director was only an indirect, and remote, consequence. If the direct aim and intention in issuing the false balance-sheet was to make the shareholders declare a dividend, it did not follow that this false representation would support this suit. Reliance was placed on what was said in the judgment of Lord Cairns in *Peek* v. *Gurney* (1). If a representation has been made for a purpose different from the result which is alleged as the ground of damages, responsibility only attaches where the damages are proximate. In this case they were too remote. *Barry* v. *Crosskey* (2) was also cited. The injury to support a suit must have been the immediate, not the remote, consequence **[218]** of the misrepresentation, which, in the case where a third person, to whom it had not been directly addressed, had acted upon it, must have been such that the act was within the defendant's intention, or contemplation. This had not been shown in the present case.

Mr. *J. D. Mayne*, in reply, argued that the limit of consequences was in the degree of probability attending the act relied on as being a probable consequence of the fraudulent misrepresentation. The limit was to be regarded as dependent upon how far the act may have been a natural consequence.

Afterwards, on the 26th November 1898, their Lordships' judgment was delivered by SIR R. COUCH.

JUDGMENT.

The appellant in this case became a shareholder in the Himalaya Bank in 1886, several years before the transactions which are the subject of this appeal. This respondent had become a director of the bank in 1885, and continued to be one until it stopped payment on the 8th July 1891 and went into liquidation. On the 16th of May 1893 the appellant brought a suit against the respondent, alleging in his plaint that the respondent strongly advised him to buy shares in the bank as a good investment, and said the bank had a large reserve fund; was on a thoroughly sound footing, and that the directors had declared and paid the usual dividend of 10 per cent.; that the respondent had been for years a director of the bank, and for years, certainly since 1887, had issued or permitted the issue of false half-yearly reports and had issued false balance-sheets that alleged the existence of a reserve fund of Rs. 70,000 in 1885, and that every half-year the sum of Rs. 5,000 had been added to the reserve fund, whereas no reserve fund ever existed; that the balance-sheets purported to show that each half-year a profit of about 19 per cent. on the capital had been made, whereas no profit had been made; that in July 1890 the respondent issued a balance-sheet and subsequently issued a directors' report, both of which he knew to be false; that on the 28th of August 1890 the appellant on the faith of the false statements of the respondent, made both as a **[219]** director and as a private individual, was induced to purchase 100 shares for which he paid Rs. 11,000 on the 10th of September 1890; that on the 31st of October 1890 the false report and balance-sheet for the half-year ending the 30th of June 1890 was laid

(1) (1873) L.R. 6 Ap. Ca. H. L. 377.
(2) (1861) 2 J. and H. 23.

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before the shareholders and the *ad interim* dividend of 10 per cent. declared and paid on the 1st of August 1890, was on that day confirmed, the respondent using the appellant's proxy for that purpose; that about the end of November 1890, by reason of the false representations made by the respondent, the appellant was induced to purchase 47 more shares for which he paid Rs. 5,170 on or about the 27th of November 1890. The respondent pleaded that he did not induce the appellant to make the purchases, and did not make any false statement or misrepresentation. The suit was heard by the Subordinate Judge of Dehra Dun who on the 31st July 1893 made a decree in favour of the appellant. On appeal to the High Court for the North-Western Provinces this decree was reversed and the suit was dismissed. Although the Courts differed in the result, they were agreed as to some of the facts in the case, and as their Lordships will treat concurrent findings of facts as binding upon the parties it is unnecessary to consider the evidence which is only applicable to them. Both Courts have found that the balance-sheets issued since 1887 were false. But they agree that the respondent is not responsible for them. The High Court say there is not sufficient evidence to show that the balance-sheets issued previous to that of 1890 were false to his knowledge. The Subordinate Judge found expressly that he was not responsible for those balance-sheets. They were prepared by Moss, the Manager of the bank, who was absent in Australia when that for the half-year ending on the 30th June 1890 was prepared. It was indeed admitted by Mr. *Mayne* who appeared for appellant, that previous to April 1890 the directors were acting upon representations made to them by Moss. The important part of the case is the issuing of the balance-sheet and report for the last half-year and declaring and paying the dividend on the 1st of August. Both **[220]** Courts have found that the verbal representations alleged to have been made by the respondent were not proved. The evidence of appellant of these representations has not been believed by either of the Courts. The case of the appellant must therefore rest upon what was done after April 1890.

It appears in the minutes of a meeting of the directors of the bank on the 10th of July 1890, of which the respondent was chairman, that the directors had gone through the accounts of the bank and that the state of its affairs had become known to them. In the minutes of a meeting on the 16th of the same month, the respondent being the chairman, it is stated that "the half-yearly balance-sheets ending 30th June 1890 "having been duly approved of, it was decided to declare the usual *ad* "*interim* dividend of 10 per cent. per annum, and that the usual notice "be inserted in the newspapers." And both Courts have found that the respondent knew that balance-sheet to be false.

With regard to the 100 shares bought on the 10th September 1890, the material question is whether the appellant in buying them was acting upon a representaion contained in the balance-sheet ending on the 30th June 1890, or made by the declaration of the *ad interim* dividend, and was thereby induced to buy those shares. *Barry* v. *Croskey* (1), *Peek* v. *Gurney* (2). The appellant was examined as a witness in support of his case, and in considering the value of his evidence it should be observed that as regards the verbal representations said to have been made by the respondent, neither of the Courts below has

(1) 2 J. and H. 23.

(2) L.R. 6 E. and I.A. 412.

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believed his evidence. He said, "On the 10th September I bought 100 "shares at Rs. 110 each. I produce the scrip. I subsequently bought "more scrip in the end of November—47 shares at the same price, from "the defendant. The scrip is in the possession of the Mussoorie Bank. In "purchasing these I was influenced by the consideration mentioned before "by the half yearly report for the half-year ending 30th June 1890, Exhibit "B, dated 31st October 1890." In cross-examination being questioned as to a [221] letter of his to the respondent of the 17th September, 1891, in which he said—"You signed the directors' report for the half-year ending 30th June 1890, declaring a dividend at the rate of 10 per cent. per annum, and stating that the net profits were Rs. 19½ per cent. and a fraction. By this report the public were deceived as to the state of the bank, and I myself was led to buy 147 more shares from you" and asked why he was led by the balance-sheet of the 30th June, 1890 to purchase 147 shares, he answered :—"The No. 147 was a mistake for 47, and the mistake "of writing 147 was a clerical error . . . . The balance-sheet of "30th June, 1890, did not influence me in buying the shares." In the printed record before their Lordships, there is between "the" and "shares" the words "(paper torn)". It is not necessary to quote the whole of his evidence on this matter. In their Lordships' opinion the effect of it is that he was not induced to purchase the 100 shares by the balance-sheet of the 30th June, 1890, or the declaration of the *ad interim* dividend.

As to the 47 shares the case is different. The evidence relating to that purchase is mainly documentary. It appears in the appellant's deposition that before the 8th September, 1890, there had been a negotiation for the purchase of the 100 shares, and on that day the appellant wrote to the respondent—"I have sold those 100 shares to Wright & Co. and "they pay transfer charges, and I have also sold 200 other shares to our "friend at Sialkot, so if Moss" (the Manager of the Bank) "will lend me "Rs. 10,000, we can do a large business." On the 3rd October, he wrote another letter to the respondent in which, after speaking about the payment for the 100 shares, he said :—"I suppose Mr. Moss has returned by this. "Have you asked him at what rate he can lend me money, say Rs. 5,000? "If he lends it at 8 per cent., I will buy 46 more shares in the Himalaya "Bank from you at the same price." On the 20th November, he wrote to "the respondent :—"I do not understand that I only receive dividends on "the 47 shares from the 1st of January, 1891. It is only two months since "I [222] bought the 100 shares from you without any such understanding, "and as the dividends for the current half-year will not be paid till "March or April, I cannot consent to any such condition of the purchase "of the 47 shares as you now propose, nor should I have gone to so much "trouble in raising a loan for their purchase if you had said that was "what you meant. I explained to you that I could only buy Himalaya "shares on favourable terms. The bank has now a very bad name as "evidenced by the large extra security required by the Mussoorie Bank "and by other indications also."

He does not notice the half-yearly balance-sheet, which he said in his deposition he received in October, or the *ad interim* dividend, as having induced him to buy the shares. And on the 27th November he wrote :— "You state that I am to draw dividends for the current half-year, so "the matter is settled between us."

A more important letter is one which the appellant wrote to the respondent on the 11th March, 1891. It is as follows :—

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"Dear Wilson,—What are the strange rumours which I hear again respecting the "Himalaya Bank? I heard things against it last year, but they were denied by you "and the other directors, and so I myself was led not to believe them. At the same "time you sold me a large number of shares at less than the market price. *Capital* "has, I am told, a very damaging paragraph against the Himalaya Bank in which it "is stated that its paper is being hawked about in the streets of Calcutta. I do not "know what all this means."

"Of course, I know very well last year that the Bank had become exceedingly un-"popular and had lost numerous constituents under Mr. Greenway's management; "but I was hoping that it would come round after Mr. Moss' return.

"Banks generally go to grief, and indeed can only go to grief either by speculation "or by large bad debts. Now I do not think that there is anybody robbing the Him-"alaya Bank, and its operations being necessarily on a small scale, I have not heard "nor can I conceive that it has had any serious losses, and I do not understand "the rumours I hear except in so far as that the Bank's business is not good at "present."

"I would request the favour of your enlightening me and giving me your advice "as to whether I ought to sell out, and if so, at what rate? Your were quite right in "selling, and I cannot blame you if the worst comes to the worst; but I think you "ought to give me your candid advice now that matters appear to have become serious."

[223] This letter is not consistent with the appellant having been induced to buy either the 100, or the 47, shares by the half-yearly balance-sheet of June 1890 or the publication of the *ad interim* dividend. Their Lordships think that if he had been so induced there would have been some allusion in it to them.

It has been seen that his evidence about the verbal representation was not believed by the Courts below, and their Lordships cannot consider his evidence where he says that in purchasing the 47 shares he was influenced by the half-yearly report dated 31st October, 1890, as sufficient proof of it, or infer it from his knowledge of the reports. In their opinion he has failed to prove that, in buying the shares, he acted upon or was induced by any false representation for which the respondent is liable, and they will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The costs of it will be paid by the appellant.

Appeal dismissed.

Solicitors for the Appellant: *Messrs. Pyke and Parrott.*
Solicitors for the Respondent: *Messrs. Rooke and Sons.*

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21 A. 223 (P.C.) = 3 C.W.N. 201 = 26 I.A. 45 = 7 Sar. P.C.J. 472.

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PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

On appeal from the High Court for the North-Western Provinces.

MUHAMMAD SIDDIQ KHAN AND OTHERS *v.* MUHAMMAD NASIR ULLAH KHAN AND OTHERS.* [18th November and 10th December, 1898.]

Contract construed as to interest claimed on part of purchase-money left unpaid by arrangement—Tender.

By an agreement between vendor and vendee part of the purchase-money was retained by the latter, but not as a mere deposit by the vendor. The money was to be retained as security, that the property sold should be cleared of incumbrances and a good title made.

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The vendee was not liable for interest unless he should refuse, or omit, to pay the money so retained when the vendor should have shown readiness to clear off the incumbrances. Till then the vendee was not bound to pay or to tender to the vendor the money retained.

[F., 10 A.L.J. 480 (484) = 15 Ind. Cas. 854 (855).]

APPEAL from a decree (11th June, 1895,) of the High Court modifying a decree (30th June, 1893), of the Subordinate Judge of Meerut.

[224] This suit (16th June, 1892) was brought by Haji Begam, the original plaintiff, now represented by the appellants, against the first respondent, and others, for Rs. 29,935.

In this, with some additions, three sums mainly formed the claim :— one sum of Rs. 17,000, balance of the purchase-money due to the plaintiff as representing her deceased husband, who in his life had sold a share in a mauza, on the 16th September, 1887, to the first defendant and his wife for Rs. 20.000, this purchase-money remaining with the vendees. Another of the sums claimed amounted to Rs. 9,718 for interest on the unpaid purchase-money from the above date to 15th June, 1892. A third sum was claimed as damages. The vendees, by the contract, were allowed to retain Rs. 17,000 for payment over to an incumbrancer, to whom it was due, Lala Srikishen Das; and also to retain Rs. 3,000 for payment to another. The latter of these sums was paid accordingly; but Srikishen was obliged to sue for the money due to him. The damages mentioned above were in respect of his costs of suit.

The defendants paid into Court, on the 25th January, 1893, Rs. 14,400, as being all that was due from them. The question on this appeal related to the interest which was claimed on the money so left in the hands of the vendees.

The Subordinate Judge decreed in favour of the plaintiffs Rs. 14,120. This was for the sum of Rs. 17,000 left as above stated, with interest thereon, but allowing for the money paid into Court, and not awarding anything in respect of costs incurred in Srikishen's suit.

Against this decree both parties appealed.

The High Court (EDGE C. J., and BANERJI, J.) modified the decree awarding, against the purchasers, Rs. 3,000 only, with interest from the date of the decree below till payment. Their reasons were thus expressed :—

"Under that sale deed it was the duty of the vendor to give a clear "title to the vendees, they on their part paying Rs. 17,000 and Rs. 3,000, "which together made up the purchase-money. [225] The evidence "given on behalf of the defendants is entirely consistent with what we "would understand from the sale deed itself to have been the terms when "once we were informed that there were outstanding liabilites on the "property. We find that it was agreed that the vendors should pay "Srikishen Das and Indarman. We find that the vendees offered to pay "to Srikishen Das before suit by him the Rs. 17,000 and that Srikishen "Das would not receive it. Under these circumstances, what is the decree "to which these plaintiffs are entitled? They are clearly entitled to a "decree for the balance of Rs. 17,000, *viz.*, Rs. 3,000, Rs. 14,000 having "been received by them. When the vendees offered to pay the Rs. 17,000 "to the vendor, he did not decline the offer on the ground that the money "was not produced at the moment the offer was made, but he declined the "offer, except on the condition that interest should be paid. Consequently, "the offer in this case amounted to a valid tender, and that would disen-"title the plaintiffs to any interest prior to decree."

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On this appeal—
Mr. *J. D. Mayne* appeared, for the appellants.
Mr. *Herbert Cowell*, for the respondents, was not heard.
Afterwards on the 10th December their Lordships' judgment was delivered by SIR R. COUCH :—

JUDGMENT.

By a deed dated the 10th September 1887, Muhammad Ghulam Kadir Khan sold a share of mauza Alipur Gajauri to Nasir-ul-lah Khan and Mussammat Ulfat, his wife, in consideration of Rs. 20,000, which sum was in the deed stated to be for paying the debts due to Lala Srikishen Das and Indarman, Bhora, and the money was said in the deed to be "left with the vendees" for paying to the former Rs.17,000 and to the latter Rs.3,000. The latter sum was paid to Indarman and the question in this appeal relates to the Rs. 17,000. The suit was brought by Haji Begam, the widow of Ghulam Kadir Khan, against Nasir-ul-lah Khan and his wife, and in the course of it the appellants and respondents were on their decease substituted **[226]** for them as plaintiffs and defendants. The plaint alleged, as was the fact, that the Rs. 17,000 were not paid to Srikishen Das, and prayed for a decree for that sum and Rs. 9,718-6-9 interest from 10th September 1887 to 15th June 1892, the day of filing the plaint, and also for the costs of a suit by Srikishen Das against Ghulam Kadir Khan. The facts were that at the time of the sale Rs. 22,000 were due to Srikishen Das and there was also a mortgage to Harjit Singh and others upon which Rs. 15,000 were due. The evidence showed that the balance due to Srikishen Das and the money due on the mortgage to Indarman were agreed to be paid by Ghulam Kadir Khan and the property sold released from mortgages. Ghulam Kadir Khan failed to provide the money for this purpose, and Srikishen Das brought a suit against him and obtained a decree for what was due to him with interest and costs and the amount decreed was realised by Srikishen Das on the 18th March 1892. The second and third of the issues in the suit were whether the defendants should be charged with interest on the Rs. 17,000, and the costs of that suit. The Subordinate Judge who tried the suit allowed the interest but not the costs, and gave a decree for the balance of the claim after deducting Rs. 14,000, which he said had been paid on the 25th January 1893. It did not appear how this was paid. Both parties appealed to the High Court, which decided that the plaintiffs were not entitled to either the interest or costs, and modified the decree of the lower Court by giving to the plaintiffs Rs. 3,000, the balance of the Rs. 17,000 with interest from the 30th June 1893, the date of that decree. The plaintiffs have appealed against this decree.

Their Lordships are of opinion that there is no ground for the appeal. The Rs. 17,000 were not left with the vendees simply as a deposit of the money of the vendor. They were to retain it as a security that the property sold should be freed from the incumbrances upon it and that they should have a good title They were entitled to retain it until the vendor provided the rest of the money necessary for this purpose. Unless this **[227]** was done, a payment of the Rs. 17,000 would leave the property still incumbered, as Srikishen would only receive it, if he did so, in part payment of what was due. From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy

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what was due to Srikishen. Without that balance they were not bound to pay or tender to him the Rs. 17,000. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs.

Appeal dismissed.

21 A. 223 (P.C.)=3 C.W.N. 201= 26 I.A. 45= 7 Sar. P.C.J. 472.

Solicitors for the Appellants: *Messrs. Barrow and Rogers.*

Solicitors for the Respondents: *Messrs. Ranken Ford, Ford, and Chester.*

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21 A. 227=19 A.W.N. (1899) 45.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

SHEORAJ SINGH (*Judgment-debtor*) *v.* GAURI SAHAI AND OTHERS (*Decree-holders*).* [7th February, 1899.]

Civil Procedure Code, ss.344 et seqq—Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.

Held that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haro Pria Dabia* v. *Shama Charan Sen* (1) and *Shridhar Narayan* v. *Atmaram Govind* (2), referred to.

[Appr., 30 C. 407 (410).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the appellant.

[228] Munshi *Ram Prasad* and Munshi *Gokul Prasad*, for the respondents.

JUDGMENT.

KNOX and BANERJI, JJ.—Raja Sheoraj Singh, the appellant before us, is a judgment-debtor of the respondents. The respondents hold a decree against him, dated the 5th March 1885, for sale under a mortgage deed. Before the decree had been passed Raja Sheoraj Singh had applied, under the provisions of Chapter XX of the Code of Civil Procedure, to be declared an insolvent. With his application he filed a list of his creditors. The list was subsequently amended by him, and in the amended list under the head No. 8 Har Sahai, father of the respondent, was entered as a creditor holding a decree dated the 5th March 1885, arising out of a mortgage bond in favour of Har Sahai, which bore date the 5th March 1879.† The judgment-debtor was eventually declared an insolvent by the order of this Court dated the 16th July 1886. Upon this the creditors mentioned in the application were called upon to produce evidence as to the amount and particulars of their respective pecuniary claims, and the record prepared at the time shows that Har Sahai did not put in an appearance. The entry says that he was said to be dead.

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* First Appeal No. 278 of 1897, from a decree of Pandit Raj Nath Saheb, Subordinate Judge of Moradabad, dated the 20th September 1897.

† [In 19 A.W.N. (1899) 45, for 5th March 1879 we have 15th March 1879, *Ed.*]

(1) 16 C. 592. (2) 7 B. 455.

The amount proved was declared to be *nil*. A receiver was appointed in due course, who made collections, paid the scheduled creditors in full, and found himself with a balance in hand of Rs. 8,324-7-11. After all this had taken place the present respondents made an application to the Collector, to whom the decree had been transferred for execution by reason of the property concerned being ancestral property, for attachment, and in due course of time we find that the District Judge paid over the balance to the respondents. They took it, and afterwards asked that the property now in dispute might be brought to sale for the recovery of the balance due from the appellant to the respondents. The property in question is the same property which had been mortgaged in the bond of 1879, and which the receiver had handed over for restoration to the judgment-debtor. Upon the application for sale the appellant raised several objections. Among them was the objection now before **[229]** us; but, with the exception of a question bearing on the question of interest, the application for execution was allowed to proceed and the property declared liable for sale. From this order arises the present appeal. It is contended before us that as the decree-holders had, under s. 356 of the Code of Civil Procedure, received their distributive share of the assets of the appellant in the hands of the receiver they cannot now execute the decree for the balance of the decretal amount; further, that by virtue of the proceedings taken under ss. 351, 356 and 357, the decree is incapable of execution. It was said that the moment the judgment-debtor was declared insolvent all creditors were bound to come and prove their debts; that the schedule prepared under s. 352 operated as a decree, and that any creditor who did not come in within the period of limitation allowed by art. 174 of the second schedule of the Indian Limitation Act and prove his debt, or, when the schedule was in error, did not get the schedule amended, lost any further rights or remedies in respect of his debt. In the present case the respondents had made no attempt either to prove their debt when the schedule was prepared, or to get the schedule amended after it had been prepared, and hence it was urged that they were not entitled to execute the decree they hold. We are unable to agree with this contention. We can find nothing in s. 353 or in any other part of Chapter XX of the Code which declares that where a creditor has not proved his claim or got an entry in the schedule amended he has debarred himself of all rights to execute a decree which he holds, especially when that decree is subsisting and is based upon a mortgage debt. S. 357, which lays down in the effect the consequence of the discharge of the judgment-debtor under the Code, refers only to scheduled debts. More than this, scheduled creditors are expressly declared to be still empowered to proceed against property other than that vested in the receiver under certain restrictions, whether that property was previously or subsequently acquired. In the case of *Haro Pria Dabia* v. *Shama Charan Sen* (1) it **[230]** has been pointed out "that where a person has got a right and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment that there can be no doubt about it." The principle of that case is on all fours with the case before us. Our view is supported by the case of *Shridhar Narayan* v. *Atmaram Govind* (2). We dismiss the appeal with costs.

Appeal dismissed.

(1) 16 C. 592.

(2) 7 B. 455.

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APPELLATE CIVIL.

21 A. 230=19 A.W.N. (1899) 38.

21 A. 230=19 A.W.N. (1899) 38.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SITA RAM (*Plaintiff*) *v.* NAUNI DULAIYA (*Defendant*).*
[9th February, 1899.]

Civil Procedure Code, ss. 25. 562—*Transfer—Procedure—Suit transferred to his own file by District Judge Appeal to High Court—Remand to District Judge—Judge not competent to transfer.*

By order of a District Judge under s. 25 of the Code of Civil Procedure a suit was transferred from the Court of the Subordinate Judge to his own Court. The District Judge decided the suit, and from his decree there was an appeal to the High Court. The High Court remanded the suit under s. 562 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held* that the District Judge had then no power to transfer the suit, but was bound to try it himself.

Semble that s. 25 of the Code of Civil Procedure has no application to a case remanded under s. 562 of the Code.

[**Diss**, 9 C.L.J. 572 (573)=4 Ind. Cas. 61=12 C.W.N. cxxxi; **Appr.**, 24 A. 304; **R.**, 36 C. 193 (202)=5 C.L.J. 611; 9 N.L.R. 40 (41)=19 Ind. Cas. 552.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the appellant.

Munshi *Gulzari Lal* (for whom Babu *Satish Chandar Banerji*), for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—The suit in which this second appeal has been instituted was transferred under the provisions [231] of s. 25 of the Code of Civil Procedure by the District Judge of Jhansi from the Court of the Subordinate Judge for trial before himself. After trial the District Judge came to the conclusion that the plaint disclosed no cause of action, and he therefore dismissed the suit. On appeal to the High Court the decision of the Judge was reversed. It was held that the plaint did disclose a cause of action, and the case was remanded to the District Judge under s. 562 of the Code of Civil Procedure to be heard on the merits.

The District Judge, however, instead of trying the case himself on the remand, thought fit, for some reason unknown to us, to disregard the orders of this Court, and sent the case for trial to the Subordinate Judge. Subsequently the District Judge heard the case on appeal from the decree of the Subordinate Judge and dismissed the suit.

On second appeal to this Court the first plea urged is that the District Judge had no power to refer the case for trial to the Subordinate Judge, and that all the proceedings in the Jhansi Courts after the remand order of this Court were without jurisdiction.

We think this plea is sound and must prevail. When a case is remanded under s. 562 of the Code, that section provides that the remand shall be to the Court against whose order the appeal was made—in this case the Court of the District Judge of Jhansi. It then is the duty of that Court to re-admit the suit under its original number in the register

* Second Appeal No. 830 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 3rd June 1896, reversing a decree of A. Rahman, Esq., Subordinate Judge of Jhansi, dated the 26th February 1896.

and to proceed to hear it on the merits. There is no power given to the Judge to transfer the case to another Court. His power of transfer under s. 25 had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge, so, even if s. 25 were applicable to a case remanded under s. 562, (we think it is not applicable) that section does not empower the District Judge to re-transfer the case to the subordinate Court from which it had been withdrawn.

The plain and unmistakeable duty of the Judge was to have obeyed the law by hearing the case himself as a Court of original [232] jurisdiction. He must now perform that duty, and it is much to be regretted that the illegal procedure adopted by the Judge has entailed heavy costs on the parties. We allow this appeal. We set aside as without jurisdiction all proceedings in the Jhansi Courts in this case subsequent to the remand order of this Court, and we direct the District Judge now to re-admit the suit under its original number and to proceed to determine it on the merits.

Costs will follow the event.

Appeal decreed and cause remanded.

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21 A. 230 = 19 A.W.N. (1899) 38.

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21 A. 232 = 19 A.W.N. (1899) 46.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAHESH PARTAP SINGH (*Defendant*) *v.* DIRGPAL SINGH (*Plaintiff*).*

[11th February, 1899.]

Hindu law—Impartible Raj—Allowance to younger sons - Matters which may be considered in assessing such allowance.

Held that in calculating what allowance might properly be made to the younger brother of the holder of an impartible raj, regard might properly be had, not merely to the extent of the property constituting the raj, but to the other sources of income, whencesoever derived, possessed by the incumbent of the raj.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the appellant.

Pandit *Moti Lal* and Babu *Jiwan Chandar Mukerji*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The appellant, who was the defendant in the Court below, is the Raja of the Anowla raj, in the Gorakhpur district, admitted to be an impartible raj. The plaintiff is one of his younger brothers. The suit, out of which this appeal has arisen, was brought by the plaintiff, and he prayed that property yielding an annual income of twelve hundred rupees be determined to be property out of which he should obtain his [233] maintenance as a junior member of the family, and he be put in possession of such property, or in the alternative a maintenance allowance of twelve hundred rupees a year should be fixed and charged on the property mentioned in the plaint. The plaint contained other prayers also, with which we are not concerned in this appeal. The defendant denied the plaintiff's right to maintenance and disputed the propriety of the amount claimed as the proper amount of plaintiff's maintenance. The Court below has made a decree in the plaintiff's favour, declaring him

* First Appeal No. 102 of 1897, from a decree of Maulvi Syed Jafar Husain, Subordinate Judge of Gorakhpur, dated the 26th March 1897.

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19 A.W.N. 1899) 46.

entitled to an annual allowance of six hundred rupees, to be paid out of the raj.

Both parties have appealed, but the only question to which the appeals were confined in the argument before us is that of the amount of the allowance fixed, the defendant contending that it is too high and the plaintiff urging that it is too low. We have to be satisfied that the amount fixed by the Court below is unreasonable with reference to the circumstances of the case. As we have said above, it is no longer disputed that the plaintiff is entitled to an allowance for maintenance. In our opinion the amount of maintenance in a case like this should be determined upon the same principles upon which the amount which ought to be awarded as maintenance has ordinarily to be determined, and every case must be decided with reference to its own peculiar facts. In this case it appears that the raj has an income of over nine thousand rupees from villages. There is also an income from malikana, which is appurtenant to the raj, so that the profits from the raj itself amount to over twelve-thousand rupees per annum. Besides, there is an income of over nine thousand rupees derived from money-lending carried on in the names of the Raja and his wife. It was within the power of the defendant to show that this income was derived from sources unconnected with the raj, but he made no effort to prove that the capital invested in money-lending was not a part of the property which came to him from his father. Having regard to the amount of profits yielded by the immoveable property belonging to the raj and the number of years the defendant has been in possession it is **[234]** very probable, as alleged by the plaintiff, that the said capital was inherited by the defendant from his father. It appears no doubt that the plaintiff has some income of his own derived from shares in some villages and other property standing in his name. The defendant urges that the villages in which shares are recorded in the name of the plaintiff were acquired by the father of the parties and form a part of the raj. This has not been proved. The villages were acquired in the name of the plaintiff and stood recorded for several years in his name. It is, however, immaterial to decide whether the property in the possession of the plaintiff is a part of the raj or not, because we are of opinion that in fixing an allowance for the plaintiff we should take into account the sources of income, however derived, which the plaintiff now enjoys. We think that the principle upon which maintenance is allowed to a Hindu widow should be applied in determining the amount of maintenance to be awarded to the plaintiff. Having regard to the income of the raj and also to the fact that the plaintiff has some other sources of income, the amount fixed by the Court below, namely, fifty rupees per mensem, does not appear to us to be unreasonable. In coming to this decision we have to bear in mind the claims of other members of the family and the expenditure which the defendant has to incur in maintaining his position as a Raja. While therefore, on the one hand, the allowance to be fixed for the junior members is not to be such as to cripple the raj, it must, on the other hand, be proportionate to the fair wants of a person in the position and rank in life of the plaintiff. We think the allowance fixed by the lower Court is reasonable and answers all requirements. We dismiss the appeal with costs [which will include one hundred and eighty five rupees as fees for the respondent's Counsel] *

Appeal dismissed.

* [The words in rectangular brackets form a portion of the judgment. They are not to be found in I. L. R. ED.]

21 A. 235 (F.B.) = 19 A.W.N. (1899) 41.

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21 A. 235 (F.B.) = 19 A.W.N. (1899) 41.

[235] FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

MADAN LAL (*Defendant*) *v.* BHAGWAN DAS. (*Plaintiff*).* [16th February, 1899.]

Mortgage—Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Suit for ejectment by one auction purchaser against the other—Form of decree.

B mortgaged a house, first to *D* and subsequently to *M* and *C*. *M* and *C* brought a suit on their mortgage without making *D* a party to it, obtained a decree, and put the house up to sale, and it was purchased by *ML*. Subsequently to the date of the decree in the above suit, *D* brought a suit on his mortgage, without making *M* and *C* parties thereto, obtained a decree and put the house up to sale, and it was purchased by *BD*. *BD* then sued *ML* for ejectment and damages. *Held* that the plaintiff's suit must be dismissed, and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant redeem the mortgage upon which the plaintiff's title was ultimately based. *Hargu Lal Singh* v. *Govind Rai* (1) followed and explained.

[Appr.. 11 C.W.N. 314 (316) ; R., 26 A. 464 = A.W.N. (1904) 108 ; 29 A. 339 (P.C.) = 4 A.L.J. 329 = 9 Bom. L.R. 656 = 5 C.L.J. 563 = 11 C.W.N. 561 = 17 M.L.J. 263 = 34 I.A. 102 ; 5 C.L.J. 527 ; 21 M.L.J. 213 (230) = 9 M.L.T. 431 (499) = 1 M.W.N. (1911) 165 (175) = 9 Ind. Cas. 513 (520) ; 7 O.C. 243.]

THE facts of the case, as stated in the judgment of the lower appellate Court, were as follows :—

"Baijnath, the owner of a house in Allahabad, mortgaged it first to Dina Nath, a minor, on 26th June 1891, for Rs. 200.

"On 2nd February 1892, he made a second mortgage of the same house for Rs. 150 to Maina Bibi and Mul Chand.

"Dina Nath's mortgage was repayable in 10 years, with interest at 12 per cent. There was a covenant in the deed that so long as the mortgage was not satisfied, the house will not be sold, gifted or mortgaged, and there was a further provision—'if, God forbid, the mortgagee entertained, within the period fixed for payment, in any way, a doubt, whether, weak or strong, with regard to the realisation of his money, he was at liberty to realise at once his money, principal and interest, by the cancelment of **[236]** the term fixed for repayment : I, my heirs, my representatives have no objection to it.'

"Both the mortgages were registered. Maina Bibi and Mul Chand, the second mortgagees, instituted, on 11th May 1894, a suit on their mortgage, without making the first mortgagee a party to it, and obtained a decree on 25th June 1894. The house was sold in execution of that decree on 21st December 1894, and purchased by Madan Lal, defendant, for Rs. 72.

"On 28th September 1894, Dina Nath instituted a suit on his mortgage, and obtained a decree on 8th November 1894. Maina Bibi and

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* Second Appeal No. 644 of 1896, from a decree of Babu Brij Pal Das, Subordinate Judge of Allahabad, dated the 9th June 1896, reversing a decree of Mr. H. David, Munsif of Allahabad, dated the 17th February 1896.

(1) 19 A. 541.

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Mul Chand, the second mortgagees, who had obtained the decree on 25th June 1894, on their mortgage, were not made parties to this suit.

"The house was sold on 25th June 1895, in execution of Dina Nath's decree and purchased by the plaintiff for Rs. 265.

"Plaintiff, attempting to take possession of the house, was resisted by the defendant; therefore plaintiff brought this suit for possession and for Rs. 11-4-0 compensation."

The Court of first instance dismissed the claim. On appeal the lower appellate Court reversed the decree of the first Court and decreed the plaintiff's claim, but subject to the condition that if the principal and interest of Dina Nath's mortgage, from the date of the deed to the date of payment, less Rs. 60 received in lieu of interest, should be paid by the defendant within four months from the date of the decree, the plaintiff's suit would stand dismissed.

The defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandar Mukerji*, for the appellant.

Pandit *Sundar Lal* and Babu *Datti Lal*, for the respondent.

JUDGMENT.

STRACHEY, C. J.—We do not think that we ought to allow the questions decided by the Full Bench of this Court in *Hargu Lal Singh* v. *Gobind Rai* (1), so recently as July 1897, to be now reopened. The only question therefore upon which we have heard [237] the learned pleaders on both sides is whether the present case is distinguishable from that decided by the Full Bench. The conclusion at which we have arrived is that there is no material distinction in principle between the two cases. Certain differences have been suggested in reference to the title set up by the defendant here; but these cannot make the cases distinguishable, for the decision of the Full Bench was necessarily irrespective of any view of the defendant's title, and based exclusively upon the failure of the plaintiff to prove a title to present possession at the date of his ejectment suit. Here, as there, the only title of the plaintiff was derived from a simple mortgage which did not entitle the mortgagee to possession as against any one, and a purchase under a decree for sale in a suit to which this defendant was not a party. Here, as there, the suit was an ordinary suit for ejectment, the plaintiff claiming to recover possession from the defendant absolutely and not subject to any condition. Here, as there, one of the Courts below—there the Court of first instance, here, the lower appellate Court—gave the plaintiff a decree for possession with a conditional right to the defendant to redeem. Before us the learned advocate for the plaintiff respondent has admitted that his client is not entitled to an absolute decree for possession. He has, however, argued that the case is distinguishable from *Hargu Lal Singh* v. *Gobind Rai*, on the ground that here it is the lower appellate Court which has given his client a decree for possession with a conditional right to the defendant to redeem, and that there is nothing in the Full Bench decision which necessarily implies that such a decree is wrong or requires this Court in second appeal to set it aside. From the paper-book in the Full Bench case it appears that there the plaintiff, in his memorandum of appeal in this Court against the lower appellate Court's decree, absolutely dismissing the suit, pleaded that he was entitled, if not to an absolute, at least to a

(1) 19 A. 541.

qualified, decree for possession, such as the first Court had given him. The Full Bench nevertheless dismissed the appeal, and did not give the plaintiff the qualified decree for possession [238] which he asked for. It is suggested that that particular plea in the memorandum of appeal may not have been pressed before the Full Bench, as the judgment does not refer to it. However this may be, it appears to us that the Full Bench did distinctly indicate their opinion that, in a suit for ejectment, such as the present, a decree for possession, with a conditional right to the defendant, should not be passed. They say that the plaintiff's suit "was properly dismissed, though on other grounds;" in other words, that the lower appellate Court acted properly in setting aside the qualified decree for possession passed by the first Court, and in substituting for it a decree absolutely dismissing the suit, though it gave wrong reasons for doing so. It is impossible to suppose that they would have said that and proceeded to confirm the lower appellate Court's dismissal of the suit if they had thought that a qualified decree for possession, such as the first Court had passed, was right in such a suit. We cannot see any substantial distinction between this case and that. We must follow the decision in *Hargu Lal Singh* v. *Gobind Rai*, and the result is that we allow this appeal, set aside the decree of the lower appellate Court, and restore that of the first Court, dismissing the suit with costs in all Courts. KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ. concurred.

Appeal decreed.

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21 A. 238 = 19 A.W.N. (1899) 42.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KISHAN LAL (*Plaintiff*) *v.* GARURUDDHWAJA PRASAD SINGH AND OTHERS (*Defendants*).* [18th February, 1899.]

Hindu law—Pious duty of son to pay his father's debts - Civil Procedure Code, s. 317—Execution of decree—Sale in execution—Benami purchase—Suit by creditor on the ground that the certified purchaser is not the real purchaser.

Held that the provisions of s. 317 of the Code of Civil Procedure are subject to no limitation other than such as is contained in the section itself, [239] namely, that the suit the maintenance of which is prohibited by that section should be (1) brought against a certified purchaser and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. The question of who the plaintiff may be is not material.

The judgment of Knox, J., in *The Delhi and London Bank* v. *Chaudhri Partab Bhaskar* (1) approved; *Rama Kurup* v. *Sri Devi* (2) followed; *The Uncovenanted Service Bank* v. *Abdul Bari* (3) distinguished; *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall* (4) and *Williamson* v. *Norris* (5) referred to.

[R., 26 A. 82 = A.W.N. (1903) 199; 30 A. 156 = 5 A.L.J. 175 = A.W.N. (1908) 61; 31 A. 176 = 6 A.L.J. 263 = 1 Ind. Cas. 479; 17 C.L.J. 38 (47) = 17 C.W.N. 280 (288) = 18 Ind. Cas. 625 (630); 8 O.C. 306 (311); 53 P.R. 1901 = 62 P.L.R. 1901].

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gobind Prasad* and Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *D. N. Banerji*, for the respondent, Hub Lal.

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* First Apppeal No. 93 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 23rd December 1896.

(1) 21 A. 29. (2) 16 M. 290. (3) 18 A. 461.
(4) (1872) 14 M.I.A. 496. (5) (1898) 68 L.J. Q.B. 34.

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21 A. 238 = 19 A.W.N. (1899) 42.

JUDGMENT.

The judgment of the Court was delivered by BURKITT, J.—This is an appeal by the plaintiff from a decree of the Subordinate Judge of Aligarh, partly dismissing the plaintiff's suit. The suit was one for sale on a mortgage of certain property executed by the defendant Garuruddhwaja Prasad Singh on February 28th, 1893. Among the mortgaged properties, in addition to landed property, was one-half of a fort or kila at Baswan, which had belonged to the mortgagor. This fort had, previous to suit, been sold in execution of a money decree held by one Madhri Saran, and had been purchased by the defendant, Hub Lal. The Subordinate Judge has given the plaintiff a decree against the mortgagor, but dismissed the suit as against the mortgagor's minor son, Matmatangadhwaja Prasad Singh, and as against Hub Lal. The result of this decree is that in execution the plaintiff can proceed only against the father's (the mortgagor's) interest (presumably one-half) in the mortgaged property, other than the fort, and that the latter cannot be touched at all.

The plaintiff now appeals, contending that he is entitled to a decree for sale of the whole property mortgaged to him without any exception. There are thus two matters to be considered in this appeal. The first is concerned with the dismissal of the [240] suit against the respondent, Matmatanga Prasad, the minor son of the mortgagor. We regret that this respondent has not been represented by counsel at the hearing of the appeal. The grounds on which the lower Court dismissed the suit against him are "that Garuruddhwaja is an extremely immoral and extravagant man, and that he has wasted property worth lakhs of rupees in a very short time. Therefore the sons and grandsons of such a man should not be held liable for any debt incurred by him." Further, the Subordinate Judge says that" whatever portion of the debt passed into Garuruddhwaja's hand was, like other debts, spent by him for his own private purposes."

These reasons are not, in our opinion, sufficient to exonerate the son from the pious duty of paying his father's debt. Had it been proved that the debt had been contracted for immoral purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed, the son would not have been liable. There is, however, not a scrap of evidence to show that the debt which formed the consideration for the bond in suit was contracted for any such purpose. Indeed the details in the schedule show that such was not the case. A mere general allegation that the father led an extravagant, immoral, and licentious life would, even if proved, not be sufficient to relieve the son. It is now settled law in this Court since the case of *Badri Prasad* v. *Modan Lal* (1), that a son can be sued jointly with his father to recover a debt contracted by the father if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt. We are therefore constrained to allow this appeal as far as the respondent Matmatangadhwaja Prasad Singh is concerned, and to give a decree against him in favour of tne appellant.

We have next to deal with the second portion of this appeal, namely, the case of the respondent, Hub Lal, the purchaser of the mortgagor's interest in the fort at Baswan. That interest was purchased by Hub Lal for Rs. 2,901 on May 10th, 1894, in execution [241] of a decree held by one Madhri Saran, and was under attachment by the Court in execution of the latter decree when it was mortgaged to the plaintiff-appellant in

(1) 15 A. 75.

February, 1893. That mortgage, therefore was void to the extent provided for by s. 276 of the Cods of Civil Procedure. The contention for the appellant is that at the auction sale the real beneficial purchaser was not the respondent, Hub Lal, who is the certified purchaser, and that the latter purchased benami for the judgment-debtor Garuruddhwaja Prasad Singh, appellant's mortgagor. It was thereupon contended for the appellant that his mortgagor is the real beneficial owner of the fort, and that the latter was liable to be taken in execution to satisfy any decree which appellant might obtain on his mortgage. It is to be noticed that the plaint does not contain any prayer asking for a declaration that the mortgagor, Garuruddhwaja Prasad, was the bedeficial owner, and Hub Lal a fictitious purchaser. But the plaint contained a prayer which is certainly peculiar, bearing in mind the fact that this Court had refused to set aside the sale to Hub Lal. It asked that if the sale to him were found not to be fictitious, the Court should direct him to receive back the purchase-money he had paid, and that on that being done the Court should direct the sale of the fort with the rest of the mortgaged property. This rather extraordinary request does not seem to have been pressed in the Court below, and is not repeated in the memorandum of appeal. The memorandum of appeal, however, contends that it has been established that Hub Lal had purchased benami for Garuruddhwaja Prasad, but like the plaint, it abstains from asking that a declaration to that effect should be made. The appeal, as regards Hub Lal, was, however, fought before us by counsel on both sides as if the object of the suit, as far as the appellant was concerned, was to obtain a declaration that the plaintiff's mortgagor, Garuruddhwaja Prasad was the beneficial purchaser and an order thereupon that the fort should be sold in satisfaction of the mortgage of February, 1893. Such a construction can certainly be put on the plaint, as otherwise the allegation of the benami purchase would be superfluous.

[242] It being then admitted for the appellant that his suit, as far as Hub Lal, the certified purchaser is concerned, is a suit against Hub Lal, instituted on the ground that his purchase was made on behalf of the appellant's debtor Garuruddhwaja Prasad, the question arises whether such a suit can be maintained, or whether it is forbidden by s. 317 of the Code of Civil Procedure. The words of that section are:—"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person." The opening words "no suit shall be maintained" mean, we have no doubt, "no suit shall be instituted, and if such a suit be instituted it shall fail." That is the only meaning we can attach to the word "maintained." We have heard very able and learned arguments from counsel on either side as to the construction to be put on this s. 317. For the respondent it was contended that the section means what it says, neither more or less, and that it forbids the institution of any suit by any plaintiff against the certified purchaser if the object of the suit is to have it declared that the purchase was made on behalf of any person other than the certified purchaser. For the appellant, on the other hand, it was argued that we should not put on the section its literal and grammatical meaning, that we should import into it an exception which finds no place in it, and that the section should be construed so as to permit of a suit by a creditor of the alleged beneficial purchaser, by adding after "any other person" the words "except it be a suit by a creditor of such other person."

We fail to see why we should put such a restrictive interpretation on the very wide language of the section, and why we should say that the words

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"no suit" do not really mean "no suit" in their plain grammatical sense, and do mean "no suit excepting a suit by a creditor." Had the Legislature intended that a certain class of suits should be excepted from the sweeping prohibition laid down in s. 317 it would, we think, certainly have altered the wording accordingly and would [243] not have left it to the ingenuity of Judges to discover that it really did not mean what it purported to say in the plainest language.

The object of the section was no doubt to prevent judgment-debtors from purchasing their own property at auction in the name of another, and for that purpose the section provided that no suit shall lie against the certified purchaser on the ground that the purchase was benami. The section does not designate any particular person or class of persons as being the person who shall not sue. It confines itself to indicating the person who shall not be impleaded as defendant in a suit institnted on the specific ground mentioned. In that way it prevents judgment-debtors who have purchased in the names of other persons from suing the certified purchasers for possession; that is to say, it permits the benami certified purchaser to reap the benefit of his fraud by barring the real purchaser from suing him, and if it also prevents the creditors of such judgment-debtors from suing the certified purchaser, it may well be that the evil is not unequally balanced. The cases are by no means few in which the benami certified purchaser defies all attempts by the real purchaser to get possession and holds on to the property. According to the construction for which appellant contends, such a certified purchaser could be sued by the creditors of the judgment-debtor, though not by the judgment-debtor, the beneficial purchaser. It appears to us that if one infringement of the hard-and-fast rule laid down by s. 317 be allowed in the case of a creditor of judgment-debtor it will be impossible to prevent others. Why should not the same privilege be allowed to a person who had purchased from the judgment-debtor the property fraudulently withheld benami by the certified purchaser? Similarly, why should not a mortgagee holding a mortgage executed by the alleged beneficiary after the alleged fictitious sale, be allowed to sue such certified purchaser for sale on his mortgage? Other cases might be put, such as cases of gift, devise by will, and the like. It seems to us that if the creditor of a judgment-debtor be not debarred [244] by s. 317 from suing the certified purchaser on the ground mentioned in that section, it will be impossible to exclude many other classes of plaintiffs from the same privilege. It is objected that the classes of persons mentioned above derived title from the judgment-debtor. But surely so does the appellant in the present case. How does his title differ from that held by a vendee or mortgagee to whom the alleged beneficiary had sold or mortgaged the property after the alleged fictitious sale? *Ex hypothesi* the property really belongs to the judgment-debtor to deal with as he pleases. If then the benami certified purchaser set him at defiance, we fail to see how, on the construction of s. 317 for which the appellant contends, a suit by such a vendee or mortgagee could be held to be barred by that section, or even a suit by the holder of a simple money decree for money borrowed subsequent to the date of the alleged fictitious sale, and in this way the alleged real purchaser would be allowed to maintain that suit indirectly through a friendly party which the law forbids him to maintain directly. We cannot see that the fact that these new obligations came into existence subsequently to the alleged fictitious sale has any bearing on the question. On the above considerations we are of opinion that if we accept appellant's

contention we must read the opening words of s. 317 as if they ran "no suit by a judgment-debtor shall be maintained" and must hold that with one exception any person may institute a suit against a certified purchaser "on the ground that the purchase was made on behalf of any other person." We are not prepared to adopt that conclusion. If the construction we put on this section is one which in some cases enables fraudulent judgment-debtors to defraud their creditors the remedy is, we think, to be sought for in legislation, and not by putting a constrained meaning on words which are plain and unmistakeable.

The question of the construction to put on s. 317 of Code of Civil Procedure has recently been most exhaustively considered by our brother Knox in the case of *The Delhi and London Bank* **[245]** v. *Chaudhri Partab Bhaskar* (1). The decision at which that learned Judge arrived was that he was "unprepared to import extrinsic matter which will limit or qualify the same words beyond those which are to be found in the section itself, and which limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser." He also examined the long array of decisions which at first sight appear to support the construction of s. 317 for which the appellant here contends, and showed conclusively that nearly all of them were suits in which the ostensible auction-purchaser, the certified purchaser, was the plaintiff, and not suits against such a purchaser. There can be no doubt now that the maintenance of the former class of suits is not forbidden by s. 317, for, to use the words of their Lordships of the Privy Council in the case of *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall* (2) (on the section corresponding to s. 317 of the present Code)—"there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit against a certified purchaser and to a specific direction as to what should be done with it, etc." In suits in which the certified purchaser is the plaintiff the question which has been discussed in this appeal could not arise, and any decision on it would be *obiter* and not binding on us. The case of the *Uncovenanted Service Bank* v. *Abdul Bari* (3), to which our brother Knox did not refer, was a suit in which the certified purchaser was plaintiff, and in which he asked for a declaration that his purchase was not benami. Such a suit clearly is not within the prohibition contained in s. 317.

On the whole, we have come to the conclusion, for the reasons given above, that this suit, so far as it concerns the respondent Hub Lal, being a suit against the certified purchaser on the ground that the purchase was made on behalf of the respondent, **[246]** Garuruddhwaja Prasad Singh, cannot be manitained. We fully concur in the opinion expressed by our brother Knox in the case cited above, and we are supported in our conclusion by the High Court of Madras in the case of *Rama Kurup* v. *Sri Devi* (4), in which the Chief Justice and Mr. Justice Handly, dissenting from one of the Calcutta decisions cited by our brother Knox in the case mentioned above, say that that decision "seems to us to contravene the clear meaning of the section (317). It is not, in our opinion, a sufficient reason for not carrying out the express terms of the section, that to do so would be to allow a fraud to be perpetrated. The person in whose name a purchase has been made for the benefit of, and with the money of another, of course

(1) 21 A. 29 (40 *et seqq.*)
(2) 14 M.I.A. 496.
(3) 18 A. 461.
(4) 16 M. 290.

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commits a fraud in claiming that property as his own. Nevertheless the law says that a suit shall not be maintained against him on the ground that the purchase was benami, and thus provides that this fraud shall prevail. The object of the section was, we consider, to put a stop to benami purchases at execution sales, and this object can only be carried out by enforcing it in all cases without regard to consequences." The above observations have our fullest concurrence, and to them we would add the following from a judgment of Mr. Justice Wills in *Williamson* v. *Norris* (1):—"To argue that, because an enactment may have an effect which was not thought of when it was passed, it cannot have the plain and obvious meaning of the words used is a fallacy, though a common one."

The appeal therefore, as far as Hub Lal is concerned, fails and must be dismissed. It is therefore unnecessary for us to discuss the question of fact as to whether Hub Lal's purchase was or was not benami. We will only remark that the evidence of Hub Lal himself, whom the plaintiff-appellant called as his witness, seems to settle the question.

We allow this appeal with costs as against the respondent Matmatanga Prasad, and we dismiss the appeal with costs as against the respondent, Hub Lal.

Decree modified.

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21 A. 247=19 A.W.N. (1899) 47.

[247] CIVIL APPELLATE JURISDICTION.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

DEOCHARAN SINGH AND OTHERS (*Plaintiffs*) *v.* BENI PATHAK AND OTHERS (*Defendants*).* [20th February, 1899.]

Landholder and tenant—Act No. XII of 1881 (*N.W.P. Rent Act*), *s.* 189—*Appeal—"Rent payable by the tenant" not in issue.*

Certain defendants being sued by the zamindars for the rent of land held by them, pleaded in effect that, whatever the rent the land in suit might be, they were entitled to retain it under an agreement between them and the predecessor in title of the plaintiffs in lieu of interest payable to them on account of a mortgage given by the said predecessor in title.

Held that the case was not one in which an appeal would lie to the District Judge under s. 189 of the N.W.P. Rent Act, inasmuch as the rent payable by the tenant was not in issue in the suit.

[R., 23 A. 283=21 A.W.N. (1901) 75.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Gobind Prasad*, for the appellants.

Mr. *Amiruddin*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by STRACHEY, C.J.—The question in this appeal is whether Mr. Justice Dillon was right in holding that the plaintiffs had no right of appeal under s. 189 of the N.-W. P. Rent Act, XII of 1881, from the decision of the Collector dismissing their suit on appeal from the Assistant Collector of the second class. Its solution depends on the exact nature of the matter in issue and decided in

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* Appeal No. 23 of 1898 under s. 10 of the Letters Patent.

(1) 68 L.J. Q.B. 34.

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the suit, and this is not altogether easy to determine. The suit was in terms one for arrears of rent for three years, under s. 93 (*a*) of the Rent Act. The written statement of the defendants is not very clearly expressed. Its principal plea is thus stated:—"The rent of the land, in respect of which rent is claimed, has all along been enjoyed by the defendants' ancestor and subsequently by the defendants in lieu of interest under a mortgage deed of 23rd December 1886, executed by the former zamindar from the time of the execution of the said deed of mortgage. No zamindars of the mahal ever received or realized **[248]** rent in respect of the said land. Hence, unless all the co-sharers in the mahal re-pay the mortgage debt and get the mortgage redeemed, no zamindar of the mahal can be competent to sue for arrears of rent." In another paragraph of the written statement the defendant pleaded that in two of the years to which the suit related "the mahal was joint. The plaintiffs alone are not competent to sue. There were also other sharers." The best construction which we are able to place upon the written statement is that the defendants, while not denying that the land in suit was held under the plaintiffs and their co-sharers as zamindars, pleaded that under a mortgage executed in favour of their ancestor by the plaintiffs' predecessor in title, they were entitled, until redemption of the mortgage, to apply, in satisfaction of the interest due, the money which they would otherwise have had to pay to the zamindars as rent. Although they stated that no zamindars of the mahal ever received or realized rent in respect of the land, they did not plead that the relation of landholder and tenant did not exist, or that, as no rent had been either fixed by agreement or determined by a Court, the suit under s. 93 (*a*) was not maintainable. Their case was, in substance, that while it was true that rent was to be paid on account of the holding of the land, that rent was, by a special agreement, not to be paid to the landholder but to be appropriated by themselves in lieu of interest due to them, the tenants, from the landholder upon a mortgage debt, until the landholder should redeem the mortgage. The mortgage had not yet been redeemed, and hence for years the rent had not been paid to the landholder. They raised no issue as to the rent payable, but pleaded that, whatever it might be, they were entitled to apply it in the manner which had been agreed.

So much for the pleadings. The Assistant Collector of the second class who tried the suit framed three issues: first, "is the mahal a joint mahal and are the plaintiffs competent to sue?" second, "are the defendants the tenants and are they liable to pay rent?" third, "has the rent been paid or is it in arrears?" Upon the second issue the Assistant Collector **[249]** apparently regarded the mortgage set up by the defendants as not sufficiently proved, saying in his judgment "it does not appear to me to be worth consideration." Relying mainly upon the settlement papers, in which there was no mention of the mortgage and in which the land was entered in the name of the defendants' ancestor as a tenant at fixed rates, and as bearing a rent of Rs. 3-1-10, he held that the defendants' liability to pay rent at that rate was established, and decreed the suit. Against his decision the defendants appealed to the Collector of the District under s. 183 of the Rent Act. In their memorandum of appeal they again relied upon the mortgage, which they described as showing "that the rent of the land in suit, amounting to Rs. 115, has been mortgaged to the appellants in lieu of interest;" and again contended that "under the circumstances, unless a redemption of the mortgage is secured, no claim for arrears of rent can stand." That

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is how the case came before the Collector. His conclusion was thus stated: "I do not entertain any doubt that this mortgage really does exist, and that no agreement to pay rent, either at all, or at any particular rate, has so far been entered into between the parties." He accordingly allowed the appeal and dismissed the suit. His finding was in substance that the defendants held the land as mortgagees and not as tenants—a view which, whether right or wrong, was not that which the defendants themselves put forward in their pleadings. That is how the case stood when the plaintiffs appealed to the District Judge from the Collector's dismissal of their suit. The District Judge reversed the Collector's decision and decreed the suit on grounds which it is unnecessary to state. The question is, whether he was competent to entertain the appeal.

Under s. 183 of the Rent Act the order of the Collector was, *prima facie*, final. Notwithstanding that section, however, an appeal lay to the District Judge under s. 189, if the suit was one in which the amount or value of the subject-matter exceeded Rs. 100, or in which the rent payable by the tenant had been a matter in issue and had been determined, or in which **[250]** the proprietary title to land had been determined between parties making conflicting claims thereto. In the present case, the amount or value of the subject-matter was less than Rs. 100, and there was no question of conflicting claims to the proprietary title to land. Unless, therefore, it can be held that the rent payable by the tenant was a matter in issue and was determined, no appeal lay to the District Judge. The words in s. 189—"the rent payable by the tenant—were inserted in the Rent Act by s. 5 of Act XIV of 1886, and have been considered in several rulings of this Court. See *Radha Prasad Singh* v. *Pergash Rai* (1); *Radha Prasad Singh* v. *Mathura Chaube* (2); *Mohib Ali Khan* v. *Martin* (3); *Sarju Prasad* v. *Haidar Khan* (4). The effect of these rulings is that the words "the rent payable by the tenant" mean the rate of rent, and not merely the actual amount of money which is due at any given time by the tenant to the landlord as rent. Whether the rent payable by the tenant in this sense has been a matter in issue and has been determined, depends upon whether the determination of the question of rent is one which would affect and be binding on the parties as *res judicata*, not merely for a particular year, but for all succeeding years, so long as no change in their relations was made either by their own agreement or by the Act of a Court. The principle would exclude an appeal where the issue had been whether the whole or part of the rent payable had been paid or not. If, then, the defendants here had pleaded that they had paid the rent payable either in whole or in part, the ruling would obviously be applicable and would exclude an appeal under s. 189. If their plea had been not payment but accord and satisfaction, the result would be the same. If it had been neither payment nor accord and satisfaction, but that, by virtue of an agreement between the parties, the defendants had set off against the rent otherwise payable by them, a sum payable to them by the plaintiffs, the same result would follow, as the rate of rent **[251]** would not have been in issue. The issue in fact raised by the defendants was closely similar to this. They raised no question as to the rate of rent payable. Their plea was, in substance, that, whatever the rent payable might be, it was by virtue of a particular contract not to be paid in to the plaintiffs' hands, but

(1) 13 A. 193 (2) 14 A. 50. (3) 16 A. 51. (4) 16 A.W.N. (1896) 148.

appropriated in a special manner, namely, the discharge of the plaintiffs' liability to pay interest due under the mortgage. If the mortgagee had been a third person, the plea would obviously have been one of payment. As the mortgagee alleged to be entitled to interest was also the tenant from whom rent was claimed, it was in the nature of a set off of the interest due against the rent repayable, and it impliedly admitted that whenever the rent payable ceased to be applicable by the defendants in satisfaction of the interest, the zamindars would be entitled to recover it. It is difficult to distinguish in principle such a plea from a plea that the rent payable in respect of the years in suit had been in effect paid or otherwise satisfied in full, and in this view of the case we think, having regard to the ruling, that the rent payable by the tenant was not a matter in issue, that the decision of Mr. Justice Dillon was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

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Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

DONDH BAHADUR RAI AND OTHERS *(Plaintiffs)* v. TEK NARAIN RAI OTHERS *(Defendants).** [20th February, 1899.]

Mortgage—Usufructuary mortgage—Suit for redemption—Non-payment at proper time of the whole mortgage-money—Dismissal of suit—Second suit for redemption accompanied by payment in full—Res judicata—*Act No IV of* 1882 (*Transfer of Property Act*), *ss.* 92, 93.

Held that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage-money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the [252] deed expressly authorizing redemption on payment of the mortgage-money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal on the first suit and the institution of the second. *Inman* v. *Wearing* (1), *Marshall* v. *Shrewsbury* (2), *Curtis* v. *Holcombe* (3), *Collinson* v. *Jeffery* (4), *Karuthasami* v. *Jaganatha* (5), *Nainappa Chetti* v. *Chidambaram Chetti* (6), *Roy Dinkur Doyal* v. *Sheo Golam* (7), *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (8) and *Sheikh Golam Hoosein* v. *Musummat Alla Rukhee Beebee* (9) referred to. *Hay* v. *Raziuddin* (10) distinguished.

[R., 24 A. 44 = 21 A.W.N. (1901) 194 ; 32 A. 215 = 7 A.L.J. 185 = 5 Ind .Cas. 269 ; 19 Ind. Cas. 393 (394) = 6 S.L.R. 140 (142) ; 3 O.C. 371 (381) ; U.B.R. (1897—1901) 582 ; D., 25 M. 300 (310).]

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gobind Prasad*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

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* Appeal No. 43 of 1898 under s. 10 of the Letters Patent.

(1) (1850) 3 De. G. and S. 729 (734). (2) (1875) L.R. 10 Ch. A. 250.
(3) (1837) 6 L.J. (N.S.) Ch. 156 = 34 R. R. 305. (4) L.R. 1896, 1 Ch. 644.
(5) 8 M. 478. (6) 21 M. 18. (7) 22 W.R.C.R. 172.
(8) 11 A. 386. (9) 3 N.W.P.H.C.R. (1871) 62. (10) 19 A. 202.

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JUDGMENT.

STRACHEY, C.J. (KNOX, J., concurring).—The question raised by this appeal is whether a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not prior to its institution paid or tendered the whole of the mortgage-money at a time authorized by the deed, has the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the deed expressly authorizing redemption on payment of the mortgage-money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second.

The mortgage of which redemption was sought was a usufructuary mortgage of a fixed rate holding, and was executed by the tenants on the 25th May, 1872, to secure the sum of Rs. 200. It provided that the principal money with interest should be paid in the month of Jeth, 1280 Fasli, and that if after that date the mortgagors should pay the whole amount due in any future month of Jeth in any year, they would be entitled to get redemption of the property. It also provided that the mortgagors were to pay to **[253]** the zamindar the rent due in respect of the holding, but did not provide for the event of their making default in such payment. In 1894, the mortgagors brought a suit for redemption, alleging that Rs. 200 only was due, and that the mortgagee had refused to accept their tender of that amount. The defendant mortgagee did not contest the right of the plaintiffs to redeem, but claimed to be entitled to add to the mortgage debt, sums exceeding Rs. 700, which he alleged that he had paid to the zamindar as arrears of rent for the holding in default of payment by the mortgagors, and that as this part of the mortgage-money has not been paid or tendered in accordance with the deed in the month of Jeth, the suit should be dismissed. The Court of first instance found that all that remained due on the mortgage, besides the Rs. 200 principal tendered by the plaintiffs, was Rs. 25, interest for one year, and on the 9th March, 1895, it passed a decree for redemption conditional upon the plaintiffs paying this further Rs. 25 in the next month of Jeth, which ended on the 7th June 1895. From this decree the defendant mortgagee appealed, and the appellate Court reversed the decree and dismissed the suit, on the ground that the plaintiffs had not paid or tendered the whole Rs. 225 due in the Jeth preceding the suit. Considering that the whole of the principal had been tendered; that only a trifling sum representing one year's interest remained; and that the defence pleaded by the mortgagee was clearly unfounded, it was, to say the least, taking a very strong course to dismiss the suit outright instead of allowing the plaintiffs, as the first Court had done, to redeem conditionally on their making good the deficiency in Jeth in accordance with the deed. However, the plaintiffs did not appeal, so that on the 18th May 1896, the suit for redemption stood finally dismissed. A week later, on the 25th May, which fell within the month of Jeth, the plaintiffs tendered to the defendant the whole sum of Rs. 225, which in the previous suit had been found due on the mortgage. The defendant again refused to accept the tender, and the plaintiffs having, on the 27th May, deposited the Rs. 225 in Court under s. 83 of the **[254]** Transfer of Property Act, brought the present suit for redemption on the 30th July. In their plaint they set forth the proceedings in the former suit. In his written statement the defendant again pleaded that the plaintiffs were not entitled to redeem

except on payment of Rs. 737, which he had paid as arrears of rent to the zamindar, in addition to the Rs. 225 deposited. He did not plead that the suit was barred by the dismissal of the former suit. The Court of first instance, holding that the defendant was not entitled to add any part of the Rs. 737 to the mortgage money, and that the Rs. 225 which had been deposited was all that was due on the mortgage, passed a decree for redemption. The defendant appealed from the decree, but confined his appeal to the matter on which he had failed in the first Court, and did not suggest that the claim was barred by the dismissal of the former suit. The lower appellate Court agree with the Court of first instance and dismissed the appeal ; and the defendant then brought a second appeal to this Court in which he for the first time raised the plea of *res judicata*, upon which his appeal has been allowed and the suit for redemption dismissed. Against that dismissal the plaintiffs have now appealed under s. 10 of the Letters Patent.

It is obvious that the defendant has no defence on the merits ; that his only plea in the Courts below was wholly unsustainable ; and that he has succeeded only upon a technical ground taken for the first time in second appeal in this Court. The plaintiffs have done all that their deed required as the condition of redemption, and their chief mistake appears to have been their not appealing against the appellate decree in the former suit. The question is whether, not having done so, they are in consequence for ever barred from redeeming the property. The right to redeem belonging to every mortgagor, including usufructuary mortgagors like the plaintiffs, is conferred by s. 60 of the Transfer of Property Act, 1882. It exists "at any time after the principal money has become payable." It arises "on payment or tender at a proper time and place of the mortgage money." What is a proper time for payment or tender depends upon the **[255]** terms of the mortgage deed. Here the mortgage deed expressly authorized the mortgagors to redeem on payment in the month of Jeth in any year after the mortgage money became payable. The plaintiffs are found to have tendered to the defendant in the month of Jeth prior to the institution of the suit the full amount due upon the mortgage. They are therefore *prima facie* entitled to a decree for redemption. But their right to redeem is, of course, subject to the proviso to s. 60: "provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court." So long as there has been no such act or order, so long as the relation of mortgagor and mortgagee exists, the right to redeem is inseparable from that relation, and may be enforced by suit. There is no suggestion that the right has here been extinguished by act of the parties. The only order of a Court which, it is suggested, has extinguished the right is the dismissal of the previous suit for redemption. If the dismissal of that suit has had that effect, it can only be by virtue of some provision of the Transfer of Property Act, or of some other enactment. It has been suggested that the dismissal of the previous suit has extinguished the right to redeem, first, because it operates as a foreclosure of the mortgage, and, secondly because it operates as *res judicata* by virtue of s. 13 of the Code of Civil Procedure. As regards the first point, it is necessary to see what are the orders of a Court which, under the Transfer of Property Act, extinguish the right to redeem and under what circumstances, if any, a usufructuary mortgage is foreclosed. The only orders to which the Act expressly gives the effect of extinguishing the right to redeem are orders absolute for foreclosure under s. 87 in a mortgagee's suit for foreclosure under s. 86, orders absolute for

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sale under s. 89, in a mortgagee's suit for sale under s. 88 and orders for foreclosure or sale under s. 93 in a mortgagor's suit for redemption under s. 92. As under s. 67 a usufructuary mortgagee as such cannot sue for either foreclosure or sale, and as under ss. 92 and 93 no order for foreclosure of a usufructuary [256] mortgage can be made in a redemption suit, it is obvious that in the case of a usufructuary mortgage, the right to redeem cannot be extinguished by any express order for foreclosure. The reason of this, as Mr. Justice Shephard points out in his commentary on the Act, is that the usufructuary mortgage does not effect a transfer to the mortgagee of the legal ownership of the land: "foreclosure implies that the property is vested in the mortgagee subject to a condition, and that an equity only remains to the mortgagor." The only order which under the Act expressly extinguishes a usufructuary mortgagor's right to redeem is the order for sale which under ss. 92 and 93 may be made in a redemption suit, though the usufructuary mortgagee could not have sued for sale any more than for foreclosure. If, then, the usufructuary mortgagee cannot sue for foreclosure, if on default of payment under a decree for redemption an order for foreclosure is expressly excluded, and if in the case of such default there is no provision for the extinguishment of the right to redeem except on the passing of an order for sale on the mortgagee's application, why should the usufructuary mortgagor's failure to obtain a decree for redemption, put the mortgagee in any better position, or give him a right for which he never bargained? It is true that in England if a mortgagor files his bill for the redemption of a legal mortgage and it is dismissed for any reason except want of prosecution, the dismissal operates as a decree for foreclosure against him: *Inman* v. *Wearing* (1), *Marshall* v. *Shrewsbury* (2), and other cases cited in Fisher on the Law of Mortgage (4th ed., p. 1002). It is also true that the rule in England has been applied to the case of a Welsh mortgage, the incidents of which closely resemble those of a usufructuary mortgage under the Indian Transfer of Property Act, and in connection with which it has been held that, although the mortgagee has no right to foreclose, the mortgagor, upon failure to pay the amount due under a decree for redemption, will be foreclosed: *Curtis* v. *Holcombe* (3). It is to be observed [257] that in that case the bill for redemption was not dismissed in the first instance, but decreed, and the ground of the decision was that the mortgagor "ought not to be allowed to obtain a decree for redemption and afterwards avail himself of the peculiar form of the deed to decline a redemption." There was a decree for redemption in the usual terms, "but in default of the plaintiff so redeeming the said mortgage by the time aforesaid, the plaintiff's bill was from thenceforth to stand dismissed out of this Court, with costs to be taxed by the Master." That has little or no resemblance to the present case where the plaintiffs were not, in the former suit, "allowed to obtain a decree for redemption." It is more analogous to the case of default by a usufructuary mortgagor in payment of the amount due under a decree for redemption, with this difference, that under ss. 92 and 93 of the Transfer of Property Act the consequence of such default is not, as in England, a further order for absolute dismissal of the suit—*Collinson* v. *Jeffery* (4), or foreclosure of the mortgage, but,

(1) (1850) 3 De. G. and S. 729 (734).
(2) (1875) L.R. 10 Ch. A. 250.
(3) (1837) 6 L. J. (N. S.) Ch. 156 = 34 R. R. 305.
(4) L. R. (1896) 1 Ch. 644.

the mortgagee applies for it, an order for sale. However this may be, there is no reported Indian case adopting the broad English rule that the dismissal of a suit for redemption for any reason except want of prosecution operates as a decree for foreclosure. The absence of any such rule from the Transfer of Property Act indicates, we think, that the Legislature did not intend it to be adopted in India. We think that its application to a usufructuary mortgage would be inconsistent with the incidents of such a mortgage and with the provisions of the Act to which we have referred. So far then as the Act is concerned, the dismissal of the former suit for redemption does not, in our opinion, bar the present.

While in the only reported case in which the English rule was applied to a Welsh mortgage the decision was put on the ground that the plaintiff could not get a decree for redemption without the usual penalty in case of default, the decisions applying it to other kinds of mortgage are based on the same principle as the rule of *res judicata*. "The mortgagor," said Lord Justice James in **[258]** *Marshall* v. *Shrewsbury*, "by filing the bill admits the title of the mortgagee and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure because he cannot afterwards file another bill for the same purpose; he is not allowed thus to harass the mortgagee." In this country the question of *res judicata* depends on s. 13 of the Code of Civil Procedure. Was the matter directly and substantially in issue in the present suit directly and substantially in issue and heard and finally decided in the former suit? To see what was directly and substantially in issue in both suits, one must look at the contentions of the parties and the judgments and decrees of the Courts. The existence of the plaintiff's right to redeem on payment of the mortgage money in Jeth of any year was not a matter in issue in the former suit. The matter in issue in the first Court was what the mortgage money must be considered to include, whether it included the arrears of rent paid by the mortgagee, whether the plaintiffs were entitled to redeem on payment of Rs. 200, as they alleged, or of over Rs. 700, as the defendant contended. The matter decided by that Court was that the mortgage money was Rs. 225 only, and did not include the arrears of rent, and that the plaintiffs were entitled to redeem on payment of Rs. 25, the unpaid balance, in the following Jeth. The only matter decided by the appellate Court was that the plaintiffs were not entitled to get a decree for redemption in that suit, as they had not prior to its institution paid or tendered the Rs. 225 in the month of Jeth. So far as this decided the fact that the mortgage was unpaid, and the principle that it could only be redeemed on payment or tender in a Jeth prior to a suit for redemption, it had, no doubt, the effect of *res judicata*. But it did not decide that there could under no circumstances be any redemption except on payment or tender in some Jeth prior to that particular suit, or in any other particular Jeth. It decided nothing inconsistent with the continuance of the mortgage relation or with the mortgagor's right to sue again for redemption, provided that before doing so they paid or tendered the full amount due in a Jeth. In the present suit the matter then heard and **[259]** decided is not again in issue. The suit is based on a tender and deposit of the whole Rs. 225 found to be due in a Jeth prior to its institution, as the former judgment decided was necessary. The only matter directly and substantially in issue in the Courts below was whether the Rs. 225 alone or the Rs. 225 *plus* the arrears of rent constituted the mortgage money. That matter was in the former suit decided by the first Court adversely to the defendant: the appellate Court did not decide

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it at all, but dismissed the suit on another ground. It appears to us that in this state of the facts s. 13 of the Code does not bar the present suit. The plaintiffs admittedly have a right to redeem in a Jeth of any year. The dismissal of the former suit appears to us to be equivalent to a decision that that particular suit was prematurely brought, and does not affect the plaintiff's right to sue for redemption upon tender prior to suit of the full amount due in a Jeth subsequent to the dismissal. This view is supported by the judgment of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (1). That was a suit, prior to the Transfer of Property Act, for redemption of a usufructuary mortgage; and their Lordships said of a decree in a previous suit for redemption, "that decree in fact did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited. According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage-debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." Nothing has happened to terminate the relation of mortgagor and mortgagee, and hence the right to redeem, which is an essential part of that relation, has not been extinguished by any order within the proviso to s. 60 of the Transfer of Property Act and this suit to enforce it is not barred.

[260] We were much pressed by the pleader for the respondent with the judgment of Sir John Edge, C. J., and Mr. Justice Burkitt in *Hay* v. *Raziuddin* (2). That case is obviously distinguishable from the present. There the first suit for redemption, instead of being, as here, wholly dismissed, was decreed, though the decree did not comply with s. 92 of the Transfer of Property Act, in that it did not specify what should take place in case the mortgage money was not paid within the prescribed period. The terms of the usufructuary mortgage are not fully stated in the report. No payment of the mortgage money was made, the decree was allowed to lapse, and it was held that the mortgagor could not again sue for redemption. The principle of that decision, when read with the Full Bench ruling of this Court which it follows, and with the Bombay ruling which it approves, is that the mortgage is merged in the decree for redemption and the original cause of action thus extinguished; that the mortgagor's failure to comply within time with his decree for redemption cannot give him a fresh cause of action; that the decree thenceforth alone regulates the relations of the parties, and the mortgagor's sole remedy is by execution, a second suit on the same cause of action and for substantially the same relief being barred by ss. 13 and 244 of the Code; and that consequently if by his own neglect he allows execution of the decree to become barred by limitation, no remedy by redemption is left, and the mortgage is thus virtually foreclosed. That decision can have no application to a case where there has been no decree for redemption merging the mortgage, extinguishing the cause of action, or substituting a remedy by execution which by the mortgagor's neglect has become barred by limitation, where therefore s. 244 does not apply, and where the cause of action upon which the second suit is based is not the mortgagor's failure to comply with any decree in his favour, but his right under the deed to redeem in a Jeth subsequent, as well as in one prior, to the dismissal of the first suit. The observation in the judgment

(1) 13 M. I.A. 404 (412). (2) 19 A. 202.

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cited that "it was the intention of the Legislature as [261] expressed in ss. 92 and 93 of the Transfer of Property Act that there should be one suit only for redemption," when read with the preceding and following sentences, must, we think, be construed as meaning one suit for redemption in which a decree for redemption is passed. It cannot indeed be said that, even thus understood, the proposition is absolutely settled law. Apart from the Madras decisions to the contrary mentioned in the judgment to which may be added *Karuthasami* v. *Jaganatha* (1), and *Nainappa Chetty* v. *Chidambaram Chetti* (2), and the decision of the Calcutta High Court in *Roy Dinkur Doyal* v. *Sheo Golam* (3), the judgment is admittedly in conflict with *Muhammad Samiuddin Khan* v. *Mannu Lal* (4), where it was held that the ruling of the Full Bench in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (5), was not binding since the passing of the Transfer of Property Act, and that as in a decree for redemption of a usufructuary mortgage foreclosure could not be directed, such decree could not operate to deprive the mortgagor of the right to redeem. It is, however, unnecessary for us to express any opinion upon this conflict of authority. It is sufficient to say that, in our opinion, the principle of *Hay* v. *Raziuldin*, assuming it to be good law, does not apply and should not be extended to a case where no decree for redemption has been passed prior to the suit before the Court. In the judgment now under appeal it is observed that if the present suit could be maintained, "the plaintiffs might institute a fresh suit for redemption upon every Jeth for the whole period for which the mortgage might subsist, and upon their failure to pay into Court the full amount due, might have their suit dismissed, and then be in a position in the following year to commence another suit." Even if the liability to pay costs were not an effectual deterrent, the provisions of ss. 92 and 93 of the Transfer of Property Act would probably be sufficient to prevent the course supposed. The proper course for the Court to [262] take in that case would be not to dismiss the suit,—for, as pointed out by Mr. Justice Shephard, the usual practice is not now, as it appears to have once been, to dismiss a redemption suit outright because the money has not been paid or even tendered,—but to pass a conditional decree for redemption in the terms of s. 92, and then in the event of default of payment within the time fixed, the mortgagee could under s. 93 obtain an order for sale extinguishing the right to redeem and preventing any future suit of the kind. The danger of repeated suits for redemption is thus hardly a practical one. In any case we think that there was nothing to bar the present suit.

The only other point relates to an objection which the present respondent raised in his memorandum of appeal to this Court, and which Mr. Justice Blair decided against him. One of the provisions of the mortgage deed was, as we have mentioned, that the mortgagors should pay the rent of the fixed rate holding to the zamindar. That is the construction placed upon the deed by the defendant mortgagee both in his written statement and in his memorandum of appeal to the lower appellate Court. The mortgagors did not pay the rent, and the mortgagee consequently did so. In both suits for redemption the defendant claimed to add the Rs. 700 odd so paid to the mortgage debt. Upon this point the lower appellate Court found in effect that the payments of rent were

(1) 8 M. 478.
(2) 21 M. 18.
(3) 22 W. R. 172.
(4) 11 A. 386.
(5) N. W. P. H. C. R. (1871) 62.

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made by the mortgagee voluntarily and were not necessary to preserve the mortgaged property from forfeiture or sale. We agree with Mr. Justice Blair that this finding of fact is a conclusive answer to the objection in second appeal. The respondent relies on s. 76 (*c*) of the Transfer of Property Act. As it is his own case that there was in the mortgage-deed "a contract to the contrary" providing that the mortgagors and not the mortgagee should pay the rent, it is obvious, without going any further, that s. 76 cannot help him. The only other ground upon which he could claim to add the amount of these payments to the mortgage-debt is s. 72 (*b*), which authorizes a mortgagee in possession to spend such money as is necessary for the preservation **[263]** of the mortgaged property from destruction, forfeiture or sale. That ground, however, is disposed of by the lower appellate Court's finding of fact that the payments were not necessary for any such purpose..

The result is that we must allow this appeal, set aside the decision of the learned Judge of this Court, and restore that of the lower appellate Court with costs.

Appeal decreed.

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21 A. 263=19 A.W.N. (1899) 76.

APPELLATE CRIMINAL.

Before Sir Arthur Strachey, Kt., Chief Justice.

QUEEN-EMPRESS *v.* MAHABIR TIWARI.* [23rd March, 1899.]

Act No. XLV of 1860 (*Indian Penal Code*), *ss.* 34,397—*Dacoity—Commission of grievous hurt in the course of a dacoity—Person liable under s.* 34, *liable also under s.* 397.

Held, that the words "such offender" in s. 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34 of the Code.

[Overruled, 28 A. 404=A.W.N. (1906) 61=3 Cr. L.J. 322; A.W.N. (1899) 186 (187); **R.**, 1 L.B.R. 232 (235); **D.**, 3 L.B.R. 121 (122).**]**

THE material facts of this case are as follows :—On the night of the 24th of February, 1898, one Gajraj was sleeping at his threshing floor. He was awakened by a noise and saw some five or six thieves going off with loads from his threshing floor, while some others were engaged in picking up loads for themselves. Gajraj at once caught one of them, the appellant Mahabir. The other men then attacked him and beat him with lathis until he was forced to let Mahabir go, whereupon Mahabir also beat him. Meanwhile the other men at the threshing floor had been aroused and approached near enough to see and recognize the thieves. Two of these men also received lathi blows and they ran off and hid themselves among the stacks on the threshing floor. Two men then came running up from their fields close by, and on their approach the thieves ran away. Gajraj was carried away from the threshing floor insensible, and on examination it was found that one of his arms was broken, but **[264]** it did not appear from the evidence which of the dacoits had caused that particular injury. On these facts the Sessions Judge convicted Mahabir under s. 397 of the Indian Penal Code and sentenced him to seven years' rigorous imprisonment. Mahabir appealed to the High Court.

* Criminal Appeal, No. 126 of 1899.

Mr. *B. E. O'Conor*, for the appellant.
The Government Pleader (Munshi *Ram Prasad*), for the Crown.

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APPELLATE CRIMINAL.

21 A. 263 = 19 A.W.N. (1899) 76.

JUDGMENT.

STRACHEY, C. J.—Mr. *O'Conor*, who holds Mr. Colvin's brief for the appellant, states that he does not propose to press this appeal except upon the question of sentence. The appellant has been convicted of an offence punishable under s. 397 of the Indian Penal Code, and has received the minimum sentence under that section, namely, seven years' rigorous imprisonment. Unless therefore that section is inapplicable, I have no power to reduce the sentence. Mr. *O'Conor* has contended that the section does not apply, because, according to the evidence for the Crown, and in particular that of the complainant Gajraj, the blow which caused grievous hurt by breaking Gajraj's arm, and which was struck during the commission of the dacoity, was struck, not by the appellant, but by another of the dacoits. He supports this argument by reference to the case in the Madras High Court (Weir 99) cited in Mr. Mayne's note to s. 397, and to the use of the expression "such offender," which implies that the liability to enhanced punishment under the section is limited to the offender who actually causes grievous hurt. There can be no doubt, however, that the appellant was one of the persons committing the dacoity; and the evidence shows, that upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with lathis, and that the appellant similarly joined the rest in so beating him. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all, and therefore each of them was liable under s. 34 of the Code in the same **[265]** manner as if he were the sole assailant. If without any dacoity the persons concerned had together attacked Gajraj, and in that attack his arm had been broken, but with no evidence as to who struck that particular blow, or even if the evidence showed that one of them other than the accused had struck it, there can be no doubt that all would, by reason of s. 34, have been guilty of causing grievous hurt to him. That principle cannot cease to be applicable because the assault happened to be committed in the course of a dacoity, or because the evidence shows that it was not the appellant's hand which in that dacoity struck the blow causing the grievous hurt. The words "such offender" in s. 397 therefore include any person taking part in the dacoity who, though he may not have himself struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34, and I am therefore of opinion that this appellant caused grievous hurt to Gajraj at the time of committing the dacoity; that the case falls within s. 397, and that I have therefore no power to reduce the sentence. I dismiss the appeal.

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21 A. 265 = 19 A.W.N. (1899) 61.

21 A. 265 = 19 A.W.N. (1899) 61.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

In re THE PETITION OF KALYAN SINGH.* [21st February, 1899.]

Criminal Procedure Code, s. 253—Discharge—Evidence—Duty of Magistrate in dealing with the evidence produced in a case triable by a Court of Session.

Held, that a Magistrate inquiring into a case triable by the Court of Session is not bound to commit simply because the evidence for the prosecution, if believed, discloses a case against the accused, but he is competent to consider the reliability of such evidence and to discharge the accused if he find it untrustworthy.

[F., 11 Cr. L.J. 18 (19) = 4 Ind. Cas. 612 (613) = 10 P.R. 1909 = 32 P.W.R. (1909); R., 6 C.L.J. 760 (762) = 12 C.W.N. 117 = 6 Cr. L.J. 406.]

THE facts of this case are as follows :—

Six persons were brought before the District Magistrate of Etah who held an inquiry into an alleged offence of dacoity said to have been committed by them. The fact of the dacoity was [266] testified to by two men, a sowar and an ekka-driver, who represented themselves to have been the victims of the alleged dacoity, and who profess to identify some of the accused as their assailants. A hospital assistant proved that the sowar arrived at the hospital with a broken arm and other marks of lathi blows. One of the accused made a full confession. The Magistrate discharged all the accused, finding that the stories of the ekka-driver and the sowar were "extraordinarily discrepant," though that of the sowar was "in some respects" supported by the confession, and that the proceedings of the police, which led up to the arrest of the accused, were "bogus." After examination and criticism of the evidence the Magistrate came to the conclusion that "every bit of the evidence bears intrinsic traces of falseness," and that "the evidence in the case could not stand the slightest criticism," and that the confession itself was open to the "greatest suspicion."

Alston, for the applicant (complainant), contended that the Magistrate's order of discharge was, under the circumstances, illegal. A *prima facie* case of dacoity against the accused had been disclosed. The dacoity itself was proved, and there was evidence connecting the accused with the said dacoity, which evidence, if believed, was sufficient for a conviction. Dacoity was an offence exclusively triable by the Court of Session, and in discussing and criticizing the evidence on its merits, and in taking upon himself the responsibility of discrediting the confession of one of the accused, the Magistrate had "tried" the case as fully and completely as the Court of Session would have done. It was contended that where the evidence sufficed for a conviction and the offence was one exclusively triable by the Court of Session, a Magistrate was bound to commit. A Magistrate had to see that there were "sufficient" grounds for committing the accused for trial, but this did not mean that he was to take it upon himself to reject evidence and confessions according as he thought them true or not. To do so was to "try" the case, which the Sessions Court alone was entitled to do.

JUDGMENT.

[267] BLAIR, J.—This is a petition for revision. I am invited to lay down the general proposition that a Magistrate having before him formally

* Criminal Revision, No. 14 of 1899.

and categorically evidence which discloses a case for trial in some Court to which such Magistrate might in his discretion commit, is bound so to commit, and that he is wrong in point of law in exercising a discretion and considering the sufficiency of the evidence. The proposition is dangerously large. It is not the practice of Magistrates within the range of my experience, nor I have heard the law so laid down in England. That is the only question I have to answer, for it is not in this case suggested that the Magistrate who refused to commit did not exercise a judicial discretion when he found that there were not sufficient grounds for commitment. The petition is dismissed.

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21 A. 266=19 A.W.N. (1899) 61.

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21 A. 267=19 A.W.N. (1899) 55.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BHOLAI KHAN (*Defendant*) *v.* ABU JAFAR (*Plaintiff*).*
[1st March, 1899.]

Jurisdiction—Civil and Revenue Courts—Appeal—Suit not tried on the merits in the Court of first instance—Act No. XII of 1881 (*N.W.P. Rent Act*), s. 208.

Held, that the application by an appellate Court of the provisions of s. 208 of Act No. XII of 1881, is not precluded by the fact that the Court of first instance has dismissed the suit on a preliminary point without any trial of it on its merits.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. M. Colvin*, for the appellant.

Pandit *Sundar Lal* and Maulvi *Muhammad Ishaq*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The appellant, who is a tenant at fixed rates, erected a building on land held by him for agricultural purposes. Thereupon the plaintiff, one of the zamindars of the village, brought the suit, out of which this appeal has **[268]** arisen, for the demolition of the building, and for the restoration of the land to its former condition. The Court of first instance was of opinion that the suit was one which came within the purview of cl. (*cc*) of s. 93 of Act No. XII of 1881, and held that it was not cognizable by the Civil Court. In this view the Munsif ought to have returned the plaint for presentation in the proper Court, but instead of doing so he dismissed the suit. The plaintiff appealed to the District Judge and the learned District Judge was asked to apply s. 208 of Act No. XII of 1881 to the case, and to remand it for trial to the Court of first instance. The learned Judge was of opinion that as the suit had not been tried by the Court of first instance on the merits, s. 208 was not applicable. He then proceeded to consider whether the suit was or was not cognizable by a Civil Court, and, coming to the conclusion that it was cognizable by a Civil Court, remanded the case to the Court of first instance under s. 562 of the Code of Civil Procedure From this order of remand this appeal has been preferred, and the contention on behalf of the appellant

* First Appeal, No. 125 of 1898, from an order of L. Marshall, Esq., District Judge of Jaunpur, dated the 16th August 1898.

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21 A. 267 = 19 A.W.N. (1899) 55.

is that the suit is cognizable by a Court of Revenue. If s. 208 of Act No. XII of 1881 is applicable to the case, the last paragraph of that section precludes the appellant from raising the contention urged on his behalf. We have therefore to determine whether s. 208 is or is not applicable. We are clearly of opinion that the learned Judge of the lower appellate Court is wrong in thinking that ss. 206, 207 and 208 would not apply to a case which has not been tried on the merits. The policy of those sections was to protect a suitor from being bandied about from Court to Court. If the question of jurisdiction was raised in the Court of first instance, ss. 207 and 208 would, in our opinion, undoubtedly apply. S. 207 applies to a case in which all the materials necessary for the determination of the suit are before the appellate Court. If such materials are not before the appellate Court, or if the materials before that Court are so imperfect that the appellate Court is not in a position to [269] determine the suit, s. 208 empowers the appellate Court either to remand the case under s. 562 of the Code of Civil Procedure or to frame and refer issues for trial under s. 566, or require additional evidence under s. 568. As in this case there were no materials before the Court for the trial of the suit, the Court was justified in remanding the case under s. 562. We shall treat the order of remand of the lower appellate Court as an order under s. 208, and, that being so, we cannot entertain the contention that the Court of first instance, to which the case has been remanded, was not competent to entertain the suit. We therefore uphold the order of remand. We deem it necessary, however, to observe that when the case goes to the Court of first instance, that Court will have to determine, in trying the question of limitation raised by the defendant, whether the limitation applicable to the suit is that provided by the Indian Limitation Act of 1877, or the limitation provided by Act No. XII of 1881. It may be necessary for the determination of that question to consider whether the suit was one of the nature cognizable by a Civil Court or a Court of Revenue, but in doing so the Court of first instance should keep out of view the conclusion arrived at by the learned District Judge upon the question of jurisdiction. In our opinion it was not necessary for the learned District Judge, having regard to the view we have taken of the case, to consider that question at all.

We dismiss the appeal with costs.

Appeal dismissed.

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21 A. 269 = 19 A.W.N. (1899) 56.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

NARAIN DAS (*Defendant*) *v.* LALTA PRASAD AND OTHERS (*Plaintiffs*).* [9th March, 1899.]

Execution of decree—Civil Procedure Code, s. 319—Possession—Formal possession—Effect of formal possession as against a third person other than the judgment-debtor—Limitation.

Held, that whatever might be the effect of the delivery of formal possession under s. 319 of the Code of Civil Procedure as against the judgment-[270] debtor

* First Appeal, No. 107 of 1898, from an order of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Farrukhabad, dated the 7th September 1898.

himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. *Mangli Prasad* v. *Debi Din* (1) referred to.

[F., 7 C.L.J. 640; Appr., 6 C.L.J. 472 (483); R., 5 C.L.J. 35 (N); 16 C.P.L.R. 107; 5 Ind. Cas. 273 (275); 15 Ind. Cas. 146 (155) = (1912) M.W.N. 669.]

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APPELLATE CIVIL.

21 A. 269 = 19 A.W.N. (1899) 56.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen, was one for possession of mortgage rights in certain zamindari properties. Those rights originally belonged to one Shankar Lal. He mortgaged them to the father of the present plaintiffs, and the father of the plaintiffs obtained a decree on his mortgage in September 1883. In execution of that decree he purchased Shankar Lal's rights on the 20th August 1884. On the 4th of May 1885, formal possession was delivered to him, apparently under s. 319 of the Code of Civil Procedure. At that time, it is admitted, the present appellant, Narain Das, was in possession by virtue of an auction-purchase in execution of a decree held by him against Shankar Lal. His purchase was made on the 21st of April 1884, and he obtained delivery of possession in January, 1885. It was found by the Court of first instance, and that finding was not questioned in the lower appellate Court, that the plaintiffs never obtained actual possession, that their allegation of an ouster in 1886 was untrue, and that since January 1885, the defendant has been in possession. The present suit was brought on the 27th of April 1897, that is a week before the expiry of twelve years from the date of the delivery of possession to the plaintiffs' father. The Court of first instance held the claim to be barred by limitation, applying art. 138 of the second schedule of Act No. XV of 1877, and dismissed the suit. The lower appellate Court has set aside that decree. It was of opinion that the delivery of possession to the plaintiffs' father on the 4th of May 1885, gave a fresh start to the plaintiffs for the computation of limita-
[271] tion. It accordingly remanded the case to the Court of first instance, under s. 562 of the Code of Civil Procedure. From that order of remand the present appeal has been preferred, and the only question which we have to determine is whether the claim was brought within time. The question is not by any means free from difficulty. There can be no doubt that had the suit been brought against the plaintiff's judgment-debtor, it would have been within time, as held in *Mangli Prasad* v. *Debi Din* (1). But here we have the case of another person, namely, the purchaser of the rights of the judgment-debtor, who is in possession. Had the judgment-debtor been in possession, the delivery of formal possession, whether under s. 318 or 319 of the Code of Civil Procedure, would have amounted to an ouster of the judgment-debtor and an entry into possession by the purchaser. If subsequently to this delivery of possession the judgment-debtor remained in possession, his possession would amount to an ouster of the purchaser, and would be adverse possession from the date of the ouster; but in the case of a third person who had already purchased the property and

(1) 19 A. 499.

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obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession. Therefore it cannot be said that such delivery of possession gave the subsequent auction purchaser a new cause of action, so as to make the possession of the person other than the debtor, who was already in possession, adverse possession from the date of delivery of possession to the auction purchaser. The possession of such person commenced on the date on which he obtained possession, and from that date must be regarded as adverse to the debtor or to the auction purchaser. As in the present case the defendant was in possession for more than twelve years anterior to the institution of the suit, the claim was barred by limitation, either under art. 138 or 144. Mr. *Baldeo Ram* on behalf of the respondents relied on the doctrine of *lis pendens*. There can be **[272]** no doubt that the title of the plaintiffs is superior to that of the defendant, but the question is whether the plaintiffs have come into Court in time to assert and enforce that title. In the view which we have taken of the case, their claim was beyond time and was rightly dismissed by the Court of first instance. The plaintiffs are themselves to blame for having lost through their own laches the title which they acquired under their auction purchase. We allow the appeal, set aside the order of the lower appellate Court, and dismiss the appeal to that Court with costs. The appellant will get his costs of this appeal.

Appeal decreed.

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21 A. 272 = 19 A.W.N. (1899) 62.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD NIAMAT ALI KHAN (*Plaintiff*) *v.* GHAFFAR MUHAMMAD KHAN AND OTHERS (*Defendants.*)*

[13th March, 1899.]

Mortgage—Suit for sale—Pleadings—Purchaser of mortgaged property paying off prior incumbrances.

The purchaser of a portion of certain mortgaged property paid off certain prior mortagages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. *Salig Ram* v. *Har Charan Lal* (1), distinguished. *Kali-Charan* v. *Ahmad Shah Khan* (2), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and Pandit *Sundar Lal*, for the appellant.

The respondents were not represented.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The plaintiff-appellant brought the suit, which has given rise to this appeal, for sale upon a mortgage, dated the 1st of November 1890, made in his favour by the first defendant Ghaffar

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* First Appeal, No. 137 of 1897, from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 4th March 1897.

(1) 12 A. 548. (2) 17 A. 48.

Muhammad Khan. The second defendant Maulvi Nazir Hasan purchased a part of the mortgaged property, which he sold to the third defendant, his wife. The [273] other defendants are purchasers of different other portions of the mortgaged property. The third defendant opposed the claim, among other grounds, upon the plea that she had discharged some mortgages which were prior in date to the mortgage of the plaintiff, and that the plaintiff was not entitled to a decree for the sale of the property purchased by her without paying to her the amount which she had paid in discharge of the prior mortgages, or a proportionate share thereof. The Court below has totally dismissed the suit on the single ground that the plaintiff had not offered in his plaint to redeem the prior mortgages which the third defendant had discharged, and in support of this opinion the learned Subordinate Judge has referred to the ruling of this Court in *Salig Ram* v. *Har Charan Lal* (1). We cannot agree with the learned Subordinate Judge that that case is not distinguishable from the present case. That was a case in which the purchasers were themselves prior mortgagees, the consideration for their purchase being the amount of the prior mortgage. That case, in our opinion, cannot be regarded as a basis upon which every suit for sale, in which the plaintiff impleads as defendant a subsequent purchaser, but owing to ignorance or some similar cause does not mention in his plaint the fact of the purchaser having discharged a prior mortgage, should be dismissed. In the judgment in *Kali Charan* v. *Ahmad Shah Khan* (2), the learned Judges who decided that case observed:—"We are unable to lay down as a rule of universal application the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled." With that observation we concur. This case more nearly resembles the case to which we have just referred, and which should have been followed by the lower Court. As we have said above, the third defendant or her husband from whom she purchased a portion of the mortgaged property was not a prior mortgagee of that property; it is only by reason of her having [274] paid off a prior mortgage that she can use that mortgage as a shield against the plaintiff's claim to the extent of the amount paid by her. The fact that the plaintiff made no mention in his plaint of the alleged payment, was not, in our opinion, a valid reason for totally dismissing the suit. The amendment which the plaintiff asked for should have been granted, and the suit decided on the merits and a proper decree passed. We allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under s. 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register and decide it on the merits. The appellant will get his costs of this appeal; other costs heretofore incurred will abide the event.

Appeal decreed and cause remanded.

(1) 12 A. 548.

(2) 17 A. 48.

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REVISIONAL CIVIL.

21 A. 274 = 19 A.W.N. (1899) 58.

REVISIONAL CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

JANKI PRASAD AND ANOTHER (*Applicants*) *v.* SUKHRANI (*Opposite Party*).* [14th March, 1899.]

21 A. 274 = 19 A.W.N. (1899) 58.

Civil Procedure Code, s. 103—*Decree* ex parte—*Death of judgment-debtor—Application by legal representative to have the decree set aside.*

Held, that where a defendant, against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is not competent to apply under s. 103 of the Code of Civil Procedure for an order to set the *ex parte* decree aside.

[**Diss.**, 29 C. 33; 36 P.R. 1903 = 88 P.L.R. 1903; **R.**, 6 O.C. 34 (37); **D.**, 29 A. 574 = 4 A.L.J. 480 = A.W.N. (1907) 176.]

THIS was a reference made by the District Judge of Jhansi under s. 617 of the Code of Civil Procedure. The facts of the case are thus stated in the order of reference. "The appellants in this case are the sons of one Jhalkan, deceased, against whom the respondent got an *ex parte* decree on the 26th November 1897. There was no decree against the two appellants. On the 1st of July 1898, the respondent executed the *ex parte* decree by issuing a notice to the appellants under s. 248 of the Code of Civil Procedure. The appellants at once filed an application under s. 108 of the Code to restore the original **[275]** suit to the file, presumably that they might defend it. They alleged that their father could not attend through illness on the date the suit was disposed of *ex parte*."

The Munsif dismissed the application on the merits, and against this order the applicants appealed to the District Judge. The District Judge being of opinion that it was not competent to the appellants to make the application at all referred that question to the High Court.

Babu *Badri Das*, for the appellants.

Babu *Ratan Chand*, for the respondent.

JUDGMENT.

STRACHEY, C.J. (KNOX, J., concurring).—In this case the District Judge of Jhansi has referred to this Court, under s. 617 of the Code of Civil Procedure, the question whether the legal representative of a deceased defendant against whom an *ex parte* decree was passed, can apply to the Court under s. 108 of the Code of Civil Procedure to have the *ex parte* decree set aside.

Section 108 provides that "in any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

Now, the remedy created by this section is in terms limited to the defendant against whom the decree has been passed *ex parte*. In such a case the section says "he may apply to the Court for an order to set it

* Miscellaneous No. 34 of 1899.

aside," and the applicant has to satisfy the Court that the summons was not duly served, or that he himself was prevented by any sufficient cause from appearing.

In order to make this remedy available to the legal representative, some general principle of law would be necessary by which the word defendant should be construed as including the legal [276] representative of a deceased defendant. No authority has been cited to us, and we are aware of none, which establishes any such general principle.

The summary remedy of an application to set aside an *ex parte* decree is created by the section, and in determining to whom that remedy is available, we cannot look beyond the terms of the section itself. It is true that where a party against whom a decree has been passed dies, his legal representative is entitled to appeal against the decree if his interest is affected by it. S. 540 of the Code gives a right of appeal from an original decree, including a decree passed *ex parte*, in terms widely, different from those of s. 108, and which do not necessarily confine the right of appeal to the person against whom the decree was passed, or exclude the legal representative whose interest is affected by the decree from appealing against it. The same observations apply to s. 584, which gives a right of second appeal.

Where the Legislature intended to allow the legal representative of a deceased defendant to have himself substituted for the defendant, or to allow a person claiming to be the legal representative to apply to set aside an order, it has expressly provided for such an application to be made by the legal representative or the person claiming to be such. Instances of such provisions will be found in ss. 368 and 371 of the Act. There is nothing of the kind in s. 108. The result is that, in our opinion, the Code gives no right to the legal representative of the defendant, or to any person except the defendant himself, to apply to the Court under s. 108 to set aside a decree passed *ex parte*. That is our answer to the reference.

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REVISIONAL CIVIL.

21 A. 274 = 19 A.W.N. (1899) 58.

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21 A. 277 = 19 A.W.N. (1899) 64.

[277] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

LILADHAR AND OTHERS (*Plaintiffs*) *v.* CHATURBHUJ AND OTHERS (*Defendants.*)* [15th March, 1899.]

Civil Procedure Code, s. 244—*Execution of decree—Jurisdiction of Court executing the decree.*

Held, that when a decree for the sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. *Maluji* v. *Fakir Chand* (1), *Seth Chand Mal* v. *Durga Dei* (2), *Sanwal Das* v. *Bismillah Begam* (3) and *Lochan Singh* v. *Sant Chandar Mukerji* (4) referred to.

[F., 31 A. 45 = 5 A.L.J. 745 = A.W.N. (1908) 288 = 1 Ind. Cas. 704; 32 C. 265; Appr., 21 A. 356. 30 M. 26 = 16 M.L.J. 545; R., 30 A. 231 = 5 A.L.J. 547 (548) = A.W.N. (1908) 93; 32 M. 429 = 2 Ind. Cas. 18 = 19 M.L.J. 417; 6 Bom. L.R. 1043

*First Appeal No 161 of 1897, from a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 2nd April 1897.

(1) 22 B. 225. (2) 12 A. 313. (3) 19 A. 480. (4) 19 A.W.N. (1899) 24.

(1049); 2 Ind. Cas. 19 (24); 105 P.R. 1900; D., 5 A.L.J. 550=A.W.N. (1908) 92.]

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APPELLATE CIVIL.
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21 A. 277=
19 A.W.N.
(1899) 64.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Babu *Dhurga Charan Banerji*, for the appellants.

Pandit *Moti Lal* and Munshi *Gokul Prasad*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is an appeal from a decree of the Subordinate Judge of Agra dismissing the suit of the plaintiffs appellants on the ground that it is barred by the provisions of s. 244 of the Code of Civil Procedure. The facts are these:—One Mussammat Jhuna, the widow of Kishore Chand, executed a mortgage in favour of the predecessor in title of the respondents on the 13th of January, 1881, in respect of property to which she had succeeded as Kishore Chand's widow. The respondents obtained a decree for sale upon the said mortgage against Jhuna Kunwar on the 28th of June, 1893, and they obtained an order absolute for sale on the 23rd of March, 1895. On the 29th of August, 1895, Jhuna Kunwar died, and on the 13th of June, 1896, application was made for execution of the decree dated the 28th of June, 1893. The plaintiffs, who are [278] the sons of Kishore Chand's brother Salig, were made parties to the execution proceedings as the legal representatives of Jhuna Kunwar. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life interest of Jhuna Kunwar only, and that that estate having determined on her death, the decree was no longer capable of execution. They also contended that Jhuna Kunwar was not competent to effect a mortgage of the property to enure beyond her lifetime, and that there was no justifying necessity for such a mortgage.

The Court executing the decree considered the first objection only, and, being of opinion that the decree ordered the sale of the mortgaged property itself and not of the life interest of Jhuna Kunwar only, dismissed the objection. Thereupon the present suit was instituted, and the relief sought is a declaration that the decree dated 28th of June, 1893, which was obtained by the defendants against Musammat Jhuna Kunwar became void and inoperative at her death, and that the property mentioned in the plaint, which is in the possession of the plaintiffs, and which the defendants have caused to be advertised for sale, is not liable for the amount of the said decree. Among the grounds upon which the above declaration is sought, is the ground which was raised in the objections in execution proceedings, and which was decided adversely to the plaintiffs: we refer to the objection that what Jhuna Kunwar had mortgaged was her life interest only, and that the decree was for the sale of that interest alone. The learned counsel for the plaintiffs admits that the claim cannot be sustained on that ground, and that the decision on that point of the Court executing the decree was a decision properly falling within the meaning of s. 244, and has become final between the parties. There are other grounds, however, upon which the validity of the decree as a decree which can operate against the estate of Kishore Chand is challenged. The suit is in substance a suit for a declaration that there was no necessity which justified the widow of Kishore Chand in making a mortgage of the property which could take effect even

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[279] after her death. The ground upon which this claim is based is that she did not in reality incur a loan, and that there were no debts left by Kishore Chand, for the payment of which it was necessary to incumber his property. In order to determine whether the present suit is maintainable, we have to consider whether the questions raised in the suit are questions which could have been determined by the Court executing the decree, under s. 244 of the Code of Civil Procedure. Clause (*c*) of that section is the clause which, it is contended, is applicable to the case. If the matter now in controversy between the parties could be decided under that clause, then there can be no doubt that the present claim is not maintainable. We are of opinion that under clause (*c*) of s. 244, the Court executing a decree could not consider the question of the validity of the decree. A Court executing a decree is bound to give effect to it as it finds it, and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of Musammat Jhuna Kunwar, could only raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment-debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of *Maluji* v. *Fakir Chand* (1). It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of the decree, and where a decree directs the sale of particular property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance, in the present case, if we assume that the present plaintiffs could [280] properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuna Kunwar, *i.e.*, whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by s. 244 of the Code of Civil Procedure. The case of a decree for money in which, after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representatives of the deceased debtor object to the attachment on the ground that the property attached is no part of the assets of the deceased debtor, is different from the case of a decree which orders sale of specific property: a case of the former class is contemplated by the ruling of the Full Bench in *Seth Chand Mal* v. *Durga Dei* (2). But when a decree specifically orders the sale of particular property no question of assets can arise, and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that decree must, in our opinion, be decided in a separate suit. This was the view taken by this Court in *Sanwal Das* v. *Bismillah Begam* (3), which is entirely in support of the contention of the learned advocate for the appellants. For the respondents our ruling in *Lochan Singh* v. *Sant Chandar Mukerji* (4), was pressed upon us. Some of the observations contained in that judgment may probably have to be reconsidered

(1) 22 B. 225. (2) 12 A. 313. (3) 19 A. 480. (4) 19 A.W.N. (1899) 24.

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when a proper occasion arises, but we do not think that that ruling governs the present case.

We are of opinion that the Court below was wrong in holding that the suit was barred by s. 244 of the Code of Civil Procedure. We allow the appeal, set aside the decree of the Court below, and remand the case to that Court under s. 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register, and try it on the merits. The appellants will have their costs of this appeal. Other costs heretofore will abide the event.

Appeal decreed and cause remanded.

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21 A. 281 (F.B.) = 19 A.W.N. (1899) 59.

[281] FULL BENCH.

Before Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

KESHO DEO AND ANOTHER (*Plaintiffs*) *v.* HARI DAS AND OTHERS (*Defendants*).* [18th March, 1899.]

Joint Hindu family—Mortgage—Mortgage executed and registered by major son and by the father for himself and for a minor son—Registration—Act No. III of 1877 *(Registration Act), s.* 35.

A joint Hindu family consisted of the father and two sons, the one of full age, the other a minor. The father and the major son executed a mortgage of the joint family property, the father describing himself in the bond as acting for himself and as guardian and next friend of the minor son. The bond was registered on the admission of the father and the major son.

Held, on suit by the mortgagees for sale, that there being no dispute as to the fact of the debt for which the mortgage was executed, and it not being alleged that such debt was incurred for any purpose which would exempt the son from the pious obligation of paying it, that there was no defect in the registration of the bond in suit which would prevent its affecting the share of the minor son. *Shankar Das* v. *Jograj Singh* (1) overruled. *Muhammad Ewaz* v. *Birj Lal* (2). *In the matter of Ram Chunder Biswas* (3) and *Badri Prasad* v. *Madan Lal* (4) referred to.

THIS was a suit to recover the balance of a debt alleged to be due on a hypothecation bond dated the 1st February 1889. The defendants were Hari Das, and his two sons Babu Ram and Mannu Lal, the three defendants forming a joint Hindu family. At the time of the execution of the bond Mannu Lal was a minor and the bond purported to be executed by Babu Ram for himself, and by Hari Das "for self and as guardian and next friend of Mannu Lal, minor, my son." The bond was registered by Hari Das and Babu Ram, but did not purport to be registered on behalf of Mannu Lal. At the time of suit the defendant Mannu Lal was of full age, and in his written statement he took the plea that the bond sued on not having been registered at his instance was inoperative as against him. On the issue raised by this plea the Court of first instance **[282]** (Subordinate Judge of Agra), relying on the ruling in the case of *Shankar Das* v. *Jograj Singh* (1), held that the person and property of Mannu Lal must be exempted from liability in respect to the bond in suit. The Court gave the plaintiffs a decree against the two other defendants.

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* First Appeal No. 270 of 1896, from a decree of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 6th June 1896.

(1) 5 A. 599. (2) 1 A. 465. (3) 16 W.R.C.R. 180. (4) 15 A. 75.

Against this decree the plaintiffs appealed urging that the Court of first instance was in error in holding that Mannu Lal was not liable to the plaintiffs' claim.

Pandit *Moti Lal* and Kunwar *Parmanand*, for the appellants.

Mr. *E. A. Howard*, for the respondents.

JUDGMENT.

AIKMAN, J. (BLAIR and BURKITT, JJ., concurring).—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, on a mortgage bond, dated 1st February 1889. The defendants are a Hindu father Hari Das, and his two sons, Babu Ram and Mannu Lal. The executants of the bond are Hari Das and Babu Ram. In the bond, Hari Das describes himself as acting for himself and "as guardian and next friend of Mannu Lal, minor, my son." The bond was registered on the admission of the two executants, Hari Das and Babu Ram.

The learned Subordinate Judge gave the plaintiffs a decree, but only as against the shares of Hari Das and Babu Ram, exempting the one-third share of Mannu Lal, on the sole ground that the bond had not been registered on his behalf.

The judgment of the lower Court is based on, and is supported by, the decision of the Court in *Shankar Das* v. *Jograj Singh* (1). The facts of that case were similar to those of the case before us. The bond in suit had been executed by one Harbans Singh for himself and as guardian of his minor son Jograj Singh, and by an adult son named Balbir Singh. It was registered on the admission of Harbans Singh and Balbir Singh. The learned Judges observe:—"There is no question but that Jograj Singh was an executing party to the bond by representation of his father. But he was not represented in the [283] registration of the instrument. Now, under s. 35 of the Indian Registration Act, as explained and applied by the Judicial Committee of the Privy Council in *Muhammad Ewaz* v. *Birj Lal* (2), this document was unregistered *quoad* Jograj Singh, disabled from executing or registering it by reason of minority and not represented for the purpose of registration by any person, far less by such a person as alone is capable of representation under part VI of the Registration Act. This being so, the instrument on which the suit is founded shall not affect any immoveable property comprised therein, in so far as Jograj Singh is interested in the same." In the result the learned Judges affirmed the decree of the lower Court which had dismissed the suit as regards Jograj Singh and his share of the property.

When the present appeal came on for hearing before a Division Bench of this Court, the Judges composing that Bench, finding themselves unable to concur with the judgment in *Shankar Das* v. *Jograj Singh*, referred the appeal for hearing by a Full Bench, and it has now come before us for decision.

With all deference to the learned Judges who decided the case of *Shankar Das* v. *Jograj Singh*, we find ourselves unable to agree with them in the view they took of the provisions of the Registration Act. What s. 35 of that Act requires is that "the persons executing the document" presented for registration should appear before the registering officer, either in person or by a duly qualified representative, assign or agent. When they so appear and admit execution, the registering officer must register the document, unless it appears to him that any of the persons by whom

(1) 5 A. 599.

(2) 1 A. 465.

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it purports to have been executed is a minor, an idiot, or a lunatic. It is the actual executants of the document who are required to appear. The law nowhere requires for the purposes of registration the appearance of the person on behalf of whom a document purports to have been executed. The learned Judges who decided the case of *Shankar Das* v. *Jograj Singh* have, it appears to us, misapprehended the scope of the decision of the [284] Privy Council in *Muhammad Ewaz* v. *Birj Lal* (1) on which they rely. The document in that case was a deed of sale which, on the face of it, purported to have been executed by three persons, namely, Mubarak Jan, a Muhammadan lady, and her two sons Hyat Muhammad and Salamat-ulla. There was an admission of execution by the two sons before the registering officer, but not by third executant, Mubarak Jan. Under these circumstances their Lordships sustained the decree of the Court of first instance which had held the deed of sale to be valid as regards the sons' shares, but invalid as regards the share of the mother.

In the judgment in the case *In the matter of Ram Chunder Biswas, petitioner* (2), the following passage occurs :—" As all the parties to the deed in question by whom it purports to have been executed had appeared before the Registrar and admitted the execution of the deed, the Registrar to whom the same was presented for registration had nothing whatever to do with the recitals of that deed or with its possible operation as regards parties who do not purport to execute it, and who must therefore be considered as third parties. If the Registrar finds that all the executants of the deed admit the execution, his duty is clear, that is, he must register the deed." We concur in these observations.

For the above reasons we dissent from and overrule the judgment of this Court in *Shankar Das* v. *Jograj Singh* (3), and hold that there is no defect in the registration of the bond in suit which would prevent it affecting the share of the defendant Mannu Lal. The fact of the debt is not disputed, and it is not alleged that it was incurred for any purpose which would exempt the son from the pious obligation of paying it. On the authority of the decision of the Full Bench of this Court in *Badri Prasad* v. *Madan Lal* (4), the plaintiffs are therefore entitled to a decree, against the whole of the joint family property hypothecated in the bond.

[285] We accordingly allow the appeal, and, modifying the decree of the Court below, order that the defendants pay to the plaintiff or into Court the sum of Rs. 7,255-8-0 within three months from the date of this decree, in default whereof the hypothecated property or a sufficient portion thereof shall be sold, and the proceeds of the sale shall be applied in payment of what has been found due to the plaintiffs, and the balance, if any, shall be paid to the persons entitled to the same. The plaintiffs will get future interest on the sum decreed up to the date of realization and proportionate costs from the mortgaged property as well as from the person of the defendant Har Dass Mal. The persons of Babu Ram and Mannu Lal are exempted. The costs will include the costs of this appeal.

In the decree as modified we have left untouched that portion of the decree of the lower Court which awarded future interest as to which no appeal was preferred.

Decree modified.

(1) 1 A. 465.
(2) 16 W.R.C.R. 180.
(3) 5 A. 599.
(4) 15 A. 75.

21 A. 285=19 A.W.N. (1899) 66.

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21 A. 285=19 A.W.N. (1899) 66.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

JAGWANT SINGH AND OTHERS (*Plaintiffs*) *v.* SILAN SINGH AND OTHERS (*Defendants*).* [25th March, 1899.]

Act No. I of 1872 (*Indian Evidence Act*), *s.* 115—*Admission—Estoppel—Admission of point of law no estoppel.*

An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of s. 115 of the Evidence Act. *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (1) and *Gopee Loll* v. *Mussamut Sree Chundraolee Buhoojee* (2) referred to.

[**Appr.**, 3 A.L.J. 534=A.W.N. (1906) 182; 3 N.L.R. 72 (79).]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *Abdul Raoof*, for the respondents.

JUDGMENT.

[286] AIKMAN, J.—This is an appeal by the plaintiff in the suit out of which S.A. No. 402 of 1898, decided this day, arose. As stated in my judgment in that appeal, one Salig Singh died possessed of shares in three villages. The plaintiff sued to recover possession of those shares as Salig Singh's heir. The learned Judge of the lower appellate Court decreed the plaintiff's claim in respect of two of the villages, and dismissed his claim to the share in the third village, Banbhirpur.

It is in respect of this dismissal that the present appeal is brought.

Salig Singh died on the 2nd of October 1894.

On 31st of October 1894 the parties to this suit presented a joint application to the Revenue Court, setting forth the fact of Salig Singh's death, stating that they owned and possessed his share in Banbhirpur in the following way, namely, that the plaintiff owned and possessed one-third, the defendants Babu Lal and Silan Singh one-third, and the defendants Bechu Singh and Ram Karam Singh the remaining third, and praying for mutation of names in accordance with this division. The application was granted. It has been found by the lower Courts that the plaintiff and the two sets of defendants discharged a debt due from the estate of Salig Singh, the plaintiff paying one-third and each set of defendants one-third. The learned District Judge held that the plaintiff was bound by his admission in the mutation proceedings in regard to the share in Banbhirpur, and on this ground dismissed his claim to that share. In appeal here it is contended by the learned vakil for the appellants, who has argued the case very ably, that the plaintiff's admission in the mutation proceedings forms no bar to the assertion of his legal rights in the present suit. I am of opinion that this contention must be sustained. When, in the mutation proceedings, the plaintiff stated that he and the two sets of defendants were, on Salig Singh's death, the owners of his property in Banbhirpur, in equal sharers, he made, no doubt under

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* Second Appeal No. 403 of 1898, from a decree of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 22nd February 1898, modifying a decree of Babu Raj Nath Prasad, Munsif of Azamgarh, dated the 13th December, 1897.

(1) (1872) L.R. Sup. I.A. 47.

(2) 11 B.L.R. 391.

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a misapprehension as to what were his legal rights, a mistaken statement of law. By law the plaintiff was the sole owner.

[287] Now, it has been held that an admission on a point of law is not an admission of a "thing," so as to make the admission matter of estoppel within the meaning of s. 115 of the Evidence Act. In the case of *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore* (1) their Lordships of the Privy Council observed at p. 71 of the judgment:—"The plaintiff is not bound by an admission of a point of law nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled." In the case *Gopee Lall* v. *Mussamut Sree Chundraolee Buhoojee* (2) the validity of an adoption was in question. The plaintiff who maintained the validity of the adoption contended that the defendant was estopped by her previous admissions and conduct from disputing either the fact or the validity of the adoption. As to this plea their Lordships of the Privy Council remark at p. 395 of the judgment:—"It appears to their Lordships there is no estoppel in the case. There has been no misrepresentation on the part of the defendant on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption, which is admitted in fact, was valid in law—a conclusion which, in their Lordships' judgment, is erroneous; but that creates no estoppel whatever between the parties."

So in this case, when the plaintiff stated in the mutation proceedings that the share of Salig Singh in Banbhirpur was in the possession of himself and the defendants, he stated what was a fact. But in stating that on Salig Singh's death he and the defendants became owners of the share, he gave expression to a mistaken proposition of law which, on the authorities quoted above, creates no estoppel as between him and the defendants.

[288] There is another ground also on which I should be prepared to hold that there is no estoppel here. This is not the case of a person who knows or must be deemed to know the real state of things creating by his representation a belief in the mind of a person who does not know the real state of things. For, quite apart from any representation made by the plaintiff, the defendants must be deemed to have known what their legal rights were.

The learned counsel for the respondents endeavoured to support the decree of the lower Court by a plea based on s. 43 of the Code of Civil Procedure. It appears that the plaintiff brought a suit on the allegation that in July 1896 the defendants ousted him from land in Banbhirpur of which he was in joint possession with them, and it is argued that as he did not then claim the whole share in Banbhirpur the provisions of the second paragraph of s. 43 preclude the maintenance of the present suit. I cannot sustain this contention. The cause of action in this suit arose on the death of Salig Singh, and is different from the cause of action in the previous suit, which was the ouster by the defendants in July 1896.

As stated in my judgment in the connected appeal, the learned vakil for the plaintiffs-appellants admits that his clients are not entitled to an unconditional decree, and that the decree in their favour should be made

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(1) (1872) L. R. Sup. I. A. 47.

(2) 11 B. L. R. 391.

subject to their repaying to the defendants the amounts which they disbursed towards defraying the debt due from Salig Singh's estate.

With reference to the above findings I allow the appeal and decree the plaintiff's claim subject to the condition that within three months from the date of this decree being certified to the lower appellate Court, they pay into Court the sum of Rs. 112, out of which Rs. 28 will be paid to each of the four defendants. If the plaintiffs fail to pay the above amount within the time fixed their suit will stand dismissed.

Under the circumstances of the case I direct that the parties bear their own costs throughout.

Appeal decreed.

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21 A. 289 = 19 A.W.N. (1899) 67.

[289] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DWARKA PRASAD (*Defendant*) *v.* LACHHOMAN DAS (*Plaintiff*).*

[4th April, 1899.]

Civil Procedure Code, s. 108—*Decree* ex parte—*Suit to set aside as fraudulently obtained a decree* ex parte—*Application to set aside* ex parte *decree.*

An *ex parte* decree was passed against a defendant. The defendant judgment-debtor applied under s. 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held* that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy* v. *Mohesh Chandra Moitra* (1) followed.

[Rel., 7 Ind. Cas. 163; R., 22 A.W.N. 187 (189).]

THE facts of this case are as follows:—An *ex parte* decree was passed against the plaintiff respondent on the 27th March 1895. The plaintiff applies under s. 108 of the Code of Civil Procedure to have that decree set aside, on the ground that he had never received notice of the suit. The Court (Munsif of Ghazipur) without taking any evidence dismissed the application as barred by limitation. From this order an appeal was preferred which was ultimately dismissed. Subsequently an application for review of the judgment was made under s. 623 of the Code of Civil Procedure; but that application was rejected. The plaintiff then instituted a regular suit in which he prayed that the decree of the 27th March 1895 and all proceedings subsequent thereto might be set aside and declared null and void on the ground that the said decree had been obtained fraudulently by the defendant, (plaintiff in the former suit) without the plaintiff's knowledge on the basis of a fictitious bond, dated the 23rd May 1891. The Court of first instance (Munsif of Ghazipur) dismissed the suit on the ground that it was precluded by the plaintiff's former application under s. 108 of the Code. The plaintiff appealed. The lower appellate Court (Subordinate Judge of Ghazipur) holding with reference to the case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (1) that the suit was not barred, set aside the decision of the Munsif and remanded the case, **[290]** under s. 562 of the Code. From this order of remand the defendant appealed to the High Court.

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*First Appeal No. 134 of 1898, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 19th October 1898.

(1) 24 C. 546.

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21 A. 289 = 19 A.W.N. (1899) 67.

Munshi *Gobind Prasad*, for the appellant.
Babu *Bishnu Chandar Moitra*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The defendant-appellant obtained an *ex parte* decree against the plaintiff-respondent on the 27th March, 1895. The plaintiff made an application under s. 108 of the Code of Civil Procedure to have that decree set aside. That application was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex parte* decree and all the proceedings relating to it were null and void.

The ground upon which this suit was brought was that the defendant had fraudulently and collusively fabricated a bond purporting to be a bond executed by the plaintiff; that in furtherance of that fraud he had obtained an *ex parte* decree without the plaintiff's knowledge, and had secretly and without the knowledge of the plaintiff caused attachment orders to be issued in execution of that decree. The Court of first instance dismissed the suit, being of opinion that it was not maintainable.

The lower appellate Court has set aside the decree of the Court of first instance and remanded the case under s. 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The view of the Court below is supported by the ruling in *Pran Nath Roy* v. *Mohesh Chandra Moitra* (1). The application under s. 108 of the Code of Civil Procedure was never heard on the merits, and the ground upon which the present suit has been brought was never considered by the Court.

We are of opinion that no sufficient ground has been made out for interfering with the lower Court's order. The appeal is dismissed with costs.

Appeal dismissed.

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21 A. 291 = 19 A.W.N. (1899) 68.

[291] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

JHANDAY LAL (*Plaintiff*) *v.* SARMAN LAL (*Defendant*).*
[5th April, 1899.]

Civil Procedure Code, s. 588 (24)—Appeal from order made under s. 485—Remand—Such order of remand not appealable—Civil Procedure Code, s. 562.

Held that no appeal would lie from an order of remand made under s. 562 of the Code of Civil Procedure when such order was itself made in an appeal under s. 588 from an order under s. 485 of the Code. *Mathura Nath Ghose* v. *Nobin Chandra Kunau Biswas* (2) followed.

[R., 3 M.L.T. 249.]

THE plaintiff in this case applied for attachment before judgment of certain property of the defendant, namely, a decree obtained by him in another suit. A conditional attachment order was issued on this application, and notice was sent to the defendant to appear within a week and show cause against the attachment or furnish security to the amount of Rs. 1,200. The defendant appeared within a week from the date when

* First Appeal No. 2 of 1899, from an order of W. F. Wells, Esq., District Judge of Agra, dated the 1st December 1898.

(1) 24 C. 546.

(2) 24 C. 774.

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notice of the abovementioned order was served on him to show cause, but the Court (Munsif of Agra) held that the time was to be counted from the date of the order, and disallowed the defendant's objections. The defendant appealed, and the lower appellate Court (District Judge of Agra) remanded the case to the Munsif under s. 562 of the Code of Civil Procedure, on the ground that the Munsif was wrong in finding the defendant's objections to be barred. Against this order of remand the plaintiff appealed to the High Court.

Babu *Parbati Charan Chatterji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The preliminary objection raised by Mr. *Ghulam Mujtaba* that no appeal lies, must prevail. An order was made against the respondent for attachment before judgment under s. 485 of the Code of Civil Procedure. An appeal was preferred from that order under cl. (24) of s. 588 of the Code, and the lower appellate Court made an order of remand under s. 562. This order of remand is the subject-**[292]** matter of the appeal before us. The last clause of s. 588 provides that orders passed in appeal under that section shall be final. The order appealed from is an order passed under s. 588, and therefore it is final according to the provision referred to above. It is true that s 588 allows an appeal from an order passed under s. 562. But the order of remand from which an appeal is allowable must be an order which was not passed under s. 588. The last paragraph of the section must be read as controlling the whole section and as barring a second appeal, where an appellate Court has made an order, whether for dismissing the appeal or decreeing the appeal or remanding the case before it. This view is supported by the ruling of the Calcutta High Court in *Mathura Nath Ghose* v. *Nobin Chandra Kundu Biswas* (1), with which we entirely agree. We dismiss the appeal with costs.

Appeal dismissed.

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21 A. 292=19 A.W.N. (1899) 82.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ABDULLAH (*Defendant*) *v.* AMANAT-ULLAH AND OTHERS (*Plaintiffs*).*

[6th April, 1899.]

Muhammadan law—Pre-emption—Suit by pre-emptor not entitled to claim the whole of the property sold—Plaintiff not obliged to frame his suit as a suit for the whole.

Held, that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to having regard to the claims of the other pre-emptors. *Amir Hasan* v. *Rahim Bakhsh* (2), and *Durga Prasad* v. *Munsi* (3) referred to. *Kashi Nath* v. *Mukhta Prasad* (4) and *Hulasi* v. *Sheo Prasad* (5) distinguished.

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* First Appeal No. 7 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 22nd December 1898.

(1) 24 C. 774. (2) 19 A. 466. (3) 6 A. 423.
(4) 6 A. 370. (5) 6 A. 455.

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(1899) 82.

THE plaintiffs, five in number, claimed to pre-empt five-sixths of certain property which had been sold to the defendant by one Balua. They did not sue for the whole of the property, [293] because, as stated in the plaint, the defendant vendee was himself possessed of equal rights of pre-emption with the plaintiff. The Court of first instance (Munsif of Azamgarh) dismissed the suit upon the ground that the plaintiffs were bound to have sued for the whole. The plaintiffs appealed. The lower appellate Court (Subordinate Judge of Azamgarh) decreed the appeal and remanded the case to the Munsif under s. 562 of the Code of Civil Procedure. That Court held that as the plaintiffs were not entitled to pre-emption in respect of more than five-sixths of the property sold, they were under no obligation to claim the whole in their plaint. Against this order of remand the defendant appealed to the High Court.

Mr. *Abdul Raoof* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid*, Mr. *Karamat Husain* and Maulvi *Muhammad Ishaq*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is an appeal from an order of remand under s. 562 of the Code of Civil Procedure in a suit for pre-emption based on Muhammadan law. The appellant before us is the vendee and the respondents are the claimants for pre-emption. The vendee is admittedly a person who has the right of pre-emption as against a stranger. The plaintiffs, who are five in number, claimed five-sixths of the property sold to the defendant. The contention before us is that such a claim is opposed to Muhammadan law and should have been dismissed, that the plaintiffs were bound to claim the whole of the property sold, and that not having done so, they were not entitled to the decree which has been granted to them. It is not disputed that according to Muhammadan law, as explained in the ruling of this Court in *Amir Hasan* v. *Rahim Bakhsh* (1), when the purchaser is a person who would as against a stranger have the right of pre-emption, other persons entitled to pre-emption are entitled to get the property divided *per capita* between all the persons possessing the right of pre-emption and claiming such right. Upon this [294] authority, which is not questioned on behalf of the appellant, it is conceded that the plaintiffs could not obtain a decree for more than a five-sixths share of the property sold. It is, however, contended that the plaintiffs were nevertheless bound to claim the whole of the property, although the Court could not decree to them more than a five-sixths share. In support of this contention the learned counsel for the appellant has referred us to the rule of Muhammadan law, which requires that a claimant for pre-emption should not split up the bargain and claim a portion only of the property sold, but should claim the whole of it. He relies on the rulings of this Court in *Kashi Nath* v. *Mukhta Prasad* (2) and *Hulasi* v. *Sheo Prasad* (3). In our opinion these rulings do not support the contention of the learned counsel that in a suit like the present the whole of the property ought to have been claimed. They go no further than to lay down that a plaintiff claiming pre-emption must in his suit include the whole of that portion of the property sold to which his right of pre-emption extends. That this was the intention of the learned Judges who decided the two cases to which we have referred, is evident from the case of *Durga Prasad* v. *Munsi* (4). In his judgment in that case Mr. Justice Mahmood, who was a party

(1) 19 A. 466. (2) 6 A. 370. (3) 6 A. 455. (4) 6 A. 423.

to the decisions relied on, observes :—" I have no hesitation in laying down the general rule that every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger, and that a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the very nature and essence of the pre-emptive right." As we have said above, it is conceded in the present case that even if the plaintiffs had claimed the whole of the property they could not have obtained a decree for a larger share than the five-sixths which they claimed in the plaint. **[295]** On the authority of the ruling in *Amir Hasan* v. *Rahim Bakhsh* referred to above, their right of pre-emption extended to a five-sixths share only, and as they have claimed that share we are unable to hold that in doing so they have transgressed any rule of Muhammadan law. The learned counsel on both sides have referred us to original authorities of Muhammadan law which have been translated and laid before us, and we are indebted to the learned counsel for the help they have thereby rendered to us. But we are unable to find anything in the authorities cited which requires that, whatever may be the extent of the share to which the pre-emptor may be entitled by virtue of his right of pre-emption, he is bound in his suit to claim the whole of the property sold to the vendee when the vendee is himself a pre-emptor. It is true that every person having the right of pre-emption is entitled to pre-empt the whole property sold, but when more persons than one have equal rights of pre-emption, there exists what the authorities of the Muhammadan law call an *impediment* to pre-emption, and unless the impediment is removed by the rival pre-emptor "relinquishing the right before the establishment of his ownership," the remaining pre-emptor is not entitled to the whole. "It is mentioned in Nihaya that when one of them surrenders his right the only alternative for the other is either to take the whole or relinquish it." (Radd-ul-Muhtar, Egyptian edition, p. 216.) It follows that where the purchaser is himself a pre-emptor, one of several pre-emptors is entitled to the whole only when the purchaser surrenders the purchase. Where no such surrender has been made the several persons entitled to pre-emption who claim their right of pre-emption have only the right to get the property equally divided *per capita*. The passage from the Fatawa Alamgiri cited on page 472 of I. L. R., 19 All., establishes this proposition. That passage is as follows :—"If a person purchases a house of which he is a pre-emptor, and then appears another pre-emptor having an equal right with him, the Qazi (Judge) will pass a decree for one half." It is urged that **[296]** as a purchaser has the option of surrendering the property at any time before decree, it is the duty of a person claiming pre-emption to claim the whole property. The authorities on this point are somewhat conflicting, but we think that the conflict has been well reconciled by the author of the Radd-ul-Muhtar in the work called Tankih Hamidia, Vol. ii, Egyptian edition, page 182, in the following passage, which has been translated for us :—"It seems that the meaning is this, that when he (pre-emptor) wishes to take a portion after having made the immediate demand and the demand with invocation of witnesses, the right is not extinguished, but if he demands a portion in the beginning, his right of pre-emption falls to the ground." This passage shows that what the Muhammadan law requires is that the immediate demand and the demand by invocation of witnesses should be made in respect of the whole property

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21 A. 292=19 A.W.N. (1899) 82.

sold which the pre-emptor would have been entitled to claim had it been sold to a stranger instead of to one having an equal right of pre-emption with him. But this does not require that when a claimant for pre-emption who has complied with the above rule has to resort to a Court to enforce his right against a purchaser who is himself a pre-emptor within the meaning of the Muhammadan law, he is bound to claim anything beyond what he is entitled to obtain. We have not been referred to any authority which goes the length of directing that in such a case the suit must relate to the whole of the property sold, although the plaintiffs might be entitled to a decree for a portion of it only. The purchaser, who is himself a pre-emptor, is given the option of surrendering the whole upon the immediate demand and the demand by invocation of witnesses being made. When he makes such a surrender there is no occasion for resorting to a Court to enforce any right. When, however, a surrender has not been made, but, as in this case, the plaintiff's right of pre-emption is denied before suit, and his demand is resisted, there is no obligation upon the plaintiff to claim anything in excess of what he is legally entitled to. This is consistent with the rule of [297] justice, equity and good conscience which is the rule applicable to cases of pre-emption, and there is nothing in the Muhammadan law, as far as we are aware, which militates against it. This appeal must fail. We dismiss it with costs.

Appeal dismissed.

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21 A. 297=19 A.W.N. (1899) 72.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Knox.

KAUSALIA AND OTHERS (*Defendants*) *v.* GULAB KUAR AND OTHERS (*Plaintiffs*).* [7th April, 1899.]

Landholder and tenants—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, s. 561—*Appeal—Objections by respondents—Letters Patent, s.* 10.

Held, that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Imdad Khatun* v. *Bhagirath* (1), *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2) and *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3) referred to.

Held also that s. 561 of the Code of Civil Procedure is not applicable to appeals under s. 10 of the Letters Patent.

[F., 23 A. 211; Appr., 4 N.L.R. 104 (111); R., 37 C. 322=11 C.L.J. 209=14 C.W.N. 487 (491)=5 Ind. Cas. 243; 3 A.L.J. 385=A.W.N. (1906) 140; 18 M.L.J. 157=3 M.L.T. 248; D., 29 A. 484=4 A.L.J. 452=A.W.N. (1907) 150.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal*, for the appellants.

Babu *Devendro Nath Ohdedar*, for the respondents.

JUDGMENT.

KNOX, J. (STRACHEY, C.J., concurring).—The respondents to this appeal (plaintiffs in the Court of first instance) came into Court as zamindars or landholders of certain land, situate within which was a grove of

* Appeal No. 24 of 1898, under s. 10 of the Letters Patent.

(1) 10 A. 159. (2) 22 C. 742. (3) 11 M. I.A. 295.

trees. Their position as zamindars was expressly admitted by all the defendants who now appear as appellants in the appeal before us. Their claim was for an injunction to restrain the defendants from cutting and selling the trees in this grove and for the recovery of damages or compensation on account of certain trees, which, according to them, some of the [298] defendants had illegally sold to other of the defendants, and which trees the last named defendants had illegally sold. The plaintiffs in a replication filed by them on the 21st of March 1896, admitted that they were not the owners of these trees, but only of the ground on which the trees stood. The District Judge of Allahabad upon hearing the appeal from the Court of the Munsif, who had dismissed the claim, held that the burden of proving that they had a right to the relief they sought lay upon the plaintiffs. He held it was for them to prove the custom set up by them, *viz.*, that they were empowered to interfere with the defendants and to prevent them from cutting and selling the trees standing in the grove in dispute, and that, as they had failed to prove it, their claim was rightly dismissed, and he accordingly dismissed the appeal before him.

The plaintiffs then came to this Court and impugned the judgment of the District Judge, first, upon the ground that the burden of proof had been wrongly laid upon them; and, secondly, upon the ground that, if it did lie upon them, the entries in the wajib-ul-arz, which they had proved and which were in their favour, sufficed to shift the burden of proof on to the respondents. The appeal was heard by Mr. Justice Burkitt. That learned Judge, following the precedent laid down in *Imdad Khatun* v. *Bhagirath* (1) held that the property in trees growing on land in agricultural villages and on occupancy holdings vests in the zamindar subject to any customary right which may be established by tenants to cut down and to remove or take the produce of the trees. The entries in the village record-of-rights, he considered, did not in any way affect the question. He called for a finding upon the issue:—Have the defendants established by evidence any legal binding custom authorizing them to cut down and sell or otherwise dispose of the trees standing in the disputed grove? The finding on this issue was against the respondents, and the appellants' (plaintiffs') claim, so far as regards the injunction asked for by them, was granted.

[299] The defendants have now come under the Letters Patent, s. 10, and ask us to reconsider the question of burden of proof. They made no attempt to deal with the precedents cited in the judgment now appealed from. Their case was that upon the pleadings the issue remitted did not arise. It had been admitted that they were owners, and their contention was that so long as they continued to occupy the grove they had a perfect right to deal with the trees as they chose.

On referring to *Imdad Khatun* v. *Bhagirath* (1) we find that in that case, as in the present, the trees were the property of occupancy tenants, and the suit was a suit brought by the zamindar for cancelment of a deed of sale under which the tenants, relying on their right as owners of the trees, had purported to sell them to others. Upon a review of earlier cases decided by this Court the learned Judge who decided that appeal found that the trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such occupancy holding, and like it are not susceptible of transfer by the occupancy holder. It does not appear in the case before us what was the precise

(1) 10 A. 159.

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21 A. 297 = 19 A.W.N. (1899) 72.

nature of the appellants' holding, but unless it were the holding of an exproprietary tenant, it could not be a holding susceptible of transfer. It it nowhere pleaded, and it certainly would have been pleaded had there been any ground for it, that the tenancy was an exproprietary tenancy.

The case of *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (1) was a similar case. There two Judges of the Calcutta High Court, after considering a number of cases on the point, held that the property in trees on a tenant's holding is by the general law vested in the zamindar. In *Ruttonji Edulji Shet* v. *The Collector of Tanna* (2) the Privy Council decided that the trees are part of the land on which they stand, and the right to cut them down and sell them is incident to the proprietorship of the land. Much was made of the admission by the respondents **[300]** that they were not the owners of the trees on the grove, but of the ground under the trees and of the claim being based on custom and usage as recorded in the village administration paper. But this admission must be read with paragraph 3 of the plaint. The two read together satisfy us that the admission was intended to be that while the defendants (appellants) were in possession, and the respondents were not owners in the sense of full and unlimited ownership, still they were owners of the ground on which the trees stood, and by virtue of this claimed the right to restrain the appellants from cutting down and selling the trees at the free will and pleasure of the latter.

In this view of the case we think the burden of proof was rightly laid and that the appellants did not prove any custom derogating from the general law.

The respondents have filed a paper which they term objections under s. 561 of the Code of Civil Procedure. Section 561 is a section which applies to appeals from original decrees. It is true that s. 590 of the Code makes the provisions of this section applicable, so far as may be, to appeals from orders, and s. 587 similarly makes them applicable to second appeals, but no statute or rules have been pointed out to us making the terms of this section applicable to Letters Patent appeals. Nor can it be pointed out that the section has ever been made use of in Letters Patent appeals.

We dismiss the appeal with costs to be borne by the appellants and we also disallow the objections with costs. The costs of the appellants, so far as the objections are concerned, will be borne by the respondents.

Appeal dismissed.

(1) 22 C. 742.

(2) 11 M.I.A. 295.

21 A. 301=19 A.W.N. (1899) 78.

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21 A. 301=19 A.W.N. (1899) 78.

[301] *Before Mr. Justice Banerji and Mr. Justice Aikman.*

DHARAM SINGH AND OTHERS (*Defendants*) v. ANGAN LAL AND OTHERS (*Plaintiffs*).* [8th April, 1899.]

Hindu Law—Joint Hindu family—Liability of sons to pay debts incurred by father—Creditors remedy against sons not barred by reason of his having sued the father separately—Mortgage—Act No. IV of 1882 (Transfer of Property Act), s. 85.

Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt.

Lachmi Narain v. *Kunji Lal* (1); *Balmakund* v. *Sangari* (2); *Bhawani Prasad* v. *Kallu* (3) *Ramasami Nadan* v. *Ulaganatha Goundan* (4); *Ariabudra* v. *Dorasami* (5) and *Nanomi Baburain* v. *Modhun Mohun* (6) referred to.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (7); *Dhunput Sing* v. *Sham Soonder Mitter* (8) and *Hoare* v. *Niblett* (9) referred to.

[F., 23 A. 355 (359); 29 A. 544 (549, 550)=4 A.L.J. 424=A.W.N. (1907) 159; R., 22 A. 307 (311, 318); 22 A. 394 (398); 25 A. 57 (59); 25 A. 162 (164); 11 A.L.J. 402 (406)=18 Ind. Cas. 904 (906); 5 C.L.J. 315=11 C.W.N. 403 (406); 6 C.L.J. 612 =12 C.W.N. 107; 9 O.C. 350 (352); 11 O.C. 334 (336); D., 7 O.C. 137 (140, 141).]

THE facts of this case sufficiently appear from the judgment of BANERJI, J.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the respondents.

JUDGMENT.

BANERJI, J.—For a proper understanding of the questions raised in this appeal it is necessary to state the following facts. [302] One Lekhraj, whose sons and grandsons are the appellants before us, executed two mortgages in respect of the same property, which was ancestral property, in favour of Bhawani Prasad, the deceased father of the plaintiff-respondents, on the 29th of June, 1879, and the 30th of July, 1880. Bhawani Prasad sued Lekhraj upon the mortgages and obtained a decree for sale on the 18th of August, 1887. He did not make the present appellants parties to his suit. The mortgaged property was sold by auction on the 23rd of July, 1889, in execution of the decree, and the present plaintiffs (Bhawani Prasad having in the meantime died) purchased it. Lekhraj had mortgaged the same property to one Chandan Singh on

* First Appeal No 267 of 1896, from a decree of Rai Anant Ram, Additional Subordinate Judge of Aligarh, dated the 30th June 1896.

(1) 16 A. 449. (2) 19 A. 379. (3) 17 A. 537.
(4) 22 M. 49. (5) 11 M. 413. (6) 13 C. 21.
(7) 3 C. 353. (8) 5 C. 292. (9) L.R. (1891) 1. Q.B. 781.

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21 A. 301 = 19 A.W.N. (1899) 78.

the 30th of November, 1874. Sobha Ram and Ganesh Lal, the sons of Chandan Singh, brought a suit upon that mortgage, obtained a decree, and in execution of it caused the mortgaged property to be advertised for sale. Thereupon the present plaintiffs who, as stated above, had already purchased the property, satisfied the decree on the 21st of December, 1889, by payment of Rs. 1,612-14-5, the amount due upon it, and remained in possession of the property. On the 26th of November, 1895, Dharam Singh, Bhawani Singh, Jiwa Ram and Ram Charan, the four sons of Lekhraj, sued the present plaintiffs for recovery of possession of a four-fifths share of the property, on the ground that the property was ancestral, that they had not been joined as parties to the suit brought by Bhawani Prasad upon his mortgages, and that the decree obtained by Bhawani Prasad could not consequently affect their interests in the property. On the 11th of March, 1896, a decree was passed in their favour on the strength of the ruling of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (1). Thereupon the present suit was instituted on the 25th of March. 1896, against the sons and grandsons of Lekhraj, to recover four-fifths of the amount due under the mortgages in favour of Bhawani Prasad, and of the amount paid by the plaintiffs on account of Chandan's mortgage by sale of the four-fifths share of **[303]** the mortgaged property for which the sons of Lekhraj had obtained their decree.

The Court below has decreed the greater portion of the claim. The defendants have preferred this appeal, and the plaintiffs have taken objections under s. 561 of the Code of Civil Procedure.

In order to clear the ground it may be stated that it is not contended in this appeal that the debts incurred by Lekhraj, in respect of which decrees for sale were obtained, were tainted with immorality, nor is it suggested that they were not in fact incurred, or that at the time when the suits for sale were instituted against Lekhraj the claims of the mortgagees were time-barred. It may also be observed that, although in the memorandum of appeal to this Court pleas were taken to the effect that ss. 13 and 43 of the Code of Civil Procedure barred the claim, the learned advocate for the appellants did not press those pleas. Having regard to the fact that the present defendants were not parties to the suits brought against Lekhraj those pleas could not be sustained. The only contention of the learned counsel in the argument before us was, that the original mortgagees having sued their mortgagor, Lekhraj, upon the mortgages executed by him. and obtained decrees which were enforced, it was not open to the plaintiffs who stand in the shoes of the mortgagees to maintain the present suit in respect of the same debts. He does not urge that s. 85 of the Transfer of Property Act, 1882, stands in the way of the plaintiffs and precludes them from bringing this suit. He concedes that, although the sons of the mortgagor, of whose interests in the mortgaged property the mortgagees had notice, were necessary parties to the morgagees' suits, and the result of the omission to join them in the suits was, according to the rulings of this Court, that the suits were liable to dismissal, there is nothing in s. 85 which forbids the institution of a second suit against persons who were not parties to the former suits. This is what was practically held by the Full Bench in *Balmakund* v. *Sangari* (2).

[304] Mr. *Ram Prasad*, however, argues that on general principles

(1) 17 A. 537.

(2) 19 A. 379.

a second suit is not maintainable after judgment has been obtained and recovered upon the original debt. He refers to the case of joint obligors of a bond and to the rule which obtains in England that "a judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others." (See Leake on Contracts, 3rd edition, page 808) and the cases cited therein. See also *Hoare* v. *Niblett* (1). Whether the law in this country is the same or not, it is not necessary in this case to decide, as I am of opinion that the analogy of the liability of joint debtors under the same contract does not apply to the case of the pious liability of a Hindu son for the debt of his father not tainted with immorality. Such liability arises, not from the contract entered into by the father, but from the fact that he is the son of the father and that the debt incurred by the father is of such a nature that it is the duty of the son to pay it. It is a liability which the Hindu law imposes on the son, and is independent of the contract made by his father. Whether the debt of the father has merged in a decree, or whether it subsist as a debt in respect of which no decree has been passed, the son is liable for it, provided that it was not incurred for immoral or impious purposes. The question we have to determine is whether the creditor's remedy against the son for the enforcement of the latter's liability is lost to the creditor by reason of his omitting to make the son also a party to the suit against the father. Their Lordships of the Privy Council have held in several well known cases, to which it is unnecessary to refer in detail, that the son's liability for his father's debt is unaffected by the procedure to which the creditor may have resorted against the father alone for the recovery of the debt. In *Nanomi Babuasin* v. *Modhun Mohun* (2) their Lordships said :—"The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against the creditor's remedies for their debts, if not [305] tainted with immorality." "If the father's debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." From these observations of their Lordships it is clear that, despite the passing of a decree against the father alone, the son may bring a suit to try the fact and the nature of the debt of the father. Upon the same principle on which a suit is allowable to the son, it seems to me it is open to the father's creditor to bring a suit against the son to establish the latter's obligation to pay his father's debt. In the case of a debt not secured by a mortgage it was held by this Court in *Lachmi Narain* v. *Kunji Lal* (3) that "if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in suit against the son." That ruling was approved of in the Full Bench case of *Bhawani Prasad* v. *Kallu* (4), and is an authority, so far as this Court is concerned, for the proposition that, although a decree may have been obtained against the father, a subsequent suit is maintainable against the son, in respect of the same debt, for the enforcement of the son's liability for it. In the case of a simple debt the creditor could, if he had so chosen, have made the son a party to

(1) L.R. (1891) 1 Q.B. 781.
(2) 13 C. 21.
(3) 16 A. 449.
(4) 17 A. 537.

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his suit against the father [see *Ramasami Nadan* v. *Ulaganatha Goundan* (1)]. The fact of his omitting to implead the son in his first suit has been held not to preclude him from suing the son afterwards. In my opinion there is no difference in principle, so far as the present question is concerned, between the case of a debt secured by a mortgage and a simple money-debt. In the case of a mortgage-debt the creditor was bound under s. 85 of Act No. IV of 1882, as interpreted by this Court, to make the son a party to his suit, if he had notice of the son's interests. **[306]** The effect of his omission to do so is that the decree obtained against the father alone is not enforceable as such against the son's interests in the mortgaged property, and this is what was held by the majority of the Full Bench in *Bhawani Prasad* v. *Kallu*, referred to above. I am unable to hold that in the case of a mortgage-debt the creditor is in a worse position than the holder of an unsecured debt. As regards debts of both descriptions the liability of the son to pay them is the same. If in the one case the creditor is not precluded from bringing a subsequent suit against the son to enforce the latter's liability, I can see no principle or rule of law which bars a similar suit in the other. It is conceded that s. 85 of the Transfer of Property Act, 1882, is no bar to it. In *Bhawani Prasad* v. *Kallu* the argument proceeded on the assumption that such a suit would be maintainable. In my dissentient judgment in that case I said, at p. 549 :—"It is said that the creditor will not be without his remedy, and that he will still be able to bring a suit against the sons to enforce his mortgage against their interests in the ancestral estate on the ground of their pious obligation to pay their father's debts. It cannot possibly be held that no remedy will be open to the creditor, as such a decision will render the rulings of their Lordships of the Privy Council on the question of the liability of Hindu sons in respect of their father's debts wholly nugatory." To this view I still adhere, and I do not find from the report that on this point my learned colleagues expressed a different opinion. In *Ariabudra* v. *Dorasami* (2) it was held by the Madras High Court that "an execution-creditor is not precluded from instituting an independent suit against the appellants [sons] to recover from them the balance of the judgment-debt which remained unsatisfied, to the extent of the value of the ancestral property which had come to their hands." That was a case in which a mortgagee, who had obtained a decree for sale against the father without joining the sons as parties, brought a suit against the sons to recover the **[307]** balance of the judgment-debt from their interests in the mortgaged property, the Court executing the decree having allowed the objections of the sons respecting the sale of those interests. That case is therefore very similar to the present case, and supports the respondent's contention that a suit like the present is maintainable. The learned Judges who decided that case repelled the plea that s. 244 of the Code of Civil Procedure was a bar to it, and held that the limitation applicable to it was that prescribed for a suit to enforce a mortgage. I agree with the view of the learned Judges, and hold that a suit like the present, in which it is sought to enforce against Hindu sons their pious obligation in respect of their father's debts not tainted with immorality, is maintainable, whether the debts were or were not secured by a mortgage, and whether a decree in respect thereof has or has not been obtained against the father alone. We have not been referred to any ruling in which a contrary view has been held,

(1) 22 M. 49.

(2) 11 M. 413.

1899
APRIL 8.
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and I think the principle of the unreported judgment of my brothers Blair and Burkitt in second appeal No. 426 of 1898, decided on 20th July, 1898, to which the learned vakil for the respondents has invited our attention, to some extent favours the respondents' case.

As I have already said, the analogy of a decree against one of several joint promisors does not apply to a case of this description. The obligation of joint contractors has been held to be single and undivided, and the cause of action against them to be one and the same. It was observed by Garth, C. J., in *Hamendro Coomar Mullick* v. *Rajendro Lall Moonshee* (1), "that the cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors whom he chooses to sue. If a plaintiff under such circumstances were allowed to sue each of his co-debtors severally in different suits, he would be practically changing a joint into a several liability." It has been held that where the obligation is joint and several "a decree obtained against one of the promisors **[308]** without satisfaction is no bar to a suit against another."—(*Dhunput Singh* v. *Sham Soonder Mitter* (2)). The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father; and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. A judgment recovered against the father only does not therefore bar a suit against the son. The fact of the mortgaged property having been once sold by auction in execution proceedings against the father alone does not amount to a satisfaction of the decree, where, as in this case, a large part of the property sold has been taken out of the hands of the creditor, purchaser, by the sons on the ground that they were not joined as parties to the creditor's suit. As four-fifths of the property which the creditor purchased at auction in satisfaction of his debt has been decreed to the sons, and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied. And as it has not been established that the debt was tainted with immorality, the sons, defendants in this case, are liable for it. There may, it is true, be instances in which the interests of the father alone fetched at auction-sale a price sufficient for the complete satisfaction of the debt. In such a case, there would be no debt of the father due to the creditor for which the latter might proceed against the sons. But it has not even been hinted that this is a case of that description. The plaintiffs were therefore entitled to claim the amount decreed to them. No objection was taken in the argument before us as to the form of the decree passed by the Court below. As no other point was argued before us, this appeal must fail and be dismissed with costs.

The objections under s. 561 of the Code of Civil Procedure are not pressed and are dismissed with costs.

AIKMAN. J,—I concur.

Appeal dismissed.

(1) 3 C. 353.

(2) 5 C. 291.

1899
APRIL 26.

APPELLATE CIVIL.

21 A. 309=19 A.W.N. (1899) 87.

21 A. 309=19 A.W.N. (1899) 87.

[309] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

MUHAMMAD HAMID-UD-DIN (*Plaintiff*) *v.* SHIB SAHAI AND OTHERS (*Defendants*).* [26th April, 1899.]

Mortgage—Sale of mortgaged property under a decree other than a decree on the mortgage—Mortgage not disclosed—Effect of such non-disclosure on mortgagee's rights under his mortgage—Estoppel.

Held that a mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decre obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage lien is estopped for ever from setting up that lien against the title of a *bona fide* purchaser. *Agar Chand Guman Chand* v. *Rakhma Hanmant* (1) and *Dullab Sirkar* v. *Krishna Kumar Bakshi* (2), followed.

[R., 35 C. 61=6 C.L.J. 320=11 C.W.N. 1011; 15 C.W.N. 748 (752)=9 Ind. Cas. 1034 (1037); 14 C.P.L.R. 17 (20); 2 N.L.R. 106.]

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. *Conlan* and Mr. *Amiruddin*, for the appellant.

Pandit *Sundar Lal* and Mr. *J. Simeon*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—This first appeal arises out of a suit in which one Hamid-ud-din claims possession of a 2½ biswa share in certain muafi land and two sihams out of 40 sihams of mauza Mahesra. He also claims a declaration of his right and title to three sihams of the same milk in the possession of mortgagees. In 1871, Harsahai, the ancestor of the present defendants, brought a suit upon a hypothcation bond of 1865 and got a decree in 1871. In the year 1872, he obtained decrees upon two other hyhothecation bonds. The decree of 1871 was a decree upon a bond given by one of two brothers in which he hypothecated a 5 biswa share in mauza Mahesra. The bonds upon which the decrees were obtained in 1872 were bonds executed by both brothers hypothecating the same shares. The decrees of 1872 were first put into execution and one-half of the hypothecated property was sold, the price of that half satisfying the two decrees. In 1879 Harsahai attached and sold in execution of a money-decree, the 2½ biswas which remained unsold upon the execution of the previous **[310]** decrees and purchased them himself in the name of his son. He then proceeded to put into execution the decree of 1871, and in execution of that decree a proclamation of sale was made, and he put up for sale and himself purchased the one-half of the property which had been sold under the decree of 1872. The purchaser under the decree of 1872 is the plaintiff here. He now seeks to recover possession of that two-and-a-half biswas. It has been contended on behalf of the appellant that the Subordinate Judge has wrongly found against him upon two issues fatal to his case. He has found first of all, that his claim is barred by limitation, the defendant having been in possession of the property for more than twelve years. He has also found that the plaintiff, when he purchased the shares at the sale of 1872, had notice of the decree of 1871 held by Harsahai.

* First Appeal No. 52 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated 11th December, 1896.

(1) 12 B. 678.

(2) 3 B.L.R. 407.

The finding of limitation is apparently based upon no evidence, and such evidence as we have before us shows that within the period of twelve years the defendants have filed a suit in which they allege dispossession of themselves. That suit was filed against the present plaintiff for the profits he had, as was alleged, received during the period of such dispossession. Upon the question of notice, we find that the Judge relies upon evidence of certain payments made at a period years after the sale for satisfaction of some lien. It has been shown to us to demonstration by documents on the record that such payments did not refer to the lien of Harsahai, the right to enforce which is disputed in the present suit; and indeed proof of knowledge at any time subsequent to the sale will be no proof of knowledge at the time of sale. Our attention has been called to two cases which seem to us accurately in point. The case of *Agar Chand Guman Chand* v. *Rakhma Hanmant* (1) and the case of *Dullab Sirkar* v. *Krishna Kumar Bakshi* (2). In those cases it was held that a decree-holder who, having a prior incumbrance, puts up for sale in execution of another decree such property without notifying that he has such a lien, is estopped for ever from setting up that lien against the title of a *bona fide* purchaser. Those rulings are not [311] merely an authority, but they are founded upon elementary principles of equity. It is manifest in this case that the sale of the property as unincumbered was a *mala fide* sale and fraud upon all intending purchasers.

For these reasons we allow the appeal, set aside the decree of the Court below, and decree the suit of the plaintiff in terms of the prayer in the plaint, with costs.

Appeal decreed.

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21 A. 311 = 19 A.W.N. (1899) 84.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHEODHYAN AND ANOTHER (*Objectors*) *v.* BHOLANATH AND OTHERS (*Opposite Parties*).* [27th April, 1899.]

Civil Procedure Code, s. 311--Execution of decree—Sale in execution—Sale without previous attachment—Material irregularity.

Held that the absence of an attachment prior to the sale of immoveable property in execution of a decree amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. *Ram Chand* v. *Pitam Mal* (3); *Ganga Prasad* v. *Jag Lal Rai* (4); *Harbans Lal* v. *Kundan Lal* (5) and *Tasadduk Rasul Khan* v. *Ahmad Husain* (6), referred to; *Mahadeo Dubey* v. *Bholanath Dichit* (7), distinguished.

[R., 34 C. 811 = 5 C.L.J. 696 = 11 C.W.N. 756; 5 C.L.J. 687 (690); 13 C.L.J. 243 (249) = 9 Ind. Cas. 918 (922); 24 M.L.J. 70 = 13 M.L.T. 207 = M.W.N. (1913) 136 = 18 Ind. Cas. 498 (499); 6 Ind. Cas. 713 (714) = 40 P.R. 1910 = 211 P.L.R. 1910 = 63 P.W.R. 1910; 18 Ind. Cas. 715 (717); 13 O.C. 43 (47) = 5 Ind. Cas. 798.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

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* First Appeal No. 6 of 1899, from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Moradabad, dated the 7th January 1899.

(1) 12 B. 678. (2) 3 B.L.R. 407. (3) 10 A. 506. (4) 11 A. 333.
(5) 18 A.W.N. (1898) 212. (6) 21 C. 66. (7) 5 A. 86.

1899

APRIL 27.

APPELLATE CIVIL.

21 A. 311 = 19 A.W.N. (1899) 84.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This is an appeal from an order refusing to set aside an auction-sale of the property of the appellants, held in execution of a decree obtained by the respondents against the appellants. It appears that a portion of the said property had been attached before judgment, that after the decree was passed an application for execution was made, and that thereupon the remainder was also attached in the manner provided by law. The property was then sold, but the sale was set aside on the ground of material irregularity in publishing and conducting it. This was on the 23rd of April 1898. On that date the Court made [312] a further order that the decree-holders should take further steps on the 25th of that month. On the 25th the decree-holders do not appear to have made any further application, and thereupon the case was removed from the file of pending cases. On the 6th of May following the decree-holders presented another application for execution and prayed for the sale of the six villages which have now been sold. The property was not attached a second time, but the usual proclamations of sale were issued, and the sale actually took place on the 20th of August 1898. We notice that, during the pendency of the execution proceedings and before sale, the judgment-debtors filed an application on the 11th of August 1898, in which they stated that the property had been attached. This application was made in connection with the decree-holders' prayer for the arrest of the judgment-debtors. After the auction-sale of the property on 20th of August 1898, the judgment-debtors applied to have the sale set aside on various grounds, one of which was that after the case had been struck off the file on the 25th of April 1898, the attachment of the property had come to an end; that the sale of the 20th of August 1898 was effected without a fresh attachment; and that the sale was consequently illegal and void. The Court below overruled the objections and confirmed the sale. It found that the judgment-debtors had not sustained any injury in consequence of the irregularities alleged by them. This finding has not been questioned in the appeal before us, so that we may take it that the judgment-debtors have not suffered any substantial loss within the meaning of s. 311 of the Code of Civil Procedure. It is urged before us that, by the striking off of the execution case on the 25th of April 1898, the attachment which had been placed upon the property had determined, and that by reason of the property not being attached a second time there was an illegality in the sale which vitiated the sale. On the question of the effect which the striking off of an execution case has upon an attachment of property made in the case, there is a conflict of authority, but in the view which we take of this case we do not think it necessary to enter into a consideration of that question. In our opinion the [313] absence of attachment, assuming in this case that the property was sold without a previous attachment which subsisted at the date of sale, did not amount to anything more than a material irregularity in the publishing of the sale. An attachment is a step towards the sale of the judgment-debtor's property. The object of an attachment is to bring the property under the control of the Court, with a view to prevent the judgment-debtor alienating it, and thereby preventing its sale in execution of the decree. In the case of immoveable property, one of the requirements of the law for perfecting an attachment is that the order of attachment should be publicly proclaimed. The main object of the proclamation of the order is to give publicity to the fact that the sale of the

particular property attached is in contemplation, and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder enforceable under the decree. The publication of the attachment is thus a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may therefore be deemed to be a material irregularity in the publishing of the sale. That was the view taken in the case of *Ram Chand* v. *Pitam Mal* (1). We were much pressed with the Full Bench decision in *Mahadeo Dubey* v. *Bholanath Dichit* (2); but it seems to us that the principle of the ruling of their Lordships of the Privy Council in *Tasadduk Rasul Khan* v. *Ahmad Husain* (3) makes the decision in *Mahadeo Dubey* v. *Bholanath Dichit* inapplicable to the present question. In that case their Lordships of the Privy Council held, with reference to a proclamation of sale issued in violation of the provisions of s. 290 of the Code of Civil Procedure, that that was nothing more than a material irregularity, and did not *ipso facto* vitiate the sale, as had been held by this Court in *Ganga Prasad* v. *Jag Lal Rai* (4). The same principle applies **[314]** to the question before us, and this seems to have been the opinion of the learned Judges who decided the case of *Harbans Lal* v. *Kundan Lal* and others (5). In this view it is not necessary to consider the effect of s. 490 of the Code of Civil Procedure or of the striking off of the execution case on the 25th of April 1898 upon the question of attachment. As the absence of attachment was in our opinion, a material irregularity in publishing the sale, and as it has not been proved in this case that such irregularity resulted in substantial injury to the judgment-debtors, the Court below was right in refusing to set aside the sale. We dismiss the appeal with costs.

Appeal dismissed.

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21 A. 314 = 19 A.W.N. (1899) 86.

APPELLATE CIVIL.

Before Mr. Justice Blair, and Mr. Justice Burkitt.

CHETAN CHARAN DAS AND OTHERS (*Defendants*) *v.* BALBHADRA DAS (*Plaintiff*).* [28th April, 1899.]

Parties to a suit—Death of plaintiff after hearing but before judgment—Judgment given by Court in ignorance of plaintiff's death—Judgment and decree valid—Doctrine of nunc pro tunc.

The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour of the deceased plaintiff. *Held*, that, nothing remaining to be done by the parties on the day when judgment was reserved, the judgment should read as from that date, and the decree was a valid decree. *Cumber* v. *Wane* (6), *Ramacharya* v. *Anantacharya* (7) and *Surendro Keshub Roy* v. *Doorgasoondery Doossee* (8), followed.

[F., 6 C.L.J. 547 = 12 C.W.N. 590; 9 C.W.N. 710 (719); **R.**, 30 A. 505 = 5 A.L.J. 658 (659) = A.W.N. (1908) 228; 26 M. 101 (102); 14 C.W.N. 759 (764); 4 Ind. Cas. 137 = 11 Bom. L.R. 1070.**]**

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* First appeal No. 50 of 1897, from a decree of Maulvi Saiyid Muhammad Sirajuddin, Subordinate Judge of Agra, dated the 15th September 1896.

(1) 10 A. 506.
(2) 5 A. 86.
(3) 21 C. 66.
(4) 11 A. 333.
(5) 18 A.W.N. (1898) 212.
(6) 1 Smith L.C. 10th Ed. 325.
(7) 21 B. 314.
(8) 19 C. 513.

1899

APRIL 28.

APPELLATE CIVIL.

21 A. 314= 19 A.W.N. (1899) 86.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard* and Munshi *Ram Prasad*, for the appellants.

Mr. *D. N. Banerji*, *Babu Jogindro Nath Chaudhri* and Babu *Satya Chandar Mukerji*, for the respondent.

JUDGMENT.

[315] BLAIR and BURKITT, JJ.—The first of the long list of the grounds of appeal in this case which was argued before us was the 11th. It is couched in the following words:—"Because the decree in the suit was illegally passed after the death of the plaintiff without any person being brought on the record as his representative." The facts are, that the trial was concluded, arguments were heard, and the judgment was reserved on the 5th of September 1896. The plaintiff died on the 9th of September 1896. He was then absent in Orissa, and his death was unknown to any of the parties or to the Court. Judgment was delivered, and the decree was passed on the 15th of September 1896. It was argued on behalf of the appellants that the suit abated from the moment of the death of the plaintiff, and that the Court was incompetent to pass a decree, no representative of the deceased having been put on the record. This is a matter which has long been disposed of in England by the application of a large general principle of law *actus curiæ nemini facit injuriam*. That principle was applied in the leading case of *Cumber* v. *Wane* (1). A defendant in error died after the time when the Court took time to consider. It was prayed that the judgment might be entered *nunc pro tunc*; in other words, that the judgment should be dated as of the day when the Court reserved its decision, and to that prayer the Court acceded. Such has been the invariable practice in England; and that practice finds expression in the rules framed under the Judicature Act of 1875. It seems to us that the decision to which we have referred and the subsequent practice of the Courts are consistent with justice and good sense. Nothing was left to be done by the parties from the moment the judgment was reserved. Any delay which took place was the delay of the Court, and we are not surprised to find that the English practice has been followed by the Courts in this country, notably in the case of *Ramacharya* v. *Anantacharya* (2). No case to the contrary has been cited before us. A similar view has been taken by the **[316]** Privy Council in the case of *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (3). We think that that decision amounts to an authority which this Court is bound to follow. We follow it accordingly. Our ruling in this case must be taken to be strictly limited to its facts, namely, that everything to be done by the parties had been done, and nothing remained except the delivery of judgment, which had been reserved by the Court. We, therefore, overrule this ground of appeal.

Appeal dismissed.

(1) 1 Smith L.C. 10th Ed. 325. (2) 21 B. 314. (3) 19 C. 513.

21 A. 316=19 A.W.N. (1899) 101.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

BENI PRASAD KUNWAR (*Defendant*) *v.* MUKHTESAR RAI AND OTHERS (*Plaintiffs*).* [29th April, 1899.]

Civil Procedure Code, s 244—Execution of decree—Representatives of judgment-debtor—Death of party to suit before final decree in appeal—Subsequent proceedings in execution taken against representatives of such party—Sale in execution—Suit to set aside sale—Estoppel.

A decree was given to the defendant (then plaintiff) in 1856 for possession of land and mesne profits against numerous defendants, including one Dawan Rai. Some of the judgment-debtors, including Dawan Rai, appealed to the Sadr Diwani Adalat, but before the decree of the Sadr Diwani Adalat was passed, Dawan Singh died. No application was made to put any representative of Dawan Rai on the record; but in 1881 (the amount of the mesne profits payable under the decree having been finally determined in 1877), certain persons were made parties, as representatives of Dawan Rai, to various proceedings in execution of the decree for mesne profits, which ended in the sale of certain property which had been of Dawan Rai in his lifetime. Subsequently the said representatives of Dawan Rai brought a suit to recover the property sold as above described on the ground that they were no parties to the decree under execution.

Held, that the plaintiffs were entitled to bring such a suit, and it was not barred by the provisions of s. 244 of the Code of Civil Procedure. *Radha Prasad Singh* v. *Lal Sahab Rai* (1), referred to.

Held, also, that as it had not been shown that by reason of the plaintiffs not objecting that they had been improperly brought on to the record of the [317] execution proceedings, the defendant had been induced to accept less favourable arrangement for the satisfaction of the decree that he might otherwise have done, there was no estoppel against the plaintiffs.

[R., 2 N.L.R. 34 (39).]

THE facts of this case sufficiently appear from the judgment of the Court and the judgment referred to therein.

The Hon'ble Mr. *Conlan*, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—The suit out of which this appeal arises was brought by the plaintiffs to recover possession of certain immoveable property which was sold by public auction on August 20th, 1889, in execution of a decree held by the respondent as representative of her deceased husband Maharaja Radha Prasad Singh. There were originally three plaintiffs to the suit, namely, Mata Dayal Rai, Musammat Prayagi Kunwar and Musammat Bartana Kunwar. The suit of the third was dismissed by the lower Court. She is not concerned in this appeal. A decree was given in favour of Mata Dayal and of Musammat Prayagi. The present appeal is against that decree, the sons of Mata Dayal who died after decree having been substituted for him as respondents. The early history of this litigation, which has now lasted since 1855, will be found fully reported in the judgment of their Lordships of the Privy Council in the case of *Radha Prasad Singh* v. *Lal Sahab Rai* (1). . The subsequent facts are, that the decree of

* First Appeal No. 81 of 1896, from a decree of Rai Kishan Lal, Subordinate Judge of Ghazipur, dated the 21st September 1895.

(1) 13 A. 53=17 I.A. 150.

1899
APRIL 29.
APPEL-LATE CIVIL.
21 A. 316 = 19 A.W.N. (1899) 101.

March 1st, 1877, by which the mesne profits due to the Maharaja were for the first time ascertained was, after many interlocutory proceedings arising out of objections taken by the parties whom it was sought to make liable under the decree of March 1st, 1877, transferred to the Collector of Ghazipur for execution under the provisions of s. 320 and the following sections of the Code of Civil Procedure in August, 1884. The Collector, with the consent of the parties against whom the decree was being executed, sold some 13 villages to the Maharaja for Rs. 75,000 in reduction of the decree, and the Maharaja consenting to accept Rs. 6,50.000 (about [318] one half of the amount due) in full discharge of the decree to him, the Collector made, with the consent of the parties against whom the decree was being executed, arrangements for paying off the Rs. 6,50,000 by instalments during a term of twenty years. This arrangement was fairly successful for a couple of years ; but eventually the persons against whom the decree was being executed interfered with the collections, themselves refused to pay and instigated their tenants to withhold their rents from the official appointed by the Collector to manage the estate. The result was, that by order of the Commissioner the attempt to save the attached property from sale was abandoned, and a sale under the decree of March 1st, 1877, took place on August 20th, 1889. The sale produced only Rs. 6,02,500 — less than half the amount of the decree with interest.

Among the parties whose property was sold and purchased by the decree-holder, the Maharaja, were the plaintiff Mata Dyal Rai now represented by his three sons (respondents) and Musammat Prayagi Kunwar now also represented since her death by the sons of her co-plaintiff Mata Dyal. The object of their suit has already been set forth. At the hearing of the suit several matters were argued and adjudicated on with which we have no concern now. The plea on which this appeal has been fought is that the plaintiffs had no concern whatever with the litigation till they were brought in during 1881 as parties who were liable under the ascertainment of mesne profits decree of March 1st, 1877.

They were brought in then as representatives of Dawan Rai. Now there can be no doubt that Dawan Rai was one of those impleaded in 1855, and that he was one of the 54 defendants who appealed to the Sadr Diwani Adalat against the decree of the District Judge of April 1856.

But it is alleged for the plaintiffs, and is now admitted by the respondents' learned counsel to be the fact, that Dawan died in 1862. The final decree of the Sadr Diwani Adalat on review was passed on April 7th, 1866, four years after Dawan's death. No one was brought on the record of the case before the Sadr [319] Diwani Adalat as his representative, and it is admitted that no one representing Dawan was impleaded in the proceedings which terminated in the mesne profits decree of March 1st, 1877. The plaintiffs here were brought on as Dawan's representatives some time in 1881, some four years after the decree of 1877. Now on the above state of facts, it seems to me to be hardly possible to distinguish the case of these respondents from that of the defendant Lal Sahab Rai in the case before their Lordships of the Privy Council mentioned above. Indeed the case of these respondents seems stronger, for though their ancestor Dawan Rai was a party to the decree in favour of the Maharaja, passed in 1856, and to the Sadr Diwani Adalat's decree in appeal in 1859, he was dead before the final decree of the Sadr Court (the decree on review) was passed in April 1866, and no one was brought on to represent him in the mesne profits ascertainment proceedings. These plaintiffs accordingly are *prima*

facie, not bound by either the decree of April 1866 or the decree of March 1877, neither they nor any person whom they represent having been parties to either of those decrees. It was on that ground that the lower Court gave plaintiffs a decree.

For the appellant it was contended that the suit was not maintainable, that it was forbidden by the provisions of s. 244 of the Code of Civil Procedure, and Mr. Conlan also, with great earnestness contended that the respondents had estopped themselves from instituting such a suit.

Now as to s. 244 the argument is that these plaintiffs when brought in in 1881 as representative judgment-debtors, liable under the decree of 1877, should at once have raised the objection that they were not then brought on the record to represent any one who had been a party to the decree of 1877. Had they raised the plea then it may be they could have been successful; but it is contended they are too late now, and cannot raise it in a separate suit. Reliance is placed for appellant on the last clause of s. 244. It seems to me, however, that that clause is not in point. It clearly refers to a case where there is a **[320]** dispute between two or more persons as to which of them is the representative of a person who had been a party to the suit. It cannot, I think, be held to include a case in which there could be no representative, as there was no party to be represented, and therefore no question as to who was the representative. Sections 367 and 368 of the Code were also referred to by the learned counsel, but I cannot see how they affect the question.

The Chief argument of the learned counsel was that the respondents had estopped themselves by their conduct from instituting the suit. He pointed out that they had submitted in silence from 1881 to 1889 to being treated as judgment-debtors liable under the decree of March 1st, 1877, that they had never taken any objection to the position assigned to them, that they jointly with hundreds of other judgment-debtors had put in many petitions in the execution proceedings after 1881, in the Shahabad and the Ghazipur Courts, making such objections as are usual in the case of judgment-debtors liable under the decree then being executed, *e.g.*, as to the amount calculated to be due on the decree and the like, but that these plaintiffs had never, in any of those numerous petitions, given the slightest hint that they really were not the representatives of any judgment-debtor and were consequently not liable under the decree of 1877; that they similarly joined in other petitions to the Collector when the execution proceedings were transferred to him, and joined in the proposal to the Collector that he should take over and manage the judgment-debtor's property holding it till the decree was paid off, and that in all these petitions and proceedings the plaintiffs remained silent as to their real position, and forebore to allege that they did not represent any defendant judgment-debtor liable under the decree of March 1st, 1877. The estoppel is then put in this way, that by the continuous silence of the plaintiffs from 1881 to 1889, and their submission without objection to the execution proceedings taken against them as representatives of Dawan (a person who was not a judgment-debtor), they had permitted the decree-holder **[321]** to believe a thing to be true, which was not true, namely, that these plaintiffs were judgment-debtors liable under the decree of 1877 as representatives of Dawan Rai, and to act upon that belief. The act which the decree-holder is said to have done in consequence of that belief is that he consented to forego his claim to about half the amount due to him under the decree of March 1st, 1877, amounting to more than 15 lakhs,

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and to accept a transfer of villages valued at the sum of Rs. 75,000 and a payment of 6½ lakhs of rupees to be paid by annual instalments of Rs. 34,240 in nineteen years, the property of the judgment-debtors to be placed under the Collector's management.

It is contended that if the decree-holder had known that these plaintiffs were not liable to him under the decree of 1877, he would not have accepted this arrangement. In support of this argument it is pointed out that these plaintiffs joined with some hundreds of other persons liable under the decree in praying the Collector to take action to save the property from sale by taking it under his management. It is also said that had he known of the true position of these plaintiffs, the decree-holder would have insisted on immediate sale. Neither of these matters appears to me to have any weight. The assent of the person against whom the decree was being executed to the Collector taking their properties into his hands, was unnecessary and superfluous, such assent not being necessary, and as to the decree-holder not insisting on an immediate sale, it is sufficient to say that it was not in his power so to insist, everything depending on the discretion of the Collector. As to the abandonment of half his claim by the decree-holder, I am unable to see that his action in that matter was in any way influenced by the belief that these plaintiffs (who are only two among some hundreds) were liable to him under the decree of March, 1877. Indeed it appears that it was pressure from the Collector, and not any such belief that induced the decree-holder to forego half his claim. For I find it recorded by **[322]** the Collector in the preamble to the conveyance by which he sold 13 villages to the Maharaja for Rs. 75,000 that on inquiry it was found that the profits were not sufficient for the satisfaction of the decree, and the sale of the whole property must take place, the amount due exceeding 15 lakhs of rupees. The document then proceeds :—"After discussion I *induced* the decree-holder to consent to agree to a transfer in his favour of the undermentioned mahals belonging to the judgment-debtors in consideration of Rs. 75,000 and to payment to him in 19 years or earlier of Rs. 6,50,000 out of the profits of their other property, which should be placed under the Collector's superintendence, by annual instalments of Rs. 34,210-8-5 from 1293 Fasli." This deed is dated February 22nd, 1886, and is record No. 409 in First Appeal No. 103 of 1896. So it seems to me that that which really induced the decree-holder to abandon half his claim was pressure put on him by the Collector and the knowledge that it was not possible to obtain full satisfaction of the decree, and not the fact that these plaintiffs had not disclosed their true position. That it was impossible to satisfy the decree in full is shown by the fact that at the sale on August 20th, 1896, the attached property, when put up to auction, fetched little more than six lakhs. The relinquishment of nearly half his claim under the decree of course was no longer effectual when the management of the estate by the Collector had to be abandoned owing to the contumacious resistance offered to the collection of rents by the judgment-debtor.

Further, I would add that our attention was not invited to any evidence on the record tending to show that the decree-holder as a matter of fact temporarily abandoned half his rights under the decree because he believed that these two respondents were liable to him under that decree. We were asked to infer that such was the case. I am not prepared to draw such an inference. I see no sufficient materials for it anywhere on the record. I do not believe that if the decree-holder had known of the true

position of these plaintiffs he would [323] for that reason have refused to abate his demands under the decree. The reason why he did so was, I believe, (1) because the Collector pressed him to do so, and (2) because he saw no chance of his ever being able to get 15 lakhs out of the judgment-debtor's property. And I would add that even if these respondents were aware of their true position during the execution proceedings (which, in my opinion, is most improbable), I fail to see that it was incumbent on them to have informed the Maharaja of it. They owed him no such duty. It was he who had improperly forced them into Court as representatives of a non-existent judgment-debtor for the purpose of compelling them by seizure of their property to discharge a non-existent debt.

I do not think it necessary to enter into the question as to whether by law an estoppel could arise under the above circumstances. I find as a matter of fact that there was no estoppel.

For the above reason I am of opinion that this appeal fails. I would dismiss it with costs.

BLAIR, J.—I concur.

Appeal dismissed.

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21 A. 323 = 19 A.W.N. (1899) 104.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

BENI PRASAD KUNWAR (*Defendant*) *v.* LUKHNA KUNWAR AND OTHERS (*Plaintiffs*).* [29th April, 1899.]

Execution of decree—Sale in execution—Suit to recover property sold on grounds which might have been made grounds for appeal against the original decree—Representative of judgment-debtors—Civil Procedure Code, s. 244.

When a party to a decree and subsequent proceedings in execution thereof has suffered execution to proceed and property to be sold without appealing, he cannot sue to recover the property so sold on grounds which might have been taken in appeal from the decree or from orders in execution.

Held also, that the question whether a person alleged to be a representative of a deceased party to a suit is such representative and also the question whether property against which execution is sought in the hands of the [324] representative of a deceased party was in fact the property of such deceased party and not the separate property of the representative, are questions to be decided under s. 244 of the Code of Civil Procedure and not by separate suit. *Rajrup Singh* v. *Ramgolam Roy* (1), *Chowdry Wahed Ali* v. *Mussamat Jumaee* (2) and *Seth Chand Mal* v. *Durga Dei* (3) referred to.

THE facts of this case appear from the judgment in this case and in F.A. No. 81 of 1896, *supra* p. 316.

The Hon'ble Mr. *Conlan*, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BURKITT, J.—This is one of the many cases now pending in appeal before us between the Maharani of Dumraon on the one side and the Narhi

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* First Appeal No. 76 of 1896, from a decree of Rai Kishan Lal, Subordinate Judge of Ghazipur, dated 7th December 1895.

(1) 16 C. 1. (2) 11 B.L.R. 149. (3) 12 A. 313.

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taluqa people on the other. The history of the litigation will be found in the judgment in F. A. No. 81 of 1896.*

This suit was instituted by a large number of plaintiffs to recover possession of their interest in the property which was sold by public auction on August 20th, 1896, and also to recover their shares in the 13 villages sold by the Collector to the decree-holder on February 22nd, 1896.

The claims of a large number of the plaintiffs were dismissed by the lower Court. This appeal is against the decrees given to some of them. The learned counsel for the appellant abandons the appeal as to Nos. 23, Musammat Lukhna Kunwar, and 25, Din Dyal, but supports it against the others. The first case is that of No. 24, Swarath Rai. This man, it appears, was not a party to the litigation up to 1866, though his elder brother, Ahlad, was a party to it. It is admitted, however, that Swarath was impleaded in the proceedings for ascertainment of mesne profits which terminated in the decree of March 1st, 1877, that he was one of the parties against whom that decree was passed, and that he continued to take part in all the execution proceedings subsequent to the decree of March 1st, 1877. But it is contended that that decree was wrongly passed against him, in that he was impleaded **[325]** personally, and not as representing any of the parties to the decree of 1866, in the proceeding for ascertainment of mesne profits which culminated in the decree of March 1st, 1877. Further it is alleged that that decree was passed *ex parte* against him, as no notice of the proceedings for ascertainment of mesne profits has been served on him. It is contended that for this reason the decree of March, 1877, is bad and can be set aside by a regular suit. Further it is contended that all the execution proceedings taken on the decree of March 1st, 1877, are bad under the following circumstances.

When the amount due for mesne profits was finally ascertained on March 1st, 1877, the Court ordered the decree-holder to pay in the sum of Rs. 2,000 deficient Court-fee duty payable on the ascertained amount of mesne profits for which execution was about to issue, to be paid into Court within three days. The decree-holder failed so to pay, and the case was struck off on March 15th, but was reinstated a few days afterwards on payment of the deficient Court fees, and execution then proceeded. It is contended for the respondent that the Court had no power to reinstate the execution proceedings, and that under s. 11 of the Court Fees Act, No. VII of 1870, the Court had no option in the matter, the deficient duty not being paid within the time limited by its order, and was bound to have dismissed the suit, *i.e.*, to have rejected the execution application. As an authority for this contention the case of *Kewal Kishan Singh* v. *Sookhari* (1), is relied on.

I am of opinion that none of the points set forth above can be raised in a separate suit. It is admitted that the decree of March 1st, 1877, was passed against Swarath among a host of others. If he were improperly made a defendant in the case in which that decree was given, his remedy was by an appeal against the decree, an appeal which must have been successful if, as he says, he was not one of the parties whose liability to contribute to the mesne profits had been declared by the decree of 1866. Again, if it be, as he says, that the decree was passed against him *ex parte* without

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* 21 A. 316 *supra*.

(1) 24 C. 173.

[326] notice, then the law provides machinery by which the decree could be set aside. But this respondent Swarath neither appealed from the decree against him which now has become final, nor has he made any attempt to have it set aside as being *ex parte*. In my opinion a suit to set aside the decree of March, 1877, which is really the object of the present suit, cannot be maintained, the proper procedure being by appeal against that decree. The plea raised on s. 11 of the Court Fees Act is open to the same objection. It is one which Swarath should have taken in appeal. If that plea, and also the plea as to want of notice of the proceedings be well founded, they would have lent most valuable support to an appeal against the decree of March 1st, 1877, but they are pleas which should have been taken in appeal against that decree and not by separate suit against proceedings taken in execution of that decree years after it had become final. The case cited from 24 Calc., 173, in no way can be considered an authority in favour of the respondent, for though the judgment does hold that the suit ought, under the circumstances, to have been dismissed, it must be noticed that the appeal which the High Court was hearing was an execution appeal against an order passed in the course of the execution of the decree. Had the respondent here instituted an appeal from the order of the Court reinstating the proceedings on payment of the deficient Court fees duty, very probably he would have been successful. But as he did not institute such an appeal, I am of opinion that he cannot now urge that matter in a suit brought practically to set aside the decree of March 1st, 1877, a decree which he might have disputed, and probably with success, by appealing. In my opinion for the above reason, the decree of the lower Court is wrong as to this respondent Swarath. I would allow the appeal as against him with costs and direct his suit to stand dismissed.

Pargas No. 46.—This respondent was brought into the execution proceedings in 1884, as representative of one Ram Hit, deceased, who admittedly was a party to all the litigation including the decrees of 1856 and 1877. It is contended that he was improperly [327] made a representative of Ram Hit. That probably is so, as Ram Hit left male issue, and Pargas is only a distant relative. But the question as to whether he was or was not properly impleaded as Ram Hit's representative is one which cannot be raised by a separate suit. It is a question which must be decided under s. 244 of the Code of Civil Procedure in the manner laid down by the last clause of that section. It is perfectly clear that Pargas, when he was impleaded as representative of Ram Hit, did not raise any question as to the propriety of the order impleading him as such. There was therefore no occasion for the execution Court either to decide any question itself or to stay the execution pending its decision in a separate suit. This suit is not the separate suit referred to in s. 244, as it has not been instituted to decide the question as to who is Ram Hit's legal representative, but has been instituted after execution had been exhausted to set aside the decree on which that execution was had. It is urged on behalf of Pargas that he is liable only at most for any assets of Ram Hit which he may have received (s. 234 of the Code of Civil Procedure), and that the property which has been attached and sold is his own individual property, and that he did not obtain it as heir of Ram Hit. To this plea the answer is that the question as to whether Pargas held the property in dispute as his own property, and so not liable to be taken in execution to satisfy a decree against Ram Hit, or whether he held it as assets belonging to Ram Hit's estate, and

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therefore liable to be taken under the decree, is a question which must be decided under s. 244 by the Court executing the decree and not by a separate suit.

The law on this point has been very clearly and unmistakeably laid down by the Calcutta High Court in the case of *Rajrup Singh* v. *Ramgolam Roy* (1), which is founded on the judgment of their Lordships of the Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jumaee* (2), and in a Full Bench decision of this Court in *Seth Chand Mal* v. *Durga Dei* (3), [328] which follows and approves of the case in 16 Calc. 1, and overrules certain cases to the contrary in this Court. In those cases it is laid down that it has been settled by a series of cases that questions arising between the decree-holder and the representative as to whether the attached property has come to the representative as such, and so liable to be taken in execution, or is the representative's own property derived from some other source, and therefore not liable to be taken in execution, must (under s. 244 of the Code of Civil Procedure) be decided in the execution proceedings and not by a separate suit. I must therefore hold that Pargas cannot be allowed in this suit to plead that the property sold as against him as representative of Ram Hit was his own property and not derived from Ram Hit. I would for the above reasons allow this appeal against Pargas with costs and would direct that his suit be dismissed.

I next take up the case of No. 52, Aprup Rai, No. 53, Nanku Rai, No. 54, Deoki Rai, and No. 55, Musammat Ghurbasi Kunwar. These persons are exactly in the same position as the respondents in F. A. No. 81 of 1896. They were brought on in the execution proceedings as representatives of one Radha Rai. The latter was a party to the decree of 1866, but not to the decree of March 1st, 1877. No one representing him was a party to the latter decree. Therefore for the reasons given by me in F. A. No. 81 of 1896, I would dismiss the appeal with costs against these respondents as far as their interest in the property sold at the auction sale of August 20th, 1896, is concerned as to their interest in the 13 villages transferred to the decree-holder by the conveyance of February 13th, 1886, executed by the Collector on their behalf with their consent, the appeal must be allowed, and that portion of their claim dismissed. Before they could succeed in this matter it is necessary that these respondents should have obtained a decree, formally setting aside the conveyance to which they had assented.

BLAIR, J.—I concur.

Decree modified.

(1) 16 C. 1. (2) 11 B.L.R. 149. (3) 12 A. 313.

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[329] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

MUHAMMAD MUNAWAR ALI (*Defendant*) *v.* RASULAN BIBI (*Plaintiff*).* [3rd May, 1899.]

Mahomedan Law—Waqf—Illusory dedication—Settlement for benefit of descendants of the settlors.

Held, that a mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the settlors in perpetuity and not dedicated in substance to charitable uses is not sufficient to constitute a good and valid waqf. *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry* (1), *Kaleeloola Sahib* v. *Naseeruddeen Sahib* (2), and *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (3) referred to.

[**Affr.**, 27 A. 320 (P.C.)=2 A.L.J. 513=2 C.L.J. 179=9 C.W.N. 625=15 M.L.J. 261 =32 I.A. 86; **F.**, 8 O.C. 379 (383); **R.**, 33 A. 400 (412)=8 A.L.J. 162=9 Ind. Cas 753; 7 A.L.J. 1095 (1103); 13 Bom. L.R. 717=12 Ind. Cas. 225; **D.**, 31 A. 136=6 A.L.J. 115=1 Ind. Cas. 763.]

THE facts of this case are fully stated in the judgment of Burkitt, J.

The Hon'ble Mr. *T. Conlan*, Mr. *B. E. O'Conor* and Pandit *Sundar Lal*, for the appellant.

Maulvi *Ghulam Mujtaba* and Babu *Satya Chandar Mukerji*, for the respondent.

JUDGMENT.

BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Jaunpur in favour of the respondent for recovery of her share according to Muhammadan law in the properties left by her father and her mother. The defendant-appellant is her elder brother. The facts out of which this case arose are as follows:—

Syed Muhammad Kaim Ali, father of the parties; and Musammat Aliyat-un-nissa Bibi, their mother, executed on March 9th, 1881, an instrument called a waqf-namah, the nature and effect of which will be considered further on. The mother died on April 19th, 1881, leaving her surviving as her heirs her husband, her two sons and four daughters. Her husband survived till February 9th, 1895, when he died leaving the same heirs, except one daughter, Musammat Asma, who predeceased him. On the death of Syed Kaim Ali, his elder son, the appellant, took possession as mutawalli of all the properties mentioned in the waqf-namah [330] and of other small properties not included in it. The present suit instituted on February 14th, 1896, is one of several suits instituted against him by his younger brother, by his sisters, and by a purchaser from the husband of the deceased sister to recover the shares in that property to which the Muhammadan law entitles them. In her plaint the plaintiff in this suit, Musammat Rasulan, denied that the waqf-namah was a valid deed of endowment, and described it as "a deed of arrangement which he (Syed Kaim Ali) had executed to preserve his reputation and dignity to prevent a partition of the property among the persons entitled, and to reserve to himself his personal interest." The plaint further alleges that during the lifetime of the settlors "there was no indication of any real charitable

* First Appeal No. 30 of 1897, from a decree of Babu Brijpal Das, Subordinate Judge of Jaunpur, dated the 16th September 1896.

(1) 22 I.A. 76 (87). (2) 18 M. 201. (3) 17 I.A. 28 (37).

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endowment." These contentions are explained in detail in the 5th and 6th paragraphs of the plaint. The defendant in reply set up the waqf-namah as a bar to the suit. He also pleaded that the suit for a share in Musammat Aliyat-un-nissa's property was barred by limitation, she having died more than twelve years before the suit, and also that before such a suit could be maintained the waqf-namah must be formally set aside. He also raised a plea of estoppel.

The Subordinate Judge gave the plaintiff a decree, holding that no valid and legal waqf of the entire corpus of the property had been executed so as to prevent its being inherited by the heirs according to their legal shares. Hence this appeal. Several pleas were taken in the written memorandum of appeal. At the hearing the only matters contended for were that the waqf-namah was a good and effectual endowment of the property mentioned in it, and that a suit to recover a share of the property which had been of Musammat Aliyat-un-nissa in her lifetime was barred by the limitation rule contained in art. 144 of the second schedule to the Limitation Act. The plea that s. 91 of the Limitation Act barred the suit was expressly abandoned at the hearing by the appellant's learned counsel, and it was also stated for the appellant that no question of estoppel was pressed in the **[331]** appeal. There was also a plea as to the moveable property, but that matter, though not expressly abandoned, was but feebly pressed. There is really nothing in it, the evidence being quite worthless. We overrule it.

I take up first the principal question, namely, is the document on which the defendant relies a good and valid waqf-namah ? It will be necessary to set out in some detail the objects and provisions of that instrument. It commences with an invocation of God, and then sets out the names of the waqifs or settlors. The object aimed at is next declared in the clearest and most unequivocal language. The settlors, after reciting that they are cousins as well as husband and wife, and that they are advanced in age, proceed as follows :—"It is absolutely necessary in order to secure the love of each individual among friends in this world and to earn merit in the next world that sufficient provision be made for the thorough management of the entire property and of the imlaks belonging to the executants and the income and the profits therefrom (which, taken as a whole, form a small estate), so that the property itself and the principal wealth of the estate may always be preserved from all manner of partition, division, transfer, and succession, and the management thereof in whole and in part should remain for ever in the hands of one person, whereby (our) *name and memory and the pomp and dignity of the estate may continue.*" Now these words cannot be taken to have any meaning other than that the intention of the settlors was to establish a perpetuity, so that their estate should not be divided among their heirs but should always remain unimpaired. But Syed Karim Ali being a practising vakil of some reputation, probably knew that that object could not be effected under the ordinary law. This is frankly admitted in the next sentence which runs as follows :—" Whereas the attainment of the above object *is impossible except by a waqf* as directed by the Muhammadan law, we the executants, of our free will and consent, without coercion or pique, and while in a sound state of body and mind, execute this deed of waqf or endowment as follows." Then comes a detail **[332]** of the property belonging to the two waqifs, from which it appears that the great bulk of it belonged to the wife and very little to the husband. Next we come to the endowment clause in paragraph 4, which provides :—

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"Out of the entire milk and property mentioned above we, both the executants,—make waqf of the whole of the immoveable property owned by us the executants specified in clauses 1 and 2 of the first paragraph of this document—*in favour of our respective selves* and after the death of one of us the executants, *in favour of the surviving executant alone and thereafter in favour of our descendants generation after generation, so long as they exist, and in favour of the servants and dependents of the riasat aforesaid, in favour of the poor, the beggars, of the needy, for ever in the manner detailed below.*" This paragraph ends with an intimation that the settlors' direction as to the appointment of a mutawalli and as to the manner in which the disbursements of the income of the "waqf" are to be made will be found recorded further on, evidently referring to the words " in the manner detailed below " of the preceding sentence.

The next paragraph 5 provides in clause (*a*) that the executants shall remain in possession of the endowed property during their joint lives "simply *as persons in whose favour a waqf* or *endowment is made*, and appropriate in every way the income and profits thereof." The effect of this provision is that though the settlors purport to divest themselves of their proprietary character, they nevertheless put all the "income and profits" of the waqf property into their own pockets, to be used at their own will and pleasure. Clause (*b*) of the same paragraph is important. In it the female executant, Musammat Aliyat-un-nissa, after singing her husband's praises at great length and reciting that she has remitted her dower-debt to him, goes on to provide that in addition to being a person in whose favour the endowment is made, the husband shall also be the "mutawalli of the property, the entire management in every respect being in his hands *according to his choice and pleasure.*" The lady **[333]** then goes on to provide that the profits remaining after the disbursements have been provided for shall during her lifetime "be appropriated by both of us, the executants, according to the discretion of the said mutawalli. If he survive me, he will continue to appropriate the entire income and profits from the whole of the property aforementioned, without the interference of any person *in the way he thinks proper* as long as he lives." The effect of this provision is that on the death of his wife, her children who by law would be entitled to three quarters of her property are entirely excluded, and the whole of her property goes to the husband to be appropriated by him and used by him at his own uncontrolled discretion. Clause (*c*) of the same paragraph provides that during their joint lives the names of both the settlors are to be used in litigation as long as the mutawalli wishes, and sets forth the name which is to be given to the estate.

Clause (*d*) of this paragraph empowers the husband as mutawalli to appoint a successor in office and to fix his remuneration with a provision restricting that office to a lineal descendant of Musammat Aliyat-un-nissa, and the next clause provides for the appointment of future mutawallis. In the next clause (*f*) the lady carefully provides for her own interests in case if she should survive her husband. In that event it is provided that one of the sons shall act as mutawalli, but shall hand over to his mother the entire income and profits from the waqf estate, to be appropriated by her and to be disbursed under her orders. The following clause (*g*) is unimportant.

So far this instrument deals with what is to happen during the lifetime of the waqfs and of the survivor of them, it is noteworthy that, though under paragraph 5 (*a*) the settlors profess to hold the property in future as

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trustees of an endowment, there is not the slightest change made in their position. They (and especially Kaim Ali, the husband), remain in complete uncontrolled possession of the endowed property without any obligation on them to devote one rupee to religious or charitable purposes, or even to continue their usual contribution to such objects. They do not [334] even deprive themselves of the power of selling or otherwise alienating any portion of the property, and had they thought fit to sell the whole and put the proceeds in their pockets it is difficult to see how they could have been prevented. In short, the first five paragraphs of this document leave the husband and wife absolute uncontrolled masters of the so-called endowment to deal with it as they please. They are not called on to exercise any self-denial, and, in the language of their Lordships of the Privy Council in the case of *Abul Fata Mahomed Ishaq* v. *Russomoy Dhur Chowdhry* (1), they take back with one hand what they appear to put away with the other. There is no dedication of the property to charitable or to religious uses. The only dedication is in favour of the settlors and their descendants generation after generation so long as they exist; and in favour of an undefined class called the "servants and dependents of the estate" and "in favour of the poor, the beggars, and the needy for ever." Strictly construed, these words amount to an immediate settlement of the property on all classes of the beneficiaries simultaneously in the manner and to the extent subsequently declared. But if it were intended by the settlors that the whole estate should devolve on "the poor, the beggars and the needy," that event could not happen till after the failure of all descendants of the settlors' two sons and four daughters, and till after the failure of the "servants and dependants" of the estate. There being nothing to indicate that "by servants and dependents" were meant only those in existence at the date of the waqf, this class, a varying uncertain class, changing from time to time, would effectually exclude the last class "the poor, the beggars and the needy." The deed, moreover, as to this last class does not provide for the poor of any particular locality, *e.g.*, Sarai Khera, where the settlors lived, thus leaving it uncertain who were the persons whom the settlors intended to benefit. And especially it is to be borne in mind that clause 4, the so-called endowment clause, provided that the benefits of the waqf were to be enjoyed by the [335] beneficiary "*in the manner detailed below.*" I have already shown what that manner was to be during the joint and several lives of the settlors. I now turn to the provisions to be observed after their death. First of all, the mutawalli is directed to pay annuities amounting in all to Rs. 2,400 to the six children of the settlors. The annuitants were to have a power of appointment among their descendants, and in the absence of such appointment the annuities were to descend to their heirs according to the rules of Muhammadan law for ever. The most extensive and arbitrary powers are given to the mutawalli in the matter of granting and of withholding these annuities at his discretion and any one of the beneficiaries who, like the plaintiff-respondent, in this appeal, repudiated the waqf or questioned the authority of the mutawalli, was *ipso facto* to forfeit his annuity. It was next provided that a sum of Rs. 1,100 per annum should be spent for purposes which the learned counsel for the appellant earnestly contended were religious and charitable uses. Several of the objects enumerated, however, would not be considered

(1) 22 I. A. 76 (87).

religious or charitable objects within the meaning of the rule laid down by the Madras High Court in the case of *Kaleeloolz Sahib* v. *Naseer-ud-deen Sahib*.(1)

The mutawalli is directed to devote a sum of Rs. 600 per annum to the support of a hospital at Sarai Kheta which the female settlor had established in March 1875, and which had since then been regularly supported by her and her husband. Then Rs. 20 per annum are provided for bringing water from the well Zamzam at Mecca, and a list is given of the persons who are to obtain spiritual benefit from this act. Rs. 36 per annum is to be spent in having the Koran recited for the benefit of the souls of the father and mother of the female settlor, the person who does the recitation being bound to transfer to those persons the spiritual benefit he had acquired from the recitation. Another reciter of the Koran was to be appointed on similar pay, and he was to transfer the spiritual benefit of his recitations to the benefit **[336]** of the souls of the settlors. The mutawalli is then directed to devote Rs. 150 per annum to charitable doles to be given to the poor every day at the principal gate. This is a continuance of the practice previously observed by the settlors. Then provision is made for the repair of the mosque at an annual cost of Rs. 50 and of the tomb of the settlor's ancestors at Sarai Kheta at a cost of Rs. 24. These matters again only perpetuate an existing custom. The next two clauses provide for the continuance of the existing customs of holding a meeting at an annual cost of Rs. 40 to commemorate the birth of the Apostle and of distributing at a cost of Rs. 60 in the Muharram food and sharbat for the benefit of the souls of the two imams. Finally, provision is made for the appointment of a person to teach the Koran and the principles of jurisprudence at Sarai Kheta. With one small exception which will be noticed further on these are all the provisions made for religious or charitable purposes, and the amount devoted to those purposes is certainly less than Rs. 1,000 per annum. The net income of the estate is between Rs. 9, 000 and Rs. 10,000 per annum. But although charitable and religious objects do not benefit by quite Rs. 1,000, we find the waqfs providing for the pomp and dignity of the family by allotting Rs. 1,200 per annum for ringing the bell and maintaining the guard attached to the estate. A subsequent paragraph provides for the occupation of the houses on the estate and for the mutwalli's powers therein, while paragraph 8 deprives the beneficiaries of all the power of alienation of their annuities and puts the latter out of the power of the law by declaring that they shall not be saleable in execution of a decree against the annuitant. From paragraphs 9 and 10 it would seem that the settlors were apprehensive that the beneficiaries had no power of enforcing payment of their annuities, and so all the descendants of the settlors and well-conducted and learned Muhammadans of the Hanafi sect are prayed for "God's sake" to see that the payments be made even by having recourse to the help of the authorities. Paragraph 11 refers to the appointment of mutawallis after the death of the settlors and "provides for a **[337]** perpetual succession of some of the male members of the family as mutawallis."

The last paragraph, which it is necessary to notice, is No. 13. This provides that when any one of the beneficiaries is appointed mutawalli, his annuity is to lapse and fall into the income of the endowment, that such mutawalli is to hold possession of the estate and make collections,

(1) 18 M. 201.

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and that after paying the Government revenue and the annuities and other expenses, he is to take the surplus (minus one tenth) for himself, his family and his dependents. The one-tenth is to accumulate till it reaches the sum of Rs. 1,000, when it is to be invested in immoveable property or in some profitable business, and the annual income of that property or business is to be spent by the mutawalli in relieving the poor.

It is contended for the appellant that this last mentioned provision, coupled with those set forth in an earlier portion of this judgment, amount to a dedication of a substantial portion of the income of the estate to charitable purposes, and that therefore the waqf is good.

I am unable to concur in that contention. The first question to be considered is what was the real object of the settlors when they executed the waqf-namah. Did they intend to dedicate the property to religious and charitable uses with a charge for the support of the members of the family engrafted on it, or did they use the form of a waqf as a veil, under cover of which they attempted to do that which the law would not permit them to do openly? As to that matter the settlors leave no room for doubt. They state in the frankest manner that their object was to preserve the estate from diminution by partition, transfer or the like, and to keep it always in the hands of one person so that thereby their name and memory, "and the pomp and dignity of the estate, may continue." Not one word is said as to any desire to benefit the poor, as to any intention to constitute them the ultimate beneficiaries. The only object avowed is the preservation of the estate intact that its pomp and dignity may continue. The settlors admit [338] that they cannot attain that object except by the device of a waqf "as directed by the Muhammadan law," and then proceed to settle the estate on themselves and on their descendants so long as any exist, on the servants and dependents of the estate, and on the poor and needy. As to the last mentioned class there is nothing within the four corners of the waqf-namah to indicate that the settlors intended that that class should obtain any benefit beyond that given by paragraph 4 and 13. I cannot but consider a document containing such a settlement to be but the merest simulation of an endowment for charitable or religious purposes. Its object is not to benefit the poor, but to preserve the name and estate of the settlors. The gift to the poor, if, as a fact, there is any dedication or gift over to them, which I very much doubt, most probably would not take effect for hundreds of years, and even then it would probably be void for uncertainty, there being nothing to show who were the poor, the beggars, and the needy intended to be benefited. In my opinion the settlors did not suppose that any gift or ultimate dedication of the estate to charitable or religious uses was necessary to validate a waqf. I cannot but think that they were under the impression that a family settlement entailing the family property in perpetuity on its members and their descendants was a good waqf under Muhammadan law, a view which found some support a few years ago, but which has now been disapproved of by their Lordships of the Privy Council.

As to the charitable gifts mentioned in paragraphs 6 and 13 of the waqf-namah, I think the opinion of the Court below is right. No specified part of the waqf property has been charged with their payment. The second clause of the 6th paragraph does no more than direct the mutawalli to make certain payments "out of the profits of the waqf," and the same may be said as to the 13th paragraph with reference to the one-tenth of the surplus. No means are provided for compelling the

mutawalli to make any of those payments. In fact the present mutawalli as to that matter is in the same position as his father Syed Kaim Ali was. **[339]** The latter of his own free will subscribed to the charitable objects to which he directed his son to continue the same amount of subscriptions, and they are no more than a devout and wealthy Muhammadan gentleman might find it becoming to spend in that way. This case can by no conceivable argument be brought within the rule of which their Lordships of the Privy Council approved in *Sheik Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (1). In fact it is to some extent the converse of the case therein cited with approval, as in this case I am asked to hold that a mere charge for some charitable purposes (which probably could not be enforced), on the profits of an estate strictly settled on the family of the settlors in perpetuity and not dedicated in substance to charitable uses is sufficient to constitute a good and valid waqf. To that contention I cannot accede. I fully concur in the opinion of the Subordinate Judge that "the little expenditure on religion and charity provided by the deed was no more than a charge on the property; it did not create a legal and valid waqf of the entire corpus of the property so as to prevent it being inherited by the heirs according to their legal shares." I would therefore affirm the decision of the lower Court that this is not a valid waqf.

There is one other point remaining for decision in this appeal. The plaintiff-respondent claims her legal share in the property left by her mother Musammat Aliyat-un-nissa, which, under the terms of the waqf-namah, was handed over to the husband Syed Kaim Ali, as mutawalli, and which remained in his possession up to the day of his death. The defendant-appellant pleads that that claim is barred by limitation, as he alleges that Kaim Ali, and the defendant after him, held adverse possession of that property from the lady's death in 1881 up to date of suit in 1896. Appellant relies on art. 144 of the second schedule to the Limitation Act No. XV of 1877. This matter is not really one of much importance to this plaintiff-respondent. On the finding that the waqf is bad there can be no doubt that Musammat Aliyat-un-nissa's property **[340]** formed in one way or another part of the property left by Syed Kaim Ali at his death. The plaintiff therefore, even assuming that property was the absolute property of Kaim Ali to which he had acquired a prescriptive title, would, as daughter of Kaim Ali, admittedly be entitled to her legal share in it by Muhammadan law.

In my opinion the respondent has failed to prove any adverse possession in Syed Kaim Ali. It is admitted for the appellant that no question of estoppel arises. But it is contended that the waqf being bad, Syed Kaim Ali held possession of his wife's estate after her death as a trespasser and so by adverse possession had acquired a prescriptive title to it before his death in 1895. Now there can be no doubt that his possession of that estate in the interval between the execution of the waqf-namah and his wife's death was permissive, and he professed to take it, not in any personal right, but as mutawalli under the terms of the waqf-namah, and for the purposes set forth in that instrument. I fail to see any change in the nature of his possession from that time up to his death. By the terms of the waqf-namah on the abandonment of their proprietary rights by his wife and himself he took possession as mutawalli or trustee to carry out the terms of the waqf-namah. He did not at any time profess

(1) 17 I. A. 28 (37).

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to have nor did he set up any personal title in himself. The fact that the waqf is not valid in law does not, in my opinion make any difference in the nature of his possession. That fact did not clothe him with any adverse title to possession, but left him as trustee for the rightful owners of the property, namely, his wife and her heirs after her. In all his acts in the administration of the waqf he professed to act as trustee or mutawalli of the endowed property. In my opinion the waqf having failed he held the property as trustee for those entitled, under a legal obligation to hand it over to them on demand. Had such a demand been made and refused there would be good ground for holding his subsequent possession was adverse to the true heirs. Nothing of the kind is alleged, there is not an atom of evidence to show any change in the nature of Syed Kaim Ali's possession from the day **[341]** when he assumed possession of his own and his wife's property as mutawalli in 1881 down to his death in 1895. I am therefore of opinion that the appeal on this point fails and that the decree of the Subordinate Judge is right. I would dismiss this appeal with costs.

BLAIR, J.—I concur.

Appeal dismissed.

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21 A. 341 (F.B.) = 19 A.W.N. (1899) 151.

FULL BENCH.

Before Sir Arthur Strachey. Kt. Chief Justice, Mr. Justice Knox and Mr. Justice Burkitt.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* SUKHDEO (*Plaintiff*).* [25th April, 1899.]

Cause of action—Pleadings—Plaint disclosing no cause of action—Discovery at the stage of an appeal under the Letters Patent of defect in the plaint—Dismissal of suit—Practice.

Where in an appeal under s. 10 of the Letters Patent it was brought to the notice of the Court that the plaint in the suit disclosed no cause of action against the defendant named therein, the Court entertained the plea and dismissed the suit.

[F., 8 A.L.J. 922 (924) = 12 Ind. Cas. 111 (112); D., 31 P.W.R. 1907.]

THIS was a suit brought by one Sukhdeo against the Secretary of State for India in Council to recover certain property, which had been seized by a Magistrate in satisfaction of a fine imposed on his son, Natthe, or in the event of such property having been sold, its value, Rs. 10.

The facts of the case, briefly stated, were that Natthe had been convicted by a Magistrate of the 1st class of an offence under s. 417 of the Indian Penal Code and sentenced to pay a fine of Rs. 200. In satisfaction of the fine certain articles were seized by the Police as being the property of Natthe. Sukhdeo raised an objection before the Magistrate who had succeeded the Magistrate by whom the fine had been imposed, but his objection was rejected, and the articles in question were sold. Sukhdeo thereupon preferred the present suit.

[342] The Court of first instance decreed the claim. On appeal the lower appellate Court modified the first Court's decree. The defendant appealed to the High Court. The appeal coming on for hearing before a

* Appeal No. 50 of 1898, under s. 10 of the Letters Patent.

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Division Bench, the Judges composing the Bench differed in opinion, and the decree of the lower appellate Court was accordingly upheld.* The defendant thereupon filed the present appeal under s. 10 of the Letters Patent.

Babu *Satya Chandra Mukerji* (with whom were Munshi *Gulzari Lal* and Munshi *Jai Bihari Lal*) for the respondent raised a preliminary objection that no appeal lay in this case under s. 586 of the Code of Civil Procedure nor under s. 10 of the Letters Patent. The plaintiff's suit was a suit of the nature cognizable by a Court of Small Causes, as it was a suit for the recovery of moveable property or the value thereof, and the amount sought to be recovered was below five hundred rupees. There was no doubt that the suit as framed was one of the nature cognizable by a Court of Small Causes, and exemption from such cognizance was sought by seeking to include it within the description of suits mentioned in clauses (2), (21) or (23) of the second schedule of Act No. IX of 1887.

[STRACHEY, C. J.—Clauses (21) and (23) do not seem to me to be in point; but what do you say to clause (2)? You will observe that the wording of clause (2) is very wide. Is not the present suit one concerning an act purporting to be done by a Judicial Officer acting in the execution of his office?]

Clause (2) does not apply. This suit is not a suit concerning an act of a public officer. For a case exactly in point see *Bunwari Lal Mookerjee* v. *The Secretary of State for India* (1). What has to be looked to in this connection is the relief that is asked for. It may be that the granting of that relief would have the effect of setting aside some order of some other public officer; but if that order is not sought to be cancelled in so many words, the suit would not be taken out of the category of Small **[343]** Cause Court suits.—*Vide* the observations of Farran, C.J. and Strachey, J. in *Raghunath Mukund* v. *Sarosti K. R. Kama* (2); also the case of *Makund Ram* v. *Bodh Kishan* (3).

[STRACHEY, C. J.—Before we decide your preliminary objection will you show us from your plaint how you establish your cause of action against the defendant? You do not even allege in your plaint how the Secretary of State is liable in this matter.]

The defendant has not taken that objection in his written statement nor in his grounds of appeal to the lower appellate Court, and it is too late to take that objection now.

[BURKITT, J.—The defendant put you to the proof of your claim. He did not admit it. You must show that you have a cause of action against him.]

The plaint is no doubt defective in that respect, but that defect should be overlooked at this late stage.

JUDGMENT.

STRACHEY, C. J.—This is a suit in which the plaintiff claims to recover from the Secretary of State for India in Council certain articles, or, in the event of their having been sold, the sum of Rs. 10 as their value.

Now the allegations of the plaint, with reference to the cause of action against the Secretary of State, are as follows:—"On the 21st April, 1894, Natthe was found guilty by Mr. O. G. Arthur, Magistrate, 1st class,

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* *See* 18 A.W.N. (1898) 173.

(1) 17 C. 290. (2) 23 B. 266. (3) 17 A.W.N. (1897) 198.

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in the case of *Queen-Empress* v. *Natthe* under s. 417 of the Indian Penal Code, and was ordered to pay a fine of Rs. 200 to Government. In order to realize the aforesaid fine the following articles were seized through the police of Muttra, and the said articles were estimated by the police to be worth Rs. 10-5-0. The aforesaid articles belong to the plaintiff. He raised an objection before Munshi Narain Singh, who succeeded Mr. Arthur, that the aforesaid articles might be released. But the said officer rejected the said objection without taking any evidence on 16th June 1894. The cause of action accrued on 16th June, the day the objection was rejected, within the limits of the jurisdic- **[344]** tion of this Court. Although the aforesaid convict is the son of the plaintiff, he has been living separate from him for a long time. He had no right and interest in the seized articles detailed below. The plaintiff is therefore entitled to receive back the said articles, or if they have been sold by auction, Rs. 10 may be awarded, no matter for what price they were sold." That is all the substantial part of the plaint.

The Court of first instance decreed the claim. On appeal the lower appellate Court modified the first Court's decree. There was hence a Second Appeal by the appellant to this Court. The learned Judges who heard that appeal differed in opinion. Mr. Justice Blair was of opinion that the suit was not maintainable against the Secretary of State, and that the suit should be dismissed. Mr. Justice Aikman, on the other hand, was of opinion that the decree of the lower Court was right. Under s. 575 of the Code of Civil Procedure, the judgment of Mr. Justice Aikman prevailed, and this appeal against his decision has been brought by the defendant under the Letters Patent.

One of the grounds taken in the memorandum of the Second Appeal to this Court was that the plaintiff had shown no cause of action. That point was not raised in the defendant's written statement, but that written statement did not admit any cause of action by the plaintiff and thereby put the plaintiff to the proof of his whole case. The learned Judges of this Court stated that in consideration of the importance of the point at issue they would allow the appellant to support his appeal by any argument which lay within the scope on his grounds of appeal. The whole of both judgments is substantially occupied with the discussion of the question whether the plaintiff had shown any cause of action against the Secretary of State in Council. Considering that that question lay at the root of the whole suit, we think there can be no doubt that the learned Judges were right in allowing it to be raised and argued. The same ground of appeal is stated in the memorandum of appeal to us under the Letters Patent.

[345] To our minds, however, the question whether any cause of action is shown presents itself in a somewhat different form from that in which it appeared to the learned Judges. What they discussed was rather the question whether any cause of action had been established in the sense of a liability in the Secretary of State in respect of such acts as the seizure and sale of the goods claimed by the plaintiff. But in our view there is a preliminary question, that is, whether, on the face of the plaint, any cause of action against the Secretary of State is even alleged by the plaintiff. We have come to the conclusion that the plaint discloses no such cause of action. What it discloses is that in order to realize a fine imposed upon a third person, certain goods belonging to the plaintiff were wrongfully seized by the police, and that, while these articles were in the custody of the Court, the Magistrate rejected an application by the

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plaintiff for their release. That is the whole of what the plaint describes as the cause of action. The plaint stops with the Magistrate's rejection of the applica'ion, and consequently with the retention of the articles in the hands of the Court. There is nothing more. No action by the Secretary of State or by any person for whom he could be deemed responsible is referred to or even hinted at. After stating these facts the plaintiff goes on to claim the articles, or, if they have been sold, Rs. 10 as their value, from the Secretary of State, who is not alleged ever to have been in possession of them, or to have any connection with them in any way whatever. In this state of the case it appears to us wholly unnecessary to consider any of the questions which were so elaborately discussed in the judgments on the appeal. Upon the short ground which I have mentioned, namely, that the plaint discloses no cause of action against the Secretary of State in Council, we are of opinion that this appeal must be allowed and the suit dismissed. As regards costs we order that, having regard to the fact that the plaintiff had no notice until a late stage of the case of the objection which is fatal to his suit, each party pay his own costs in each of the Courts.

Appeal decreed.

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21 A. 346 = 19 A.W.N. (1899) 123.

[346] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

GANESHA SINGH (*Plaintiff*) *v.* MUNDI FOREST COMPANY (*Defendant*).* [5th May, 1899.]

Company—Suit against unregistered company—Form of suit.

Where a company is not registered under Act No. VI of 1832, a plaintiff bringing a suit against such company must make each individual member of the company a defendant to the suit, and he cannot escape from this obligation by stating in his plaint that he has been unable to discover who the individual members of the company are. *Koylash Chunder Roy* v. *Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khalbolia Factory* (1) considered. *The N.W.P. Club* v. *Sadullah* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *W. Wallach*, for the respondent.

JUDGMENT.

KNOX and AIKMAN, JJ.—The suit out of which this appeal has arisen was a suit brought by one Ganesha Singh against a defendant whom he describes as the Mundi Forest Company through W. Martin Towell, partner and agent, resident of camp Umballa. A written statement was put in signed by one E. W. Graham Roe, who describes himself as agent, Mundi Forest Company, Aligarh. That written statement was filed on the 10th of September 1897. It is admitted on both sides that before that date W. Martin Towell had died and there has been no application even up to the present date to bring any person on the record in

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* First Appeal No. 19 of 1898, from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 13th of September 1897.

(1) (1867) 8 W. R. C. R. 45. (2) 20 A. 497.

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his place. The written statement put in sets out that the Mundi Forest Company is not a legal corporation, and it has not been registered under Act No. VI of 1882, and on that ground it was pleaded that the suit would not lie. The learned Subordinate Judge sustained the plea and dismissed the suit. In appeal before us it is contended that the learned Subordinate Judge should before dismissing the suit have given the appellant an opportunity to amend the plaint. **[347]** The amendment, which, it is contended, should have been allowed, is the addition of a statement that the plaintiff was unable to discover the names and addresses of the individual members of the Mundi Forest Company. The object of inserting this amendment is to rely upon an expression of opinion contained in the case of *Koylash Chunder Roy* v. *Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khalbolia Factory* (1). In that case Sir Barnes Peacock held "that in case of unregistered companies the proper course would be to sue the individual members in the same way as the individual members of any other firm, not being incorporated or registered, would have to be sued, but where it appeared that the plaintiff did not know of what persons the company in question is composed, he was of opinion that the plaintiff might sue the company in the name under which they were carrying on their business and contracted with him, provided he had stated in the plaint that he was unable to give any better description of the defendants than that." This view, so far as we can ascertain, does not appear to have been acted upon in any reported case, and it is opposed to what was said by this Court in the case of *N.W.P. Club through G. B. Goyder* v. *Sadulla* (2). We quote the following words from the judgment :—"The question remains as to whether the action can rightly be said to have been brought against the North-Western Provinces Club ; that is what the case mentioned above calls an abstract entity unknown to the law. To hold that an action lay against it and to give judgment in such action would be to hold that an action lay against agreat number of individuals who had not been cited in the action, who had no opportunity of appearing, but who should have been so cited, and who should have had such opportunity given to them to appear and contest the action." We cannot therefore sustain the contention raised. The learned vakil went on to ask that he might be granted permission to amend by adding the names of such of the partners as he could ascertain. Even if **[348]** we were disposed to grant the prayer, there would still be a fatal objection that the suit as against every person who might now be added, even if he were added to-day, would be barred by limitation. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1867) 8 W.R.C.R. 45.

(2) 20 A. 497.

21 A. 348=19 A.W.N. (1899) 97.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

T. E. STRACHEY (*Plaintiff*) *v.* THE MUNICIPAL BOARD OF CAWNPORE (*Defendant*).* [5th May, 1899.]

Act No. XV *of* 1873 (*N W.P. and Oudh Municipalities Act*), *s.* 15—*Act No. XV of* 1883 (*N. W. P. and Oudh Municipalities Act*), *ss.* 29, 42. 41—*Municipal Board—Powers of taxation—Procedure—Consideration of objections to proposed tax—Final imposition of tax—Special meeting—Act No.* I *of* 1877 (*Specific Relief Act*), *chapter VIII—Injunction.*

The N. W. P. and Oudh Municipalities Act, 1883, not conferring the powers given by Act No. XV of 1873 to "cancel or vary" a tax imposed, the procedure to be adopted for the enhancement of an existing tax must be the same as that prescribed for the imposition of a new tax.

In imposing a new tax the procedure laid down in s. 42 of Act No. XV of 1883 must be strictly followed. Where therefore neither the special meeting of the Board at which an assessee's objections to a proposed tax were considered, nor the special meeting at which the tax was finally imposed, were properly constituted within the meaning of s. 29 of Act No. XV of 1883, it was *held* that the imposition of the tax was invalid. *The Municipality of the City of Poona* v. *Mohan Lal* (1) approved.

Held also that there is nothing in Chapter VIII of the Specific Relief Act to prevent the High Court from granting an injunction agnist a Municipality as part of the remedy in a regular suit. *Moran* v. *The Chairman of Motihari Municipality* (2), considered. *Ganga Narain* v. *The Municipality of Cawnpore* (3), referred to.

[R., 16 Ind. Cas. 449=8 N.L.R. 107; 21 M.L.J. 878=12 Ind. Cas. 311=10 M.L.T. 219=1911 M.W.N. 233.]

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *W. K. Porter* and *W. Wallach*, for the appellant.

The Officiating Government Advocate (Mr. *E. A. Ryves*), and afterwards the Government Advocate (Mr. *E. Chamier*), for the respondent.

JUDGMENT.

[349] BANERJI and AIKMAN, JJ.—This appeal and the connected First Appeal No. 291 of 1896 have arisen out of a suit brought by Theodore Edward Strachey, a Barrister practising in Cawnpore, against the Municipal Board of Cawnpore, in which he seeks to recover the sum of Rs. 200, which, he alleges, was illegally levied from him by the Municipal Board as license tax, with Rs. 8 interest thereon, and also prayes for an injunction restraining the defendant Board from levying or recovering any assessment from him by virtue of the resolution and notice under which the tax was assessed. The learned District Judge has given the plaintiff a decree for the money claimed, but has refused the prayer for the injunction. Both parties have appealed to this Court. This is the appeal of the plaintiff against that part of the decree of the lower Court which refused the injunction. It appears that under the provisions of s. 15 of Act No. XV of 1873 a tax upon trades and professions in the Cawnpore Municipality was imposed by the Municipal Committee. The rules made by the

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* First Appeal No. 192 of 1896 from a decree of J. E. Gill, Esq., District Judge of Cawnpore, dated the 8th June 1896.

(1) 9 B. 51. (2) 17 C. 329. (3) 19 A. 313.

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Committee for the collection of the said tax and confirmed by the Lieutenant-Governor are contained in Government Notification No. 160 A, dated the 2nd May 1876, to be found at page 575 of the Government Gazette of that year. For the purpose of the tax all professions, trades and callings were arranged under three classes. Class I specifies bankers and several other professions and trades. Class II sets forth a still longer list of callings. Under Class III are included all dealers or persons practising any trade or profession not mentioned in the above classes or in a list of explanations appended. As the profession of barrister-at-law was not specified either in Class I, Class II, or the list of explanations, it is clear that barristers-at-law fell under Class III. According to the rules the highest tax which could be imposed upon persons falling under Class III was Rs. 12 per annum.

Up to the year 1887 no tax had been levied from barristers-at-law practising at Cawnpore. At a special meeting of the Municipal Board held on the 27th of June 1887, it was resolved **[350]** that persons practising as barristers should be included under Class I, thereby rendering them liable to a maximum tax of Rs. 200 per annum. At the time this resolution was passed Act No. XV of 1883 was in force. S. 42 of that Act prescribes the procedure which has to be followed in imposing taxes for the purpose of the Act. S. 44 of the Act gives the Municipal Board the power to abolish or reduce any tax imposed under the preceding sections. It is noticeable that this section confers no power upon the Municipal Board to enhance a tax already imposed, and in this respect it differs from the former Act, No. XV of 1873, which, by s. 15, gave the Committee the power to "cancel or vary" any tax which it had imposed. As the existing Act gave the Municipal Board no power to enhance an existing tax which was the object they had in view when they determined that barristers should be included in Class I, they adopted the only course which appears to have been open to them, that is, they treated the matter as if it were the imposition of a new tax.

Assuming that the procedure was under s. 42 of the Act, as it purports to be, the plaintiff contends that there were in the procedure of the Board such defects as rendered the imposition of the tax upon him illegal. When a Board wishes to impose a tax for the purpose of the Act, it is required by sub-s (1) of s. 42 that the resolution to impose the tax should be passed at a special meeting, the necessary quorum for which must, according to s. 29, sub-section 1, be one-half of the whole Board. In order to enable us to determine the questions raised before us, we found it necessary to ask the lower Court for a finding as to the number of members constituting the whole Board between the 27th of June 1887 and the 25th of August 1887. The finding of the Court below is that between those dates the Municipal Board of Cawnpore consisted of twenty-one members, *i.e.*, 18 elected and 3 appointed. We find that the meeting at which the preliminary resolution under s. 42 for the inclusion of barristers in Class I was passed, was a **[351]** properly constituted special meeting. After the passing of this resolution, the next thing required of the Board is the publication of "a notice defining the persons or property proposed to be taxed, the amount or rate of tax to be imposed and the system of assessment to be adopted." It was objected on behalf of the plaintiff that the notification published on the 30th of June 1887 under this sub-section was defective, inasmuch as it failed to define the amount or rate of the tax to be imposed and the system of assessment to be adopted. This contention is not devoid of

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force. It is impossible to say that the notification complies with the strict letter of the law, but it may be, as contended by the learned counsel for the respondent, a mere defect in form which would be covered by the provisions contained in s. 43 of the Act. To proceed: sub-section (3) provides that any inhabitant of the Municipality objecting to a proposed tax may within a time fixed submit his objection in writing to the Board, which is bound to take the objection into consideration at a special meeting. The plaintiff did submit an objection, which was taken into consideration on the 27th of July 1887, at a meeting which is described as an "adjourned special meeting." The number of members present at the meeting was 7, which was only one-third of the whole Board. It is true that under the proviso to s. 29 no quorum is necessary for an adjourned special meeting, but the proviso requires that at such adjourned meeting only such business should be brought before and transacted at the adjourned meeting which would have been brought before the original meeting if there had been a quorum present.

The question we have to consider is whether the objection to the imposition of a tax on barristers could legally be considered at the adjourned meeting held on the 27th July 1887. We must answer that question in the negative. The so-called adjourned special meeting held on the 27th of July 1887, had been adjourned from the 19th of July 1887, which again had been adjourned from a meeting of the 11th of July 1887, which last **[352]** meeting had been adjourned from the 27th of June 1887. At none of these meetings was a consideration of objections to the imposition of taxes on barristers a business to be brought forward. Consequently the adjourned special meeting of the 27th July, 1887, was not competent to consider the plaintiff's objection to the imposition of the tax. In the case of *The Municipality of the City of Poona* v. *Mohan Lal* (1), it was held that the consideration by the Municipality of objections to a tax was an essential part of the machinery provided by the corresponding section of the Bombay District Municipality Act for the legal imposition of the tax and a decree of the lower Court awarding to the plaintiffs whose objections had not been duly considered the amount of the tax which had been levied from them was sustained. The Court declined to accept the contention on behalf of the Municipality that the consideration of objections of the inhabitants was merely a formal act, the omission of which did not invalidate the tax. But there remains a more formidable objection to the procedure of the respondent Municipal Board. S. 42, sub-s. (7), provides that when the proposals of a Municipal Board for the imposition of a tax have been sanctioned by the Local Government, the Board may at a special meeting direct the imposition of the tax in accordance with those proposals. The Cawnpore Municipal Board, in order to comply with the provisions of this sub-section, held what purports to have been a special meeting on the 25th of August 1887, at which it was formally resolved that barristers should be assessed in accordance with the proposals set forth above, which had received the sanction of Government. At this meeting only ten members were present, so that according to the finding on the issue referred by us, there was not present at that meeting the quorum required by law for a special meeting. We are constrained to hold that this defect entirely invalidates the resolution for the imposition of the tax under which the amount claimed was levied from the plaintiff. To hold otherwise would

(1) 9 B. 51.

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21 A. 348 = 19 A.W.N. (1899) 97.

[353] lead to the result that one or two members of a Municipal Board (not being an adjourned special meeting) could by calling themselves a special meeting direct the imposition of a tax upon the whole of the inhabitants. The learned Judge did not decide the case on the ground of the defects to which we have referred above, but made a decree for the amount claimed on the ground that there had been a breach of rule 6 of the rules for the imposition of license tax, inasmuch as the sub-committee by which the tax on the plaintiff was assessed was not duly constituted. This is an additional ground for sustaining the decree which has been granted to the plaintiff.

As we said at the outset, this is the plaintiff's appeal against the part of the decree dismissing his prayer for an injunction. The learned District Judge, although he framed an issue as to whether he had jurisdiction to grant the injunction asked for, did not decide that issue, but contented himself by decreeing the money part of the claim. For the respondent it was contended that this Court was not competent to make a decree for an injunction, and the case of *Moran* v. *Chairman of Motihari Municipality* (1), was relied on. It is true that the learned Judges who decided that case were of opinion that the power to compel corporations to do their duties and to restrain them from doing that which it is not within their province to do had been reserved to the High Court in its ordinary original jurisdiction with respect to the presidency towns, but had been withheld in respect of any of the Municipalities in the mufassil. What was apparently in the minds of the learned Judges when they expressed the above opinion was Chapter VIII of the Specific Relief Act. That chapter, it is true, does by implication withhold from High Courts the power to make orders save as to corporations within the local limits of their ordinary original civil jurisdiction. But a consideration of the terms of the chapter will render it clear that the orders referred to therein are orders passed upon applications, and not decrees in suits. The order referred to in [354] that chapter may be made *ex parte* on a mere application supported by an affidavit. There is nothing in that chapter to take away from Courts the power to grant injunctions in a suit when a sufficient ground is made out for doing so. Injunctions against Municipalities have been granted by this Court, *vide Ganga Narain* v. *The Municipality of Cawnpore* (2). We therefore overrule the respondent's plea and allow the appeal. We vary the decree of the Court below by granting an injunction restraining the defendant Board from levying or recovering any tax from the plaintiff by virtue of the resolution of the 25th August 1887. The appellant will get his costs of this appeal, and such costs as were refused him in the Court below.

Appeal decreed.

(1) 17 C. 329.

(2) 19 A. 313.

21 A. 354=19 A.W.N. (1899) 96.

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21 A. 354=19 A.W.N. (1899) 96.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHEO RATTAN RAI AND OTHERS (*Objectors*) *v.* MOHRI (*Applicant*).*

[8th May, 1899.]

Act No. I of 1894 (*Land Acquisition Act*), *ss.* 18, 19, 32 *and* 54—*Reference by Collector to Judge—Appeal from Judge's order—Court-fee—Decree or order.*

Held, that an appeal will lie to the High Court from an order of the District Judge made upon a reference by the Collector under ss. 18 and 19 of the Land Acquisition Act, 1894, as to the disposal of compensation awarded for land taken up by Government under the Act. *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra* (1), followed.

Held, also, that in an appeal from the order of the District Judge above referred to the memorandum of appeal must be stamped as an appeal from an original decree.

[F., 24 A. 189; R., 36 B. 360=14 Bom.L.R. 325 (328)=15 Ind. Cas. 512 (513); 31 C. 214 (216); 39 C. 906 (912)=14 Ind. Cas. 724 (725); 11 C.L.J. 533=14 C.W.N. 1024=6 Ind. Cas. 508 (510); 6 Ind. Cas. 157; 17 Ind. Cas. 117 (119); 53 P.R. 1906=103 P.L.R. 1906; D., 32 C. 921 (926)=2 C L.J. 595; 26 M. 287 (288).]

IN this case certain land, which was in the possession of the respondent, holding a life estate as a Hindu widow or daughter, was taken up under the provisions of the Land Acquisition Act, 1894. There appears to have been no objection to the amount of the compensation awarded, but certain reversioners to the estate came before the Collector with an objection that the whole of the compensation ought not to be made over [355] directly to the respondent, inasmuch as she was only entitled to a life interest in the property taken up, and there was danger of their reversionary rights being lost. The Collector thereupon, under ss. 18 and 19 of the Act, referred the disposal of the compensation to the District Judge. The District Judge, disallowing the objections of the reversioners, ordered the compensation money to be paid to the respondent. From this order the objectors appealed to the High Court. At the hearing of the appeal two preliminary objections were taken, which were disposed of by the following order:—

BLAIR and BURKITT, JJ.—Two preliminary objections have been raised to the hearing of this appeal. The first is as to whether s. 54 of the Land Acquisition Act, No. I of 1894, gives an appeal to this Court. Upon that matter we see no reason to differ from the reasoning and conclusion of the learned Judges of the Calcutta High Court in *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra* (1).

The second point is, whether the appellants here ought to stamp their memorandum of appeal as an appeal from an order or an appeal from an original decree. We are of opinion that it is an appeal from an original decree and must be stamped as such.

We therefore refer this case to the Taxing Officer for his decision and report as to what stamp should be paid on this appeal, if it be considered as an appeal from an original decree.

[The report called for having been supplied and the deficiency in the

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* First Appeal No. 104 of 1898 from an order of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 5th August 1898.

(1) 23 C. 526.

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21 A. 354=19 A.W.N. (1899) 96.

Court-fee stamp having been made good, the appeal was put up for final disposal.]

Maulvi *Ghulam Mujtaba* and Babu *Jiwan Chandar*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—This case arises under the Land Acquisition Act, No. I of 1894. Land had been taken in which the respondent here had a life estate. Whether that of a **[356]** Hindu widow or a daughter we are not informed. In neither case had she the power to alienate except for legal necessity. The District Judge, in the face of an objection by the reversioners, has ordered the purchase-money to be paid to the Musammat. This order cannot stand. The case is manifestly one provided for by s. 32 of Act No. I of 1894. We set aside the order of the Court below, and direct that, under the provisions of s. 32, the money shall be invested in the purchase of other lands, to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or, if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit. Payment of the rent or other proceeds of such investment will be made to Musammat Mohri as the person for the time being entitled to the possession of such land. The Judge will further strictly comply with the other provisions of s. 32. We make no order as to costs.

Appeal decreed.

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21 A. 356=19 A.W.N. (1899) 100.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice and Mr. Justice Banerji.

HIRA LAL SAHU (*Decree-holder*) *v.* PARMESHAR RAI (*Objector*).*

[9th May, 1899.]

Execution of decree—Decree for sale on mortgage—Powers of Court executing decree—Hindu law—Joint Hindu family—Objection by son that his interest in the property mortgaged is not saleable in execution of a decree obtained against his father.

Held, that it is not open to a son in a joint Hindu family, who has been made a party as the legal representative of his father to proceedings in execution of a mortgage decree against the father, to raise an objection in those execution proceedings that the decree against the father is not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed. *Bhawani Prasad* v. *Kallu* (1) referred to. *Sanwal Das* v. *Bismillah Begam* (2) and *Liladhar* v. *Chatarbhuj* (3), approved; *Lochan Singh* v. *Sant Chandar* (4) not followed.

[F., 32 C. 265 (267).]

[357] THE facts of this case sufficiently appear from the judgment of BANERJI, J.

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*Second Appeal No. 910 of 1896, from a decree of H.D. Griffin, Esq., District Judge of Azamgarh, dated the 25th August 1896, modifying a decree of Munshi Ahmad Ali Khan, Subordinate Judge of Azamgarh, dated the 15th May 1896.

(1) 17 A. 537.
(2) 19 A. 480.
(3) 21 A. 277.
(4) 19 A.W.N. (1899) 24.

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APPELLATE CIVIL.

21 A. 356 = 19 A.W.N. (1899) 100.

Messrs. *W. M. Colvin* and *D. N. Banerji*, for the appellant.
Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BANERJI, J.—The appellant obtained a decree for sale under s. 88 of the Transfer of Property Act, 1882, against the father of the respondent. The decree directed the sale of the property comprised in the mortgage. This appeal arises out of an application made by the decree-holder for an order absolute for sale under s. 89 of the Act. That application was made against the respondent by reason of the mortgagor having in the meantime died. The respondent objected to the order under s. 89 being passed in respect of the whole property, on the ground that it was ancestral property, and that as he, the respondent, was not joined as a party to the suit in which the mortgagee decree-holder had obtained his decree, that decree could not affect his interests, and those interests were not liable to sale in execution of that decree. Both the Courts below have allowed the objection and exempted a one-third share of the mortgaged property, which they have declared to be the share of the respondents, from liability under the decree. The decree-holder mortgagee has preferred this appeal, and the question which we have to determine is whether the Courts below were competent to consider the objection raised by the respondent, the decree being one for sale under a mortgage, and directing that the whole of the mortgaged property should be sold. It is urged, and with reference to the rulings of this Court, rightly, that an application under s. 89 of the Transfer of Property Act is an application in execution of the decree for sale. The Court which dealt with that application was therefore dealing with a matter which must be taken to have arisen in connection with the execution of a decree. There can be no doubt that a Court executing a decree is bound to give effect to the decree as it finds it, and is not competent to vary or alter it in any way. The decree in this case directs, as stated above, the sale of the whole of the mortgaged **[358]** property. That being so, could the Court executing the decree consider the question whether any portion of that property was exempt from liability under the decree? No doubt according to the ruling of the Full Bench in *Bhawani Prasad* v. *Kallu* (1) the son of a Hindu mortgagor who had not been joined as a party to the mortgagee's suit for sale, is competent to sue for the exemption of his interests in the mortgaged property from sale on the single ground that he was not a party to the suit in which the decree was passed; but that is not a question which, it seems to me, can be raised in execution proceedings by the son of the mortgagor, if he happens to be made a party to those proceedings in his character of legal representative of his father. The determination of such a question would lead to a determination of the question of the validity of the decree passed against the father. Such a question is beyond the scope of the powers of a Court executing a decree. This was the principle of the ruling in the case of *Sanwal Das* v. *Bismillah Begam* (2), and the same view was apparently taken in the case of *Lilladhar* v. *Chatarbhuj* (3). No doubt in the case of *Lochan Singh* v. *Sant Chandar* (4) sitting with my brother Aikman, I held that it was open to a son who had been made a party to the execution proceedings as the legal representative of his father to raise an objection on the ground that the decree against the father was not binding on him in his personal

(1) 17 A. 537. (2) 19 A. 480. (3) 21 A. 277. (4) 19 A.W.N. (1899) 24.

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capacity by reason of his not having been made a party to the suit in which the decree was passed; but on reconsideration that view seems to me to be erroneous. I may observe that in a later case a doubt was expressed by my brother Aikman and myself as to the correctness of the view taken in the case of *Lochan Singh* v. *Sant Chandar*. A Court executing a decree, as I have said, is bound to give effect to the decree as it stands. If the decree orders the whole of the property mortgaged by the father to be sold, the Court executing the decree cannot consider the question whether the decree was validly made against the [359] interests of the son. If a son, although a party to the execution proceedings, in his capacity as legal representative of his father, could be allowed to raise the question of the binding effect of the decree on his interests, and if the Court executing the decree be permitted to give effect to such objection, the result would be that such Court might be in a position to vary the decree. This certainly a Court, in exercise of its powers relating to the execution of decrees, is not competent to do. Upon reconsideration, I think that the view which was taken in the case of *Sanwal Das* v. *Bismillah Begam* was the right view. I would allow the appeal, and, setting aside the orders of both the Courts below, remand the case to the Court of first instance, with directions to make an order under s. 89 of the Transfer of Property Act in respect of the whole of the property comprised in the decree under s. 88, and then to proceed with the application for execution. I would allow the appellant his costs here and in the Courts below.

STRACHEY, C. J.—I am of the same opinion.

Appeal decreed, and cause remanded.

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21 A. 359 = 19 A.W.N. (1899) 123.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

NARAIN SINGH AND ANOTHER (*Plaintiffs*) *v.* JASWANT SINGH (*Defendant*).* [9th May, 1899.]

Civil Procedure Code, s 43—*Application for leave to sue* in forma pauperis—*Application rejected—Subsequent suit not barred—Civil Procedure Code, s.* 413.

Held, that s. 43 of the Code of Civil Procedure would not apply so as to bar a subsequent suit where the so called previous suit was not a regular suit but an application for leave to sue *in forma pauperis*, which was rejected.

THIS was a suit to enforce as against the property of the defendant a lien for contribution arising out of a mortgage entered into by the plaintiff Narain Singh and the defendant jointly, on the allegation that the plaintiff's property had been sold in [360] execution of a decree obtained by the mortgagee on the mortgage, while the property of the defendant co-mortgagor had been exempted from sale. The principal plea raised by the defendant was that the suit was barred by the operation

* Second Appeal, No. 887 of 1896, from a decree of G. A. Tweedy, Esq., District Judge of Farrukhabad, dated the 27th June 1896, confirming a decree of Maulvi Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 20th December 1895.

of s. 43 of the Code of Civil Procedure inasmuch as the plaintiff had formerly made an application for leave to sue *in forma pauperis* for contribution in respect of the same cause of action. This application related merely to the claim for money, that is, it was not a claim for enforcement lien, and was rejected.

The Court of first instance (Subordinate Judge of Farrukhabad) dismissed the suit holding it to be barred by the provisions of s. 43 of the Code of Civil Procedure. The plaintiff appealed, and the lower appellate Court (District Judge), taking the same view of the law, dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

STRACHEY, C.J., and BANERJI, J.—We think that the learned Judge was wrong in holding that s.43 of the Code of CivilProcedure barred the present suit. S. 43 only applies where there has been a suit, and the plaintiff omits in that suit to make a particular claim which he is entitled to make in respect of the cause of action. Now prior to this suit the plaintiff did not bring any suit having reference to the cause of action alleged in the present suit. What he did was to make an application for leave to sue *in forma pauperis*, but that application was rejected. S. 410 of the Code clearly shows that it is only when such an application is granted that it becomes the plaint in a suit, and therefore if the application is rejected, it never becomes a suit, and s. 43, which is limited to suits, cannot apply so as to bar any subsequent suit. There is nothing in this view inconsistent with s. 413. All that s. 413 shows is that an order of refusal to allow the applicant to sue as a pauper bars any subsequent application for leave so as to sue in respect of the same right. It does not bar any suit brought in the ordinary way. The **[361]** words "but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right," do not imply that the applicant is not at liberty to institute a suit in the ordinary manner in respect of any other right than that to which the application related. In the present case the application for leave to sue as a pauper was merely in respect of the personal remedy of contribution, and there was no claim to enforce the charge created by s. 95 of the Transfer of Property Act. The present suit is a suit to enforce that charge, and there is nothing in s. 413 which could be held to bar it. That is all that is necessary to say about s. 43 of the Code. As to the question of limitation the learned Judge is right in holding that art. 132 is applicable. As we disagree with the learned Judge's view of the effect of s. 43 on which his decree is based, we must allow this appeal. We set aside the decrees of both the lower Courts and remand the suit to the Court of first instance for disposal on the merits. Costs of the appeal in the lower appellate Court and in this Court will be paid by the respondent. The costs of the first Court will abide the event.

Appeal decreed and cause remanded.

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21 A. 361 (F.B.) = 19 A.W.N. (1899) 91.

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FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

BAKAR SAJJAD (*Judgment-debtor*) *v.* UDIT NARAIN SINGH (*Decree-holder*).* [15th May, 1899.]

Execution of decree—Construction of decree—Act No. IV of 1882 (*Transfer of Property Act*), *ss.* 86, 88, 89—*Decree for sale on a mortgage—Interest allowable after date fixed by decree for payment of the mortgage money.*

A Court executing a decree the terms of which are ambiguous should, where it is possible, put such a construction upon the decree as would make it in accordance with law. *Amolak Ram* v. *Lachmi Narain* (1), *Pirbhu*, [362] *Narain Singh* v. *Rup Singh* (2) and *The Maharaja of Bhartpur* v. *Rani Kanno Dei* (3) *quoad hoc* approved.

But in construing a decree for sale upon a mortgage, the terms which are susceptible of being construed either as allowing interest only up to the date fixed by the decree for payment of the mortgage-debt or as allowing interest also after that date until realization, the proper construction, to make the decree in accordance with law, is that interest is allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. *Amolak Ram* v. *Lachmi Narain* (1), *Nain Dat* v. *Harihar Dat* (4) and *The Maharaja of Bhartpur* v. *Rani Kanno Dei* (3) as to this point overruled.

Achalabala Bose v. *Surendra Nath Dey* (5) and *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar* (6) referred to. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (7) followed.

[Diss., 17 C.P.L.R. 164 (166-168); Appr., 23 A. 181 (192) (P.C.) = 3 Bom L R. 51 = 5 C.W.N. 137 = 28 I.A. 35; R., 22 A. 79 (82); 29 C. 43 (51); 23 M. 637 (641); 6 C.W.N. 769 (771); 16 Ind. Cas. 374; D., 1 N.L.R. 43 (44).]

THIS was an appeal arising out of an application for execution of a decree under s. 88 of the Transfer of Property Act. The facts of the case will be found set forth in detail in the judgment of the Chief Justice, and it is only necessary to state here that the question before the Full Bench was whether the lower Court was right in allowing the decree-holder respondent's claim for interest up to the date of the application, that is to say, interest after the date fixed by the decree for payment of the mortgage-money, and in disallowing the judgment-debtor appellant's objection that interest was only payable under the decree up to the said date.

Munshi *Gulzari Lal*, for the appellant.

The decree in this case under s. 88 of the Transfer of Property Act only provides for payment of the sum found due with interest at the rate mentioned therein on 31st December, 1892, the date fixed by the Court for payment. The decree is silent as to payment of any interest after that date. A Court executing the decree cannot by a mere process of interpretation add to the terms of the decree—*Forester* v. *Secretary of State for India* (8).

The terms of the order absolute, dated 29th June 1873, awarding interest after the date fixed for payment are immaterial because the decree

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* First Appeal, No. 96 of 1898, from an order of Rai Pandit Indar Narayan, Subordinate Judge of Farrukhabad, dated the 15th January 1898.

(1) 19 A. 174. (2) 20 A. 397. (3) 18 A.W.N. (1898) 164.
(4) 18 A.W.N. (1898) 57. (5) 24 C. 766. (6) 21 M. 364.
(7) 26 C. 39. (8) 4 I.A. 137.

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to be executed is still the decree under s. 88 of [363] the Transfer of Property Act—*Raj Kumar* v. *Bisheshar Nath* (1); *Amolak Ram* v. *Lachmi Narain* (2); *Kashi Prasad* v. *Sheo Sahai* (3); *Oudh Bihari Lal* v. *Nageshar Lal* (4). A Court in passing an order absolute for sale has only to see whether the amount payable under the decree has been paid or not, and to order sale. Interpretation of the terms of the decree is beyond its scope, especially in a case like the present, where no payment has been made. Anything contained in the order absolute for sale cannot have the effect of *res judicata* in future execution proceedings *Shib Charan* v. *Raghu Nath* (5). The point now raised was never raised and determined by the Court directly between the parties after due notice—*Sheik Budan* v. *Ramchandra Bhunjgaya* (6); *Ram Lal* v. *Narain* (7); *Shafaat Begam* v. *Hurmat Sultan Begam* (8); *Madho Prasad* v. *Daryai Bibi* (9); *Nathu Ram* v. *Muhommad Ali Khan* (10).

Mr. *E. Chamier*, for the respondent.

The decree *nisi* provides for future interest, but does not state clearly up to what date such interest shall be paid. The decree *nisi* should, if possible, be construed as a decree prepared in accordance with law, see *Amolak Ram* v. *Lachmi Narain* (2) and *Pirbhu Narain* v. *Rup Singh* (11). As to what interest a decree under s. 88, Act IV, 1882, should provide for, see the decision of the Privy Council in *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (12), also *Achalabala Bose* v. *Surendra Nath Dey* (13) and *Subbaraya Ravuthamina Nainar* v. *Ponnusami Nadar* (14). The decision of this Court in *Amolak Ram's* case is no longer of authority in view of the decision of the Privy Council. The decree *nisi* now in question is capable of being construed as making provision for interest up to the date of realization and should be so construed.

[364] Next it is the duty of the Court which prepares the order absolute under s. 89 of Act No. IV of 1882 to construe the decree *nisi* and from the order absolute accordingly—the order absolute cannot be challenged at any later stage of the proceedings in execution, see *Badshah Begam* v. *Musammat Hardei* (15) and *Perbhu Narain Singh* v. *Rup Singh* (11). The order absolute in this case clearly provides for future interest and was never challenged till the publication of the decision in *Amolak Ram's* case. The principle of explanation II to s. 13, Civil Procedure Code, applies.

The order absolute was prepared after notice to the judgment-debtors; notice was again issued to them under s. 287, Civil Procedure Code, previous to the preparation of the proclamation, see cl. (*d*) of that section. The matter is now *res judicata*. *Ram Kirpal Shukul* v. *Rup Kuari* (16) *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (17). The case of *Sheikh Budan* v. *Ram Chandra* (6) is distinguishable.

Lastly, the judgment-debtor, appellant, has obtained adjournment of the sale, at the same time agreeing that the proclamation shall stand and has filed petitions admitting evidently that the amount due includes interest up to the date of realization. He is now estopped from raising the question of interest. He cannot rip open the proceedings of six

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(1) 16 A. 270. (2) 19 A. 174. (3) 17 A.W.N. (1897) 12.
(4) 13 A. 278. (5) 17 A. 174. (6) 11 B. 537.
(7) 12 A. 539. (8) 15 A.W.N. (1895) 15. (9) 15 A.W.N. (1895) 108.
(10) 15 A.W.N. (1895) 119. (11) 20 A. 397.
(12) 26 C. 39. (13) 24 C. 766. (14) 21 M. 364.
(15) 18 A.W.N. (1898) 17. (16) 11 I.A. 37.
(17) 8 I.A. 123.

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years. See *Girdhari Singh* v. *Hurdeo Narain Singh* (1) and *Arunachellam* v. *Arunachellam* (2).

Munshi *Gulzari Lal* in reply. In *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (3) their Lordships of the Privy Council never meant to decide the point which is now under discussion. The question before their Lordships simply related to the rate of interest to be allowed in a mortgage-decree between the date of the institution of the suit and the date fixed for payment. They held that interest at the contractual rate was **[365]** to be allowed. "Date of realization" in the judgment of the Privy Council must mean the "date fixed for realization" as put in the head note to the ruling as reported in the Indian Law Reports. In saying that, "if the High Court has allowed something less the mortgagee makes no complaint" their Lordships evidently referred to "rate of interest" in the previous sentence, and not to the period for which it was to be allowed, which was not in question in the case. The rate of interest was 12 per cent. compound interest and not simple interest as awarded by the High Court. It was to this that the Privy Council alludéd and to nothing else. It is thus that the Privy Council ruling has been interpreted by the Judicial Commissioner of Oudh in a very recent case—*Allahabad Bank* v. *Syed Mohamad Jawad* (4). The terms of ss. 86, 88 and 89 of the Act clearly support this view. Form No. 128 in sch. IV of the Code of Civil Procedure makes no mention of any interest after the date fixed for payment. Compare the form for an order for sale in Seton on Decrees and Orders, Vol. III, page 1587. As far as a decree for foreclosure or sale under the Transfer of Property Act is concerned, the Court can calculate interest on the mortgage debt as such only up to the date fixed for payment. It was so held even by the Calcutta High Court in *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhury* (5). The recent ruling in *Achalabala Bose* v. *Surendra Nath Dey* (6) apparently overlooks the old practice of the Calcutta High Court. The interest at 4 or 6 per cent. which is generally allowed by the Calcutta High Court after the date fixed for payment is not under the provisions of the Transfer of Property Act. S. 209, Civil Procedure Code, has nothing to do with the matter as it cannot apply to a mortgage decree. The ruling of *Amolak Ram* v. *Lachmi Narain* does not stand alone in this Court. The same view was held in *Tarachand* v. *Dina Nath* (7).

JUDGMENT.

[366] STRACHEY, C.J.—This was an application for execution of a decree for sale of mortgaged property under s. 88 of the Transfer of Property Act, 1882. The question is whether the Court below was right in allowing the decree-holder's claim for interest up to the date of the application and disallowing the judgment-debtor's objections that interest was payable under the decree only up to the 31st December 1892. The decree was passed on the 30th June 1892. It recites the relief claimed in the plaint, that the defendants may be ordered to pay to the plaintiff Rs. 13,771-8, principal and interest, together with interest accruing during the pendency of the suit and future interest on the date to be named by the Court, and that, in case of default, the mortgaged property might be sold in satisfaction of the debt, with relief against the person and other property of the defendants. The operative part of the decree is as follows :—

(1) 3 I.A. 230. (2) 15 I.A. 171. (3) 26 C. 39.
(4) Oudh Cases (1899) 37 (=2 O.C. 37). (5) 20 C. 360.
(6) 24 C. 766. (7) 15 A. W. N. (1895) 76.

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"It is decreed and hereby declared that on the 31st December, 1892, the sum of Rs. 14,848-6 will be payable to the plaintiff, *viz.*, Rs. 13,817-6 for principal and interest on the mortgage, dated the 21st day of March 1883, *i. e.*, Rs. 13,771-8, the amount claimed and Rs. 45-14 *pendente lite* interest, and Rs. 1,031 for his costs of this suit, and it is hereby ordered that upon the defendants paying to the plaintiff or into Court on the 31st December, 1892, aforesaid the said sum with interest at annas 8 per cent. per mensem, the plaintiff shall deliver up to the defendants, or to such person as they appoint, all documents in his possession or power relating to the property specified below, and shall transfer the property to the defendants free from all incumbrances created by the plaintiff, or any person claiming under him, or by those under whom he claimed and shall put the defendants in possession of the property. But if such payment be not made as aforesaid on or before the aforesaid 31st day of December, 1892, then it is ordered that the said property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of the sum **[367]** found due to the plaintiff, and that the balance, if any, be paid to the defendants or other persons entitled to receive the same. And it is further ordered that each of the mortgagors, Ahmad Sajjad and Bakar Sajjad, can redeem 5 biswas of mauza Babapur Patti on payment of the amount decreed in equal shares."

The judgment-debtors not having paid the amount decreed, an order absolute for sale of the mortgaged property under s. 89 of the Transfer of Property Act was passed on the 29th June, 1893, after notice to them. They did not appear on the date fixed by the notice, and the order absolute for sale was therefore passed *ex parte*. The material part of the order was as follows:—"It is decreed and ordered that the property detailed below be sold on a date to be fixed hereafter and the sale proceeds, after defraying the expenses of sale, be paid into Court and applied in paying Rs. 16,046 with usual future interest, which has been found to be due to Raja Udit Narain Singh, decree-holder." This Rs. 16,046 included interest calculated up to the 29th June, 1893. As the property to be sold was ancestral property, the Court proceeded to order, in accordance with the rules prescribed by the Local Government under s. 320 of the Code of Civil Procedure, that the record should be transmitted to the Collector for execution of the decree. It does not appear whether any proceedings in execution were taken by the Collector before the 20th September, 1894. On that date the property was proclaimed for sale, the amount due under the decree being notified in the proclamation as Rs. 16,046, that is, the amount stated in the order absolute. No sale, however, took place. The sale was first adjourned by the Collector upon an application by the judgment-debtors, who represented that they were making arrangements with the decree-holder for a private disposal of the property. After this it was adjourned several times pending an application made by one of the judgment-debtors, the present appellant, to the Court of the Subordinate Judge, on the 10th December 1894, dismissed by that Court in September, 1895 and finally dismissed by the High Court in appeal on 8th December, **[368]** 1896. In that application, the object of which was to have satisfaction of the decree recorded by reason of an alleged compromise, the appellant stated the "amount due by the judgment-debtor" to be Rs. 8,642, which is half the Rs. 16,046 mentioned in the order absolute and interest thereon at 6 per cent. from the date of that order. On the 11th January,

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1896, the decree-holder applied for execution of the decree, claiming interest up to the date of the application, but as the judgment-debtor's appeal to the High Court from the order dismissing his application of the 10th December, 1894, was then pending, the application for execution was not proceeded with. On the 1st November 1897, the present application for execution was made. In it the decree-holder claimed interest up to the 30th October. Notice was issued under s. 248 of the Code to the judgment-debtor, who then for the first time objected that the decree-holder was not entitled to interest beyond the 31st December 1892, the date fixed by the decree for payment. The Court below disallowed the objection, and ordered execution to issue for the full amount claimed. In this appeal by the judgment-debtor we have to decide whether the lower Court's order was right.

It is clear from the order absolute, the Collector's proclamation, and the appellant's application of the 10th December 1894, that until the appellant raised his objection to the present application, both the Court and the parties thought that the decree-holder was entitled to interest after the 31st December 1892. In the argument before us there has been much discussion of the questions whether, and in what sense, the Court, when passing the order absolute, was competent to construe the decree of the 30th June 1892, or to add to its provisions as to interest; whether, having regard to the terms of the notice to the judgment-debtors upon which that order was passed, the order had the effect of making the question of interest until realization *res judicata* and whether the appellant is estopped from raising his present contention by anything else which occurred in the execution proceedings. In the view which we take of the case, it is not necessary to [369] decide any of these questions. The only question which we need consider is up to what date the decree upon its true construction awards interest. Now the decree begins by reciting the claim in the plaint for interest after decree as well as interest before suit and interest *pendente lite*, and then fixes the 31st December 1892, as the date for payment of (i) Rs. 14,848-6 made up of (*a*) the principal sum and interest claimed in the plaint as due up to the date of suit, (*b*) interest from the date of suit to the date of the decree, (*c*) costs, and (ii) future interest on the Rs. 14,848-6 at annas 8 per mensem. Then it directs, in accordance with s. 88 of the Transfer of Property Act, 1882, that if payment is not made on or before the 31st December 1892, the property or a sufficient part of it is to be sold and that the proceeds after defraying the expenses of sale are to be paid into Court and applied in payment of the sum found due to the plaintiff. Thus the decree clearly makes future interest payable, and the only question is until when? It does not expressly state when the interest thus set running is to stop. The only possible dates at which the Court passing the decree can have intended it to stop are the 31st December 1892, the date fixed for payment, and the date of actual payment or realization. To which of these dates does the decree awarding interest impliedly refer? Upon principle, and apart from authority, statutory or otherwise, it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid. The 31st December, 1892, is only named in the decree as the date on which payment is to be made, and after which, if payment is not made, the property is to be sold. It is not named with any special reference to interest. However, in the absence of any express direction as to the date to which interest is payable, the decree is certainly not free from ambiguity on the point.

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In *Amolak Ram* v. *Lachmi Narain* (1), *Pirbhu Narain Singh* v. *Rup Singh* (2) and *The Maharaja of Bhartpur* v. *Rani* [370] *Kanno Dei* (3) this Court has laid down the principle that a Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon the decree as would make it in accordance with law. The principle is, I think, undoubtedly sound : the only question is as to its application. The decree of the 30th June 1892 is, as just shown, capable of two different constructions. Which of the two would make the decree in accordance with law. The construction that it awards interest only up to the date fixed for payment or the construction that it awards interst up to realization ? The question depends upon the interpretation of ss. 86, 88 and 89 of the Transfer of Property Act, 1882, read with ss. 90, 94 and 97 of the same Act, and with s. 209 and forms 109 and 128 of the fourth schedule of the Civil Procedure Code. Upon this point there is a conflict of authority. On the one hand it was held by this Court in *Amolak Ram* v. *Lachmi Narain* (1), *Nain Dat* v. *Harihar Dat Singh* (4) and *The Maharaja of Bhartpur* v. *Rani Kanno Dei* (3), that in a decree for sale of mortgaged property the Court has no power, under s. 88 read with s. 86 of the Transfer of of Property Act, 1882, to allow interest beyond the date fixed by the decree for payment of the mortgaged money. On the other hand, the Calcutta High Court in *Achalabala Bose* v. *Surendra Nath Dey* (5), and the Madras High Court in *Subbarzya Ravuthaminda Nainar* v. *Ponnusami Nadar* (6), have dissented from the decision in *Amolak Ram's* case, and held that the Court has power in a decree under s. 88 to award interest subsequent to the decree and the date fixed by the decree for payment, until realization. It is not necessary for us to examine these decisions or to consider which of them we should have followed in the absence of superior authority. Since the latest of them was given, the question has been considered by the Judicial Committee of the Privy Council in *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (7), in [371] a judgment which appears to us to settle it in the sense of the Calcutta and Madras rulings. There the Subordinate Judge passed a decree for sale of mortgaged property awarding interest at the mortgage rate of 12 per cent. down to the date of the institution of the suit, and thereafter at 4 per cent. until realization, with directions for sale in case of non-payment in six months. On an appeal by the defendants to the High Court, the plaintiff mortgagee filed objections to the decree under s. 561 of the Code, one of which was that "the Subordinate Judge is wrong in making up the accounts in directing that the amount due should, from date of suit to date of payment, bear only 4 per cent. interest instead of the rate of interest stipulated for in the bond." The decree of the High Court as regards this point is incompletely stated at page 41 of the report. We have been favoured by the Registrar of the Calcutta High Court with a copy of the printed book of appeal to the Privy Council, from page 105 of which it appears that the decree was as follows :—"It is ordered and decreed that the decree of the lower Court, so far as it directs that the amount due should, from the 7th August, 1891, to 15th March, 1893, being the date of payment fixed by the lower Court, bear interest at 4 per cent. be set aside, and in lieu thereof, this Court doth direct that interest do run on the amount due at 12 per cent. from

(1) 19 A. 174. (2) 20 A. 397. (3) 18 A. W. N. (1898) 164.
(4) 18 A. W. N. (1898) 57. (5) 24 C. 766. (6) 21 M. 364.
(7) 26 C. 39.

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the 7th August, 1891, up to the 15th March, 1893, the date fixed by the lower Court for the payment of principal and interest, and thereafter at the rate of 4 per cent. until realization, and it is further ordered and decreed that, save and except as aforesaid the said decree be and it hereby is dismissed, and it is further ordered and decreed that the appellant do pay to the respondent Rs. 1,454 6-0 (as per details at foot) being the amount of costs incurred by them in this Court, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization." That is to say, the High Court, while agreeing with the Subordinate Judge in awarding interest until realization, thought that the mortgage rate of 12 per cent. should be paid not only to the date of the institution of the suit, but to the date **[372]** fixed by the decree for payment, and that only from that date onwards until realization should the rate be reduced to 4 per cent. From the decision of the High Court the defendants appealed to the Privy Council, one of the grounds of appeal being that the High Court " was wrong in allowing interest at 12 per cent. per annum (the stipulated rate) from the date of the suit till the date fixed for payment by the Subordinate Judge." No objection was taken that the Courts should not have allowed interest beyond the date fixed for payment. In the argument as reported it was apparently common ground that, whether the case was governed by the Transfer of Property Act, 1882, or not, interest until realization was properly awarded, and no question appears to have been raised as to the rate of interest awarded from date fixed for payment until realization. The only questions regarding interest were whether the Act applied, and whether the rate of interest from the date of the suit to the date fixed for payment should be the stipulated rate or something less. The judgment of the Privy Council, after stating the effect of the Subordinate Judge's decree, goes on to say, "the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it." The terms of the High Court's decree above quoted show that it would have been exactly correct to say that the High Court varied the decree by ordering 12 per cent. interest instead of 4 up to the date fixed by the Subordinate Judge for payment instead of up to the date of suit, and with that exception affirmed it. Upon the general question their Lordships say:—"The High Court founded their order on ss. 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." The appeal was accordingly **[373]** dismissed. The words "if the High Court has allowed something less," that is, less than the mortgage rate of 12 per cent. can only refer to the period from the date fixed for payment until realization. It is thus obvious that the question whether a decree under s. 88 read with s. 86 of the Transfer of Property Act should allow interest beyond the date fixed for payment and until realization was considered by the Privy Council and answered in the affirmative.

While therefore we must, in accordance with the principle stated in *Amolak Ram* v. *Lachmi Narain* (1) and the later decisions of the Court construe the decree of the 30th June, 1892, so as to make it in conformity

(1) 19 A. 174.

with ss. 86 and 88 of the Transfer of Property Act, we cannot follow those decisions in their application of the principle. To be in conformity with those sections as interpreted by the Privy Council the decree must be construed as awarding interest, not merely until the 31st December, 1892, but until realization of the mortgage money, and in this view of the decree the Court below was right in disallowing the judgment-debtor's objection and in allowing execution for the full amount claimed by the decree-holder. The appeal must be dismissed with costs.

KNOX, J.—I concur.

BANERJI, J.— I am of the same opinion, and have nothing to add.

AIKMAN, J.—I concur in the judgment of the learned Chief Justice, and have nothing to add.

BLAIR, J.—As one of the Judges who was responsible for the decision in *Amolak Ram* v. *Lachmi Narain* (1), and as one of the Bench which referred this case with a view to its consideration by a Full Bench, I desire to say that I entirely concur with the view of the Chief Justice that the question is authoritatively decided for us by the ruling of the Judicial Committee of the Privy Council in the case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (2). I agree that the appeal must be dismissed with costs.

Appeal dismissed.

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Before Sir Arthur Strachey, Kt., Chief Justice,

Mr. Justice Knox, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

JANKI PRASAD AND ANOTHER (*Defendants*) *v.* ISHAR DAS (*Plaintiff*),*

[15th May, 1899.]

Pre-emption—Wajib-ul-arz—*Partition*—*Effect of partition on pre-emptive rights, no new* wajib-ul-arz *being framed*—*Cause of action*—*Extinction of cause of action before suit brought.*

In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit is brought. *Dalganjan Singh v. Kolka Singh* (3) referred to.

[**Diss.**, 4 Ind. Cas. 337 (340) = 91 P.R. 1909 = 148 P.L.R. 1909 = 161 P.W.R. 1909; **Appl.**, 26 A. 389 = 1 A.L.J. 209 = 24 A.W.N. (1904) 68; 23 A. 247 (248); CONS., 21 A 441 (442); **R.**, 31 A. 530 (532) = 6 A.L.J. 699 = 2 Ind. Cas. 42; 32 A. 45 = 6 A.L.J. 966 = 3 Ind. Cas. 782; 1 Ind. Cas. 528; 3 Ind. Cas. 923 (925) = 5 N.L.R. 136 (140); 3 Ind. Cas. 546 = 12 O.C. 229; 4 Ind. Cas. 179 (187) = 90 P.R. 1909 (**F.B.**) = 147 P.L.R. 1909 = 159 P.W.R 1909; 2 N.L.R. 150 (152, 153); 7 O.C. 61 (63); 11 O.C. 290 (291); 30 P.L.R. 1902 = 32 P.R. 1902; 3 P.L.R. 1907 = 124 P.R. 1907 = 48 P.W.R. 1907; 163 P.L.R. 1908 (**F.B.**) = 17 P.R. 1908 = 18 P.W.R. 1908; 24 P.W.R. 1908; **D.**, 31 A. 111 = 6 A.L.J. 51 = 1 Ind. Cas. 819.]

THIS was a suit for pre-emption of a 4 biswansi 12 kachwansi 10 nanwansi share in mauza Rajora. The defendants were Kalyan, Kuar Sen and Naik Rai, the vendors, Janki Prasad and Raghubar Dial, the

* Second Appeal No, 860 of 1896, from a decree of H. W. Lyle, Esq., Officiating District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Babu Jagat Narain, Munsif of Shikohabad, dated the 30th March 1896.

(1) 19 A. 174. (2) 26 C. 39. (3) 19 A.W.N. (1899) 111.

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vendees, and Musammat Jai Debi, the plaintiff in an earlier suit for pre-emption arising out of the same sale. The suit was brought on the basis of the *wajib-ul-arz*, the plaintiff alleging that the vendors being owners of a share in patti No. 2 of the plaintiff's thoke had sold the same to strangers. The plaintiff also alleged that the price (Rs. 500) entered in the sale deed was fictitious, and that the true price was Rs. 375. Both vendors and vendees pleaded that by reason of a partition which had taken place in 1894-5 the plaintiff was not a sharer in the patti in which the share in question was sold and therefore had no right of pre-emption. Musammat Jai Debi pleaded a pre-emptive right superior to that of the plaintiff. The sale out of which the suit arose was effected by a deed executed on the 28th of February 1895. By virtue of proceedings which were completed on the 15th August 1895, the mahal in which originally both the plaintiff and the defendants-vendors were sharers was broken up, so that the plaintiff ceased to be a sharer in the mahal in which the share sold was situated. No new *wajib-ul-arzes* were prepared for the new mahals which were formed on partition. The suit was filed on the 25th of February 1896.

[375] The Court of first instance (Munsif of Shikohabad) decreed the plaintiff's claim for half the share sold, having regard to the pre-emptive rights of Jai Debi, and found the true sale price to be Rs. 400.

The defendants-vendees appealed, and the lower appellate Court (District Judge of Mainpuri) dismissed the appeal and upheld the decree of the Munsif on the grounds upon which that decree was based.

The defendants-vendees appealed to the High Court.

Pandit *Sundar Lal*, for the appellants. The plaintiff cannot maintain the suit for pre-emption unless he can show that he continued a co-sharer at least until the day when he instituted his suit for pre-emption. The object of a suit for pre-emption is to exclude strangers and to prevent them from intruding into a co-parcenary body. It would be defeating the object of pre-emption if a person who himself has ceased to be a co-sharer at the date of suit and has thus become a stranger is permitted to pre-empt. That would be permitting one stranger to step into the place of another.

The Muhammadan law requires that the pre-emptor's interest in the tenement, the ownership of which gives him a right of pre-emption, should be subsisting up to the time when the Qazi pronounces his decree for pre-emption—*Sakina Bibi* v. *Amiran* (1), Baillie's Digest of Moohummudan Law, Hanifeea, p. 505, Tagore Law Lectures, 1873, p. 535. The principle upon which this rule of Muhammadan law is based is applicable equally to pre-emption cases based on the *wajib-ul-arz*.

The *wajib-ul-arz* conferred a right of pre-emption on co-sharers of four classes. The plaintiff does not come within the first three of these classes. The fourth class within which he fell on the date of sale (*viz.*, that of co-sharers in the thok) had ceased to exist on the date of suit by reason of the thoke itself having ceased to exist.

Babu *Satya Chandra Mukerji* (for Babu *Jogindro Nath Chaudhri*) for the respondent.—This case differs in a material respect from *Dalganjan Singh* v. *Kalka Singh* (2) which has **[376]** just been argued before this Bench. In this case the plaintiff was a co-sharer with the vendor at the date of sale, but, by reason of partition proceedings having been completed in the meanwhile, he had ceased to be a co-sharer at the

(1) 10 A. 472.
(2) 19 A.W.N. (1899) 111.

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date of suit. The question to be determined here is whether under such circumstances the suit is maintainable. It is submitted that it is. The crucial date to be looked at is the date on which the cause of action arose, which was here the date of sale. A complete cause of action which has once accrued can be enforced by a suit brought according to law and within the statutory period.

The plaintiff may waive his right to relief or defendant may discharge the cause of action which had accrued to the plaintiff by performance; but the plaintiff cannot lose his right to relief by something independent of his will. Here the plaintiff did not apply for partition and he cannot lose his right by some act of a third person which he was powerless to prevent. The principle contended for is supported by the decision of Mr. Justice Burkitt in Second Appeal 649 of 1895*. If the argument for the appellant were correct, a man has only to sell his share to a stranger and the stranger has the next day to apply for partition and get the property sold partitioned into a separate mahal. Would such a course defeat all rights of pre-emption? It is not an essential element of the plaintiff's cause of action that he was a co sharer at the date of suit. He need only show that he was a co-sharer at the date when the cause of action arose.

[STRACHEY, C. J.—Supposing there had been a compulsory sale by process of law of the share of the plaintiff between the date of sale and the date of suit, would he still be entitled to bring his suit ?]

No. Sale in execution of a decree stands on the same footing as a private sale. The compulsory sale by process of law follows some preceding act of the person against whom execution is enforced, and would be included in the principle of losing one's cause of action by waiver.

[377] [STRACHEY, C. J.—Supposing in a suit for an easement the dominant tenement is destroyed by lightning or earthquake before the suit is instituted, would the suit lie still ?]

Yes, it would; the Court might not be able to grant relief by reason of the destruction of the dominant tenement; but it might grant other reliefs, such as for damages.

JUDGMENT.

STRACHEY, C. J.—This case raises a question similar to that considered by this Full Bench in *Dalganjan Singh* v. *Kalka Singh* (1). It relates to the effect of a perfect partition upon the right of pre-emption recorded in the wajib-ul-arz of an undivided mahal, where no new wajib-ul-arz has been framed for the new mahals created by the partition. The village Rajora originally consisted of several thokes, one of which was shown as "thoke Ishar Das." That thoke was an undivided 3 biswas 16 biswansis 10 kachwansis share of the village. The wajib-ul-arz prepared at the last settlement contained a chapter, headed "Chapter II, about the right of co-sharers (*hissadars*) among themselves based on custom or covenant." Clause 4 was as follows:—Custom (*dastur*) relating to pre-emption (*shafa*).—If any co-sharer (*hissadar*) wishes to transfer his share (*hissa*), then, having regard to the right of pre-emption, he should transfer his estate (*haqiyat*), that is, the claim to pre-emption shall accrue to, first, own brothers' and brothers' sons, next

* (Unreported.) This case has however been dissented from by Edge, C. J., and Banerji, J. in *Serh Mal* v. *Hukam Singh*, (1897) I. L. R. 20 All. 100 —ED.

(1) 19 A.W.N. (1899) 111.

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to cousins, next to co-owners in the parcel sold (*sharik-i-haqiyat*), after them to co-sharers in the patti (*sharkian patti*), after them to co-sharers in the thoke (*sharkian thoke*).

In February 1895 the defendants Nos. 3 to 5 sold a share in thoke Ishar Das to the defendant-appellant Janki Prasad, a stranger to the village. The plaintiff-respondent was at that time a co-sharer with the vendors in thoke Ishar Das. At the time of the sale, proceedings for perfect partition of the village had been commenced and were still pending. After the sale the perfect partition was completed, and it became operative on the [378] 1st July 1895, when the sanction of the Collector was given. By the partition thoke Ishar Das was divided into several separate mahals. The property sold fell within one of the mahals shown as mahal Ganga Prasad. In that mahal neither the plaintiff nor the vendees owned any share. No new wajib-ul-arz was framed for any of the now mahals. The present suit for pre-emption was brought in 1896. It was based on the pre-emption clause of the old wajib-ul-arz. In this appeal two questions have been discussed. The first is whether, after the perfect partition, the plaintiff was still entitled to pre-emption under the old wajib-ul-arz. The second is, whether it makes any difference that the sale took place before the completion of the partition: in other words, whether, granting that the plaintiff at the time of the sale obtained a good cause of action, he was deprived of it by the completion of the partition before the institution of the suit.

The principles upon which the first question must be decided have been fully considered in *Dalganjan Singh* v. *Kalka Singh* (1), The wajib-ul-arz was not in my opinion abrogated by the perfect partition. The question is whether, upon the true construction of its provisions, the plaintiff is entitled to pre-emption. The pre-emption clause gives the right (1) to certain relatives of the vendor, (2) to *sharik-i-haqiyat* or co-owners in the parcel sold, (3) to co-sharers in the patti, (4) to co-sharers in the thoke. "Co-sharers in the thoke" means co-sharers in the thoke which contains the property sold. No right is given to co-sharers in any other thoke or in any part of the village other than the thoke in which the vendor is a co-sharer. The plaintiff claims as one of this fourth class of pre-emptors, as a co-sharer in thoke Ishar Das. If he is a member of that class he is entitled to pre-emption: if he is not, his claim must fail. The effect of the perfect partition was to destroy the thokes into which the village Rajora had been divided, and thoke Ishar Das had, at the date when the suit was brought, ceased to exist. Neither the plaintff nor any one else has, since the partition, been a co-sharer in thoke Ishar [379] Das, and no one, therefore, can now claim pre-emption as a member of the fourth class of pre-emptors mentioned in the wajib-ul-arz. That disposes of the first question.

Next, does it make any difference that, at the date of the sale, though not at the date of the suit, thoke Ishar Das still existed, and that the plaintiff could, before the partition, have sucessfully sued for pre-emption as one of the co-sharers in the thoke? In my opinion, it makes none. No case exactly in point has been cited, but the principle appears to me to be clear. To maintain a suit for pre-emption, the plaintiff must, I think, show not only that the sale gave him a cause of action, but that the cause of action still subsisted at the date of the institution of the suit. It is not necessary to consider what would have been the effect of the partition, if

(1) 19 A.W.N. (1899) 111.

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it had been completed after the institution of the suit but before decree. To hold that the plaintiff is entitled to a decree if he merely proves that he had a right of pre-emption and a good cause of action at the time of sale, and that it is unnecessary to show that the right and the cause of action still subsisted when the suit was brought, should result in all sorts of anomalies. Suppose, for instance, that the plaintiff, after the sale, ceased to be a co-sharer in the thoke, not by reason of a partition but in any other way, such as by selling his share, could he still sue as a co-sharer? The learned pleader for the respondent admitted that he could not, but suggested that in such a case there would be a waiver or relinquishment of the right by the pre-emptor's voluntary act. But suppose that the sale was not a voluntary one: suppose that it was in execution of a decree against him? The learned pleader could suggest no answer to that question. Again, suppose that, after the sale, the vendee sold the property to a co-sharer having an equal right with the plaintiff to pre-emption under the wajib-ul-arz. Could the plaintiff deprive the new purchaser of the benefit of his purchase, although the rights of the two were equal? In *Serh Mal* v. *Hukam Singh* (1) that question was **[380]** answered in the negative. The argument that "at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action." was not allowed to prevail.

For these reasons I am of opinion that the suit ought to have been dismissed by the Courts below, and that we ought to allow the defendants' second appeal and dismiss the suit with costs in all Courts.

KNOX, BANERJI, BURKITT and AIKMAN. JJ., concurred.

Appeal decreed.

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21 A. 380 = 19 A.W.N. (1899) 130.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

YAD RAM (*Plaintiff*) *v.* UMRAO SINGH AND OTHERS (*Defendants*).* [16th May, 1899.]

Mortgage—Suit for sale on a mortgage—Benamidar—Right of benamidar mortgagee to sue.

Held, that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person. *Nand Kishore Lal* v. *Ahmad Ata* (2) followed. *Gopi-Nath Chobey* v. *Bhugwat Pershad* (3); *Bhola Pershad* v. *Ram Lall* (4); *Sachitananda Mohapatra* v. *Baloram Gorain* (5); *Shangara* v. *Krishnan* (6); *Ravji Avpaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (7) and *Dagdu* v. *Balvant Ramchandra Natu* (8) referred to; *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (9); *Issur Chandra Dutt* v. *Gopal Chandra Das*, (10) and *Baroda Sundari Ghose* v. *Dino Bandhu Khan* (11) dissented from.

[**Diss.**, 30 C. 265 (273); **F.**, 28 A. 44 = 2 A.L.J. 702 = A.W.N. (1905) 173; 12 C.L.J. 357 = 7 Ind. Cas, 166 (170); **R.**, 13 C.P.L.R. 33; 10 O.C. 263.]

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* Second appeal No. 21 of 1897, from a decree of T. C. Piggott, Esq., Additional District Judge of Aligarh, dated the 2nd October 1896, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 24th March 1896.

(1) 20 A. 100. (2) 18 A. 69. (3) 10 C. 697. (4) 24 C. 34.
(5) 24 C. 644. (6) 15 M. 267. (7) 22 B. 672. (8) 22 B. 820.
(9) 16 C. 364. (10) 25 C. 98. (11) 25 C. 874.

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THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendra Krishna Mukerji*) for the appellant.

Mr. D. *N. Banerji* and Munshi *Ram Prasad*, for the respondents.

JUDGMENT.

[381] STRACHEY, C.J.—This is a suit for sale of mortgaged property brought by a second mortgagee offering to redeem the first mortgagees, who are parties to the suit. The first mortgage was a usufructuary mortgage. The only defendants who resisted the suit were the purchasers, subsequent to the plaintiff's mortgage, of the equity of redemption of part of the mortgaged property. Their main defence was that the plaintiff had no right to maintain the suit, as he was only a benamidar, the mortgage money having been advanced by the defendants, first mortgagees. The Court of first instance decreed the suit. The lower appellate Court, without going into the merits, dismissed the suit on the ground that the plaintiff was merely a benamidar of the first mortgagees, and therefore was not competent to maintain the suit. That is the only question which we have to consider in this appeal. We must take it that the plaintiff, in whose favour the mortgage sued on was executed, was only a benamidar for the first mortgagees.

Now the question whether, and in what circumstances, a benamidar is competent to maintain a suit in his own name and without the beneficial owner being a party to the suit, has been discussed in a number of rulings in the various High Courts, and in regard to it a considerable conflict of authority prevails. In those cases which affirm the right of the benamidar so to sue the right has been based partly on the fact that he is the transferree named in the registered instrument constituting the transfer, and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the benamidar must be presumed to be suing on behalf of the beneficial owner, or, to put the same idea into other words, that the suit is really brought by the beneficial owner through, and in the name of, the benamidar. On the other hand, those rulings which are adverse to the right of the benamidar to sue are mainly based on the ground that a suit cannot be maintained by any person who fails to prove, if his title is challenged, that he has a real interest of his own in the subject-matter of the suit.

[382] Now I do not propose to discuss on principle which of these conflicting views I should follow if the question were *res integra*. I propose to deal with it simply on the authorities. In this Court the authority is all one way. In *Nand Kishore Lal* v. *Ahmad Ata* (1), it was held that a benamidar was competent to sue in his own name to recover possession of immoveable property, and that such a suit must be deemed to have been instituted with the consent and approval of the beneficial owner. I think that we are bound to follow that decision, unless we entertain so strong a view that it is wrong that we consider it our duty to refer the matter to a Full Bench. When the cases subsequent to that case are examined, I think that they show a very decided preponderance of authority in its favour. The decision expressly dissents from that in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (2) in which, it has laid down that a benamidar cannot maintain a suit for recovery of land on

(1) 18 A. 69.

(2) 16 C. 364.

title, even if the real owner disclaims or is a party to the suit. This Court's decision has again been dissented from, and the case reported in 16 Calc., p. 364, followed, in two recent decisions of the Calcutta High Court. In the first of these—*Issur Chandra Dutt* v. *Gopal Chandra Das* (1), it was held that a mere benamidar cannot maintain a suit for ejectment. The same was held in the case of *Baroda Sundari Ghose* v. *Dino Bundhu Khan* (2). Now these two decisions of the Calcutta High Court merely follow as correct certain previous decisions of that Court. They are not consistent either with the recent rulings of the Calcutta High Court itself, or with the rulings, not only of this Court, but of the Madras and Bombay High Courts. Taking first the decisions of the Calcutta High Court itself, in *Gopi Nath Chobey* v. *Bhugwat Pershad* (3), the principle was laid down generally that in the absence of evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner; and if so, any decision would bind the **[383]** real owner as if the suit had been brought by the real owner himself. The suit there was a suit for malikana, but the principle is laid down in all its generality. In the 24th volume of the Calcutta Series of the Indian Law Reports, there are two cases not referred to in the most recent decisions of that Court, but wholly inconsistent with the view that the benamidar cannot maintain a suit. In *Bhola Pershad* v. *Ram Lall* (4), the suit was for enforcement of a mortgage bond. In the judgment it is observed:—"We are unable to say that a benamidar cannot under any circumstances sue. * * * Unless an objection be taken, a decree can be made in his favour. There is authority to show that the real owner is bound by a suit by the benamidar." In *Sachitananda Mohapatra* v. *Baloram Gorain* (5), the suit most closely resembled the present. It was a suit for foreclosure. It was held that a suit for foreclosure may be brought by the person named in the mortgage-deed, though he is only a benamidar, and that the suit should not be dismissed because the beneficial owner is not a party. The ground of that judgment which refers to another decision in a very similar case, was that the contract could be enforced by the parties who had entered into it, and that, whoever supplied the money, the transfer of the mortgaged property was by the deed made to the plaintiff. There is therefore strong authority in the Calcutta High Court itself, not referred to in the decisions which dissent from the ruling of this Court in *Nand Kishore Lal* v. *Ahmad Ata*, that a benamidar is competent to sue in his own name for enforcement of a mortgage without the beneficial owner or the person supplying the funds being made a party.

Turning next to the decisions of the other High Courts, the authorities are to the same effect. In *Shangara* v. *Krishnan* (6) the suit was to recover possession of land. It was held, citing the case reported in 10 Calc., p. 697, that the beneficial owner was bound by a decree passed in a previous suit brought by the benamidar and which must be presumed to have been brought with the true owner's authority and consent, and the decision **[384]** implies that the benamidar was competent to maintain that suit. The most recent rulings are two decisions of the Bombay High Court. The first is the case of *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarani* (7). In that case Mr. Justice Ranade referred to all the principal rulings on the subject, and observed that the Allahabad

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(1) 25 C. 98. (2) 25 C. 874. (3) 10 C. 697. (4) 24 C. 34.
(5) 24 C. 644. (6) 15 M. 267. (7) 22 B. 672.

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High Court in *Nand Kishore Lal* v. *Ahmad Ata* (1) had shown good reasons for its dissent from the ruling of the Calcutta High Court in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*. He adds,—here speaking apparently for Mr. Justice Parsons as well as himself,—that they are inclined to agree with the Allahabad and Madras High Courts, and to hold that a benami certified purchaser can sue in his own name, even when the true owner's name is disclosed. That decision was followed in *Dagdu* v. *Balvant Ramchandra Natu* (2). The suit in that case was for redemption of mortgage; it was held that a benamidar may maintain a suit in his own name, but that the Court will put the defendant in the same position as if the real owner were the actual plaintiff. It was found in that case that the beneficial owner, who was not an agriculturist, was using the benamidar plaintiff, who was an agriculturist, for the purpose of suing without payment of the usual stamp fee, and of obtaining the benefit resulting from the provisions of the Dekkan Agriculturists' Relief Act in favour of agriculturists. The Court, while allowing the suit by the benamidar to proceed, imposed, for the purpose of defeating the contemplated fraud on the public revenue, the condition that it should only be allowed to proceed "on payment of the usual stamp fees as though Kelkar was the nominal as well as the real plaintiff."

This review of the cases shows, I think, that, treating the matter purely as one of authority, the balance of authority is most distinctly in favour of the decision of this Court in *Nand Kishore Lal* v. *Ahmad Ata*. I think, therefore, that we ought to follow that ruling. The result of this view is that the decree of the lower appellate Court must be set aside and the case remanded **[385]** to that Court, and the Court directed to dispose of the case on the merits.

In so disposing of the case I think the Court should have regard to the principle laid down by the Bombay High Court in *Dagdu* v. *Balvant Ramchandra Natu*. It is alleged or suggested that the object of this benami transaction and of the suit brought by the benamidar is to obtain a decree for sale for the benefit of the second set of defendants, who, as usufructuary mortgagees, would not themselves be entitled to obtain a decree for sale in respect of their usufructuary mortgage. As to whether this is the object of the suit we of course express no opinion; but in considering the question the lower appellate Court should, I think, bear in mind the observations of Sir Charles Farran in the case I have just mentioned.

The plaintiff will have the costs of this appeal. The other costs will abide the result.

BANERJI, J.—I agree that the decree of the Court below should be set aside and the case remanded to that Court. The suit is one for sale upon a mortgage in which the plaintiff is named as the mortgagee. It has been found by the lower appellate Court, and that finding must be accepted in this second appeal, that the plaintiff is only a benamidar for certain other persons. The question therefore which has to be determined in this appeal is whether a benamidar is entitled to maintain a suit like this in his own name. The question, so far as this Court is concerned, is covered by the authority of the ruling in *Nand Kishore Lal* v. *Ahmad Ata* (1). That ruling has been approved by the Bombay High Court in the cases to which the learned Chief Justice has referred. It is in consonance with the decision of the Madras High Court in *Shangara* v. *Krishnan* (3) and it is supported by at least one of the cases decided by the Calcutta

(1) 18 A. 69. (2) 22 B. 820. (3) 15 M. 267.

High Court—I mean the case of *Sachitananda Mohapatra* v. *Baloram Gorain* (1). The weight of authority is thus in favour of the view [386] taken by this Court, and I do not feel myself justified in departing from that view. On this short ground I would decree the appeal and remand the case under s. 562 of the Code of Civil Procedure.

Appeal decreed and cause remanded.

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21 A. 386=19 A.W.N. (1899) 133.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

DHARAMRAJ KUNWAR (*Plaintiff*) *v.* SUMERAN SINGH AND ANOTHER (*Defendants*).* [18th May, 1899.]

Act No. XII of 1881 (*N.W.P. Rent Act*), *s.* 44—*Landholder and tenant—Improvements—Wells—Power of tenants to construct wells without consent of landholder.*

Held, that having regard to s. 44 of the N.W.P. Rent Act, 1881, an occupancy tenant may, if such well be an improvement within the meaning of the section, construct either a kachcha or pacca well on his holding without any reference to the consent of the zamindar. *Raj Bahadur* v. *Birmha Singh* (2) and *Muhammad Raza Khan* v. *Dalip* (3) referred to.

[R., 13 Ind. Cas. 554=15 O.C. 170 (175).]

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. *B. E. O'Conor*, for the appellant.

Mr. *J. Simeon*, for the respondents.

JUDGMENT.

STRACHEY, C.J.—The plaintiff in this case claimed an injunction involving the demolition of a pacca well constructed by the defendants on land which the plaintiff claimed as his own. He claimed a right, as owner of the land, to have the well demolished. The defendants pleaded that they had constructed the well on land belonging to themselves. It has been found as a fact that the defendants are occupancy tenants of the land on which they constructed the well. It is common ground that they constructed it without the consent of the plaintiff, who is the zamindar. That is how the case stood in the Court of first instance. The question as stated by that Court is:—"Can an occupancy tenant construct a well on his holding without the permission of [387] his landlord?" The answer given to that question by the first Court is, that an occupancy tenant can do so. The Court, in support of that view, referred to the case of *Muhammad Raza Khan* v. *Dalip* (3). The Munsif says, first, with regard to that case that "the facts of the two cases are exactly alike." I understand him to mean that the suits in that case and the present were of exactly the same character; that the wells sought to be demolished were both masonry wells; that in

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* Second Appeal No. 170 of 1897, from a decree of J. J. McLean, Esq., District Judge of Jaunpur, dated the 7th December 1896, confirming a decree of Babu Bhawani Chandar Chakarvarti, Munsif of Jaunpur, dated the 25th August 1896.

(1) 24 C. 644. (2) 3 A. 85. (3) 12 A.W.N. (1892) 103.

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each case the parties stood in the relation of landholder and occupancy tenant, and that in each the well was constructed by the occupancy tenant without the landholder's permission. Then the Munsif goes on to say that in the precedent cited, "in spite of the condition in the wajib-ul-arz that it can be done with the zamindar's permission, the ruling has laid it down that such permission need not be sought and obtained." I understand him to mean that the precedent is an *a fortiori* case, and shows that the landholder's permission for the building of the well is immaterial, even where there is a clause in wajib-ul-arz prohibiting the construction of wells without the landholders' consent. I do not think that the Munsif was referring to any wajib-ul-rarz produced in the case before him. Certainly no wajib-ul-arz is mentioned or relied on in the plaint, which bases the claim, not on any instrument of the kind, but on the plaintiff's right as owner to remove a construction improperly placed on his land. No wajib-ul-arz, and no evidence referring to any wajib-ul-arz, is to be found anywhere on the record. The plaintiff appealed to the District Judge, and in his second ground of appeal there is what appears to be the first reference to any wajib-ul-arz as applicable to this case. That plea in the memorandum of appeal referring to the wajib-ul-arz appears to have been suggested by the Munsif's allusion to the ruling reported in the Weekly Notes and to the wajib-ul-arz therein referred to, and the plea is that the ruling "is not applicable to the present case with reference to the conditions of the wajib-ul-arz." With reference to this plea the lower appellate **[388]** Court appears to have taken it for granted that there was a wajib-ul-arz in the present suit, the terms of which were exactly similar to those of the wajib-ul-arz in the case reported in the Weekly Notes, and that Court concurred with the first Court in dismissing the suit on the authority of that ruling. Now the plaintiff has presented a second appeal to this Court. The learned Judge before whom that appeal came has referred it to a Division Bench because he disagrees with the judgment of Mr. Justice Mahmood in the case cited. His view is that Mr. Justice Mahmood treated the occupancy tenant's power to make wells as being larger than the law allows or than would be reasonable. He expresses the opinion that so far from its being unreasonable and opposed to public policy, that an occupancy tenant should not be able to build a pacca well without the consent of the zamindar, it would be throwing an unreasonable burden on the zamindar if the occupancy tenant's rights were not conditional on the zamindar's consent being obtained. Now it is quite clear that s. 44 of the N. W. P. Rent Act does recognize the right of an occupancy tenant to construct wells without the landholder's consent. The last paragraph of that section shows by necessary implication that an occupancy tenant is entitled to compensation in respect of improvements, including wells, made without the consent of the landholder, and can resist ejectment from the land without payment of such compensation. It is not a question of reasonableness or of public policy; the occupancy tenant's right is distinctly conferred by statute. Even under s. 44 of the N.W.P. Rent Act, 1873, which contained no such provision as the last paragraph of s. 44 of the present Act, the Full Bench of this Court in *Raj Bahadur* v. *Birmha Singh* (1) gave effect to the same right by dismissing a suit brought by a landholder against an occupancy tenant for an injunction restraining the defendant from constructing a

(1) 3 A. 85.

well on his occupancy holding. Mr. Justice Pearson, with whom the rest of the Court concurred, said:—"I am of opinion that s. 44 **[389]** of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them." In this case, as in that, "it is not pretended that the well constructed by the defendant is not calculated to benefit the land." The effect of the last paragraph of s. 44 of the present Act is to confirm the view taken by the Full Bench, and to make it clear that, in the case of tenants at fixed rates and occupancy tenants, the well, if an improvement, as defined by the section, may be made without the landholder's consent. The learned Judge remarks that Mr. Justice Mahmood's decision would throw an intolerable and enormous burden on a zamindar in compelling him to make compensation for so-called improvements. I think, with all respect, that he has overlooked the explanation to s. 44, which shows that for a merely "so-called" improvement the landlord would not be liable to pay compensation. Unless the well or other work fulfils the definition of "works by which the annual letting value of the land has been and at the time of demanding compensation continues to be increased," it is not an improvement within the meaning of the section at all, and the landlord can eject the tenant without paying compensation for it. The section only compels compensation where the landlord has received a real *quid pro quo*, and only prevents the landlord from appropriating the land without compensating the tenant for the real and permanent improvements in it which he owes to the tenant's industry. Now in the case decided by Mr. Justice Mahmood, that learned Judge held that the right conferred by s. 44 on the occupancy tenant would not be taken away by a clause in the wajib-ul-arz of the village recording a custom which required the zamindar's consent,—which the section itself dispenses with,—on the ground that such a custom would be unreasonable and opposed to public policy. On the facts of this case it is not necessary for us to express any opinion on that portion of Mr. Justice Mahmood's judgment, though I entirely agree with his view of s. 44 and of the Full Bench ruling of this Court. We have been asked to send **[390]** down an issue in this case with reference to the wajib-ul-arz to which the lower appellate Court refers in its judgment. On consideration I think that we ought not to do so. The plaintiff's claim, as I have shown, was not, as brought, in any way based on any wajib-ul-arz, and to allow him now to take his stand on any custom or contract recorded in the wajib-ul-arz apart from the general rights of the zamindar would, in my opinion, be allowing him to change the whole foundation of his suit. I think that the appeal should be dismissed with costs.

BANERJI, J.—I am of the same opinion. Section 44 of the Rent Act recognizes the right of an occupancy tenant to make improvements, including the construction of a pacca well, without the consent of the landlord. The last paragraph of the section clearly implies that it is only in the case of a tenant other than a tenant at fixed rates or an occupancy tenant that the consent of the landlord to the making of the improvement is necessary so as to entitle the tenant to compensation on ejectment. The section therefore confers on an occupancy tenant an unlimited right to make improvements in the shape of pacca wells. What the effect of a condition in the wajib-ul-arz making the right of an occupancy tenant to build a well dependent on the consent of the landlord will be on the provisions of s. 44 it is not necessary, in my opinion, to consider in this case. The case as set up in the plaint had no reference to any

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provisions of the wajib-ul-arz. The case alleged in the plaint was that the land on which the well had been built belonged to the plaintiff: that the defendants had no concern with that land, and that they had therefore no right to construct the well. It was not alleged by the plaintiff that by reason of the provisions of the wajib-ul-arz the defendants were precluded from building a well without the plaintiff's consent. It was upon this case that the parties went to trial in the Court of first instance, and it was this case which the Court of first instance decided against the plaintiff. It was for the first time in the appeal before the lower appellate Court that the plaintiff urged that, having regard **[391]** to the provisions of the wajib-ul-arz, the defendants were incompetent to build the well. In my opinion the lower appellate Court ought not to have allowed the plaintiff to put forward a case in appeal which she had not set up in the Court of first instance. The consideration of any question having reference to the provisions of the wajib-ul-arz does not therefore arise in the appeal before us. As the learned Chief Justice has pointed out, the fact of an occupancy tenant being allowed to construct a well without the consent of the landlord would not, having regard to the provisions of s. 44, impose on the landlord any "intolerable or enormous burden." The decree of the Court below is, in my opinion, right, and I agree in dismissing the appeal with costs.

Appeal dismissed.

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Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* HORI.* [27th May, 1899.]

Act No. VIII of 1897 (*Reformatory Schools Act*), *s.* 16—*Rules of the Local Government framed under s.* 8, *sub-s.* (3) *of the Act—Order sending a boy of the Dalera caste to a Reformatory School—Jurisdiction of High Court to interfere with orders under s.* 16 *—Interpretation of statutes.*

Held, that the High Court has power to interfere in appeal or revision with an order for detention in a reformatory school passed in substitution for transportation or imprisonment when such order is made without jurisdiction and is not an order warranted by Act No. VIII of 1897.

Section 16 of Act No. VIII of 1897 only precludes the interference of a superior Court with the original Court's order so far as it (1) determines the age of a youthful offender or (2) directs the substitution of detention in a reformatory school for transportation or imprisonment, where such substitution is not made without jurisdiction and is not otherwise illegal, having regard to the provisions of the Act. *Queen-Empress* v. *Himai* (1), and *Queen-Empress* v. *Gobinda* (2) **[392]** overruled. *Queen-Empress* v. *Billar* (3), *Queen-Empress* v. *Kaidya Husain* (4), *Deputy Legal Remembrancer* v. *Ahmad Ali* (5), *Queen-Empress* v. *Ramalingam* (6), *Roop Lall Das* v. *Manook* (7), *Queen-Empress* v. *Partap Chunder Ghose* (8), *Ex parte Bradlaugh* (9) and *The Colonial Bank of Australasia* v. *Willan* (10) referred to.

In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute,

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* Criminal Revision No. 117 of 1899.

(1) 20 A. 158. (2) 20 A. 159. (3) 20 A. 160.
(4) 1 Bom.L.R. 162. (5) 25 C. 333. (6) 21 M. 430.
(7) 2 C.W.N. 572. (8) 25 C. 852.
(9) L.R. 3 Q.B.D. 509. (10) L.R. 5 P.C. 417 (442).

and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company* v. *North British Railway Company* (1) referred to.

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IN this case a boy named Hori, about the age of 12 years, had been convicted by a Magistrate of the first class of the offence of theft, under s. 379 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment; but in view of the boy's age the Magistrate directed that, instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction to the Sessions Judge of Farrukhabad, who dismissed the appeal. An application was thereupon filed by the Local Government for revision of this order on the ground that "the order of detention in a reformatory school of a Dalera", to which caste the boy Hori was said to belong, "is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act."

The Government Advocate (Mr. *E. Chamier*), in support of the application.

Section 16 of the Reformatory Schools Act should be construed, if possible, in such a manner as to give effect to the intention of the Legislature. Construed literally, as in *Queen-Empress* v. *Himai* (2) and *Queen-Empress* v. *Gobinda* (3), this section would oust the jurisdiction of the High Court in every case in which detention in a reformatory had been substituted for transportation or imprisonment whether the Court passing the order had jurisdiction or not.

[393] It is submitted that s. 16 of the Act can, without doing violence to its language, be construed as barring interference in two matters only, *i.e.*, a finding as to the age of the offender and the lawful exercise by a lower Court of its discretion in substituting detention in a reformatory for transportation or imprisonment. Various illegal orders in cases under the Act have been set aside by the Calcutta, Bombay, and Madras High Courts—see *Deputy Legal Remembrancer* v. *Ahmad Ali* (4), *Queen-Empress* v. *Ramaligam* (5), and *Imperatrix* v. *Bhan Singh*, decided by Parsons and Ranade, JJ. (unreported).

An order passed by a Magistrate without jurisdiction or in violation of the rules made by the Local Government not being justified by the Act is not protected by s. 16.

Similarly orders purporting to have been passed under s. 143, Code of Criminal Procedure, but not warranted thereby have been held to be liable to revision, notwithstanding the terms of s. 435 (3) of the same Code—*Queen-Empress* v. *Partab Chandar Ghose* (6).

JUDGMENT.

STRACHEY, C. J.—The object of this application by the Local Government is to obtain a reconsideration of the decisions of this Court in *Queen-Empress* v. *Himai* (2), and *Queen-Empress* v. *Gobinda* (3), in which it was held that by reason of s. 16 of the Reformatory Schools Act (VIII of 1897), this Court is in no case competent to interfere in appeal or revision with an order for detention in a reformatory school passed in substitution for transportation or imprisonment, even though the order is made without jurisdiction or is otherwise illegal. In the present case, a Magistrate of the first class convicted the accused, Hori, a boy about 12 years old, of theft under s. 379

(1) L.R. 6 App. Cas. 114 (122). (2) 20 A. 158. (3) 20 A. 159.
(4) 25 C. 333. (5) 21 M. 430. (6) 25 C. 852.

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of the Penal Code, and sentenced him to six months' rigorous imprisonment, but in view of the boy's age directed that instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction [394] to the Sessions Judge of Farrukhabad, who dismissed the appeal. The present application by the Local Government is for revision of the orders of the Courts below on the ground that "the order of detention in a reformatory school of a Dalera is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act." The rule referred to is rule 4 of the rules made by the Local Government and published at pages 167, 168 of the *North-Western Provinces and Oudh Government Gazette*, Part VI, 3rd July, 1897. It provides that "no boy belonging to any of the undermentioned tribes, whether such tribe has or has not been formally proclaimed in these Provinces under the Criminal Tribes Act, 1871, should be sent to a reformatory school." Among the tribes mentioned are the Daleras, to which tribe the accused is said to belong. The rule was made under s. 8, sub-s. (3) of the Reformatory Schools Act, 1897, which authorizes the Local Government to make rules for defining what youthful offenders should be sent to reformatory schools, having regard to the nature of their offences or other considerations; and sub-s. (1) shows that the power given to certain Courts to direct youthful offenders to be sent to and detained in reformatory schools instead of undergoing their sentences is subject to any rules so made. If therefore the accused Hori was a Dalera, the order of the Magistrate directing that instead of undergoing his sentence he should be sent to a reformatory school was illegal. There is on the record no evidence that the accused is a Dalera. He did not before either of the Courts below state that he was one, and the fact does not appear to have been discovered by the Local Government until after the decision of the Sessions Judge. In a petition to this Court, acknowledging notice of the present application, the accused prays that he may be released from the reformatory school "because I am a Dalera by caste, and none of my caste fellows is here." Assuming that he is a Dalera, the question is whether this Court is competent in revision to alter or reverse the illegal order for his detention in a reformatory school, having regard to s. 16 of the Reformatory Schools [395] Act, and to the decision in *Queen-Empress v. Gobinda*, (1) which is exactly in point.

Section 16 is as follows:—"Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorize any Court of Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender, or the substitution of an order for detention in a reformatory school for transportation or imprisonment."

The section is not well drawn; but apart from obvious verbal criticisms its object is clear enough. It does not exclude the exercise of appellate or revisional jurisdiction under the Code in all cases where a subordinate Court has ordered an offender to be detained in a reformatory school. The exclusion is limited to two specified matters, in regard to which the Legislature considered the Court trying a youthful offender better placed for arriving at a sound conclusion than an appellate or revisional Court could be. The first of these is the age of the youthful offender, a finding on which is, under s. 11, a necessary condition precedent to every order for detention in a reformatory school, which might often

(1) 20 A. 159.

be difficult to determine, and in determining which a subordinate Court which saw the offender would have a considerable advantage over a superior Court which did not. The second is "the substitution of an order for detention in a reformatory school for transportation or imprisonment." These words are no doubt very general, and, if read with absolute literalness, would protect the most illegal orders substituting detention for imprisonment from any sort of interference. So to read them would, I think, defeat the plain intention of the Legislature. It appears to me that they only refer to the propriety or suitableness of such a substitution in the particular case, having regard to all the circumstances. They do not include the legality of the substitution directed or the competency of the Court or Magistrate to direct it. The Legislature may well have thought that, upon the question whether a particular **[396]** offender would benefit by detention in a reformatory school, or whether under the circumstances imprisonment would be more suitable, as well as upon the question of age, the Court having the youthful offender before it, and observing his appearance and demeanour would be more likely to be right than a superior Court not having that advantage. But there the advantage ends. Upon questions as to which the subordinate Court has no advantage at all by reason of personal observation or otherwise, and especially upon questions of jurisdiction or law arising upon the construction of Act VIII of 1897, there could be no more reason than in any other class of cases for making its orders final. Section 16 cannot have been intended to enable the most junior Magistrate in the country to make at pleasure orders substituting detention in a reformatory school for imprisonment in any case whatever, for prisoners of any age, or class or of either sex, for any period of time in absolute disregard of the Act, without possibility of correction. If this view is right, the words in s. 16 protecting from appellate or revisional interference the substitution of an order for detention in a reformatory school for transportation or imprisonment must not be read with absolute literalness. The substituted orders to which the section refers are orders made under s. 8, s. 9, or s. 10, not orders made outside the Act and wholly unauthorized by it. If the order is an order for substitution within the meaning of those sections, then s. 16 applies, and it cannot be altered or reversed in appeal or revision. If it is not an order for substitution within the meaning of those sections, then s. 16 does not apply, and it may be altered or reversed like any other illegal order. I do not think that this construction does violence to the terms of s. 16. It cannot be said that the section is unambiguous, and in such a case we are at liberty to put on it a construction in accordance with the intention of the Legislature. "The more literal construction," said Lord Selborne in *Caledonian Railway Company* v. *North British Railway Company* (1), "ought not to prevail if it is opposed **[397]** to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

The decisions in *Queen-Empress* v. *Himai* and *Queen-Empress* v. *Gobinda* are based upon the literal construction of s. 16 without reference to the object with the Legislature in passing Act VIII of 1897 had in view. They interpret the section as prohibiting interference in appeal or revision with any order whatever of a subordinate Court substituting detention in a reformatory school for transportation or imprisonment, even if

(1) L.R. 6 App. Cas. 114 (122).

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the order is passed without jurisdiction or violates every provision of the Act. The following are some of the consequences which such a construction involves. A Magistrate having no power whatever to make any order under the Act, directs that a youthful offender, instead of undergoing his sentence of imprisonment, shall be sent to a reformatory school. His order, being the substitution of an order for detention in a reformatory school for imprisonment, cannot be set aside. A Magistrate orders an adult offender or a girl, who cannot legally be sent to a reformatory school at all, to be detained there instead of undergoing his or her sentence of imprisonment for a period of ten years, being more than the maximum period allowed by s. 8. The illegal order cannot be interfered with. A Magistrate in violation of the rules made by the Local Government and having the force of law under s. 8, substitutes detention in a reformatory school, for transportation in the case an offender convicted of murder, or substitutes detention for imprisonment in the case of an offender belonging to a criminal tribe, or convicted of an unnatural offence, "or whose antecedents afford reasonable grounds for assuming habitual immorality." Effect must be given to the illegal order, and the provisions and policy of the whole Act defeated in order to comply with the letter of s. 16. In such cases there would be no remedy. The Local Government [398] could, of course, under s. 14, order any youthful offender to be discharged from a reformatory school. But as the Government has not, under Act VIII of 1897, the power which it possessed under s. II of the repealed Act V of 1876, to order a youthful offender discharged before the expiration of his sentence to undergo the residue of it, such a discharge would not restore the operation of the sentence; and the Government would thus be in the dilemma of allowing an illegal order for detention to be carried out or allowing the offender to escape all punishment. Again, s. 16 itself clearly shows that the legality of an order for detention in a reformatory school may in some cases be questioned, and the order set aside in appeal or revision. For instance, if without first passing any sentence of transportation or imprisonment, a Court or Magistrate makes an order for detention, that order, not being in substitution for transportation or imprisonment, is not protected by the section: *Queen-Empress* v. *Billar* (1), *Queen-Empress* v. *Kaidya Husain* (2). Can the Legislature have intended that a superior Court should be competent to set aside an illegal order for detention where the illegality merely consisted in an omission by the Magistrate to formally record a sentence of imprisonment which he intended immediately to supersede, but that it should not be competent to interfere where the Magistrate, having gone through that form, proceeded to order detention without having received authority under the Act to pass such orders, or ordered the detention of an adult, a girl, or any other person wholly outside the scope of the Act, or of a youthful offender for a term far in excess of the maximum allowed by the Act? In other words, was it intended that the mere formal record of a sentence of imprisonment for which detention is substituted should absolutely protect from interference every sort of illegality in the order, while in the absence of such formal record the appellate and revisional jurisdiction under the Code might be freely exercised? Again, if the literal construction of the second part of s. 16 is adopted, the earlier part protecting [399] "any order passed with respect to the age of a youthful offender" is superfluous. These words refer to the finding as to age required by s. 11

(1) 20 A. 160.
(2) 1 Bom. L.R. 162.

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before any youthful offender can be sent to a reformatory school under the previous sections but that finding is not an independent and substantive order; it is only a necessary preliminary to any substitution of retention for imprisonment; and if, every such substitution, legal or illegal, is protected, the preliminary finding is, of course, protected as part of it, and requires no separate protection. Further, there is nothing in s. 16 which takes away the power of a superior Court to set aside in appeal or revision the conviction and consequently the sentence of imprisonment in substitution of which the order for detention in a reformatory school was made. In such a case the order for detention would necessarily become inoperative. If the superior Court maintained the conviction, but, altered the sentence to one, such as whipping, for which detention in a reformatory school could not, under the Act, be substituted, the same result would follow. This shows that s. 16 cannot be read with absolute literalness, for in such cases the substituted order for detention is undoubtedly altered or reversed.

Section 16 does not appear to have been discussed by any of the other High Courts in any reported case. In practice those Courts do not act on the view that they have no power to alter or reverse in appeal or revision an illegal order substituting detention in a reformatory school for transportation or imprisonment. Thus in *Deputy Legal Remembrancer* v. *Ahmad Ali* (1), the Calcutta High Court in revision set aside as contrary to law an order of a Magistrate substituting detention in a reformatory school for two years for a sentence of imprisonment, the main grounds being that the least period for which the detention could be ordered under s. 8 of the Act was three years, and that there was no clear finding as to the age of the offender as required by s. 11. In *Queen-Empress* v. *Ramalingam* (2), the Madras High Court in revision altered an order of a Magistrate **[400]** substituting detention in a reformatory school for imprisonment so as to make the period of detention in accordance with the rules made by the Local Government under the Act. In an unreported case in the Bombay High Court (*Imperatrix* v. *Bhan Singh*, Criminal Reference No. 43 of 1897, decided on the 17th June 1897), Mr. Justice Parsons and Mr. Justice Ranade set aside the Magistrate's order as illegal under Act VIII of 1897, on the ground that it did not appear from the record that the accused was under the age of 15 years. There is some analogy to s. 16 of Act VIII of 1897 in s. 435 (3) of the Code of Criminal Procedure, which provides that orders made under ss. 143 and 144 are not proceedings the record of which the High Court may call for and examine for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. It has been held that where an order, though purporting to be made under s. 143 or 144, is not authorized by them and is clearly made without jurisdiction, the prohibition does not apply and the High Court can interfere. The reason is that what the Legislature intended to protect from interference in revision was orders legally passed under the sections in question, not any illegal order which a Magistrate might profess to pass under them. "If this were not so Magistrates might by affecting to act under s. 144, when the case was not within that section, oust the jurisdiction of this Court to interfere:"—*Roop Lall Das* v. *Manook* (3), and see *Queen-Empress* v. *Partab Chander Ghose* (4), and the cases there cited. It is on similar grounds

(1) 25 C. 333. (2) 21 M. 430. (3) 2 C.W.N. 572. (4) 25 C. 852.

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that sections in special Acts of Parliament expressly providing that convictions, orders or other proceedings "shall not be removed into the High Court by certiorari or otherwise," have been construed as not depriving the High Court of power ito issue a certiorari where the order has been passed without jurisdiction. Thus in *ex parte Bradlaugh* (1), the Act provided in [401] the most general terms that no information, conviction or other proceeding before or by any of the said Magistrates shall be quashed, or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench. It was, however, held that a section in an Act of Parliament taking away the certiorari did not apply in the case of total absence of jurisdiction. Mellor, J., said:—"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleased without question." See also *The Colonial Bank of Australasia* v. *Willan* (2). "The prohibition obviously applied only to cases which have been entrusted to the lower jurisdiction": Maxwell on Statute, p. 180. So here I think that s. 16 of the Reformatory Schools Act, 1897, does not apply where there was an absence of jurisdiction, and that the consequence of holding it to apply where the order substituting detention for transportation or imprisonment is illegal, would be that a Magistrate could make any such illegal order he pleased without question.

Even if I am wrong in this view, still s. 16 in terms refers only to the interference of the superior Courts under the Code of Criminal Procedure, and the High Court could alter or reverse any such illegal order in the exercise of its powers of superintendence under s. 15 of the High Courts Act, 1861, which is in no way touched. That provision is not referred to in the judgments in *Queen-Empress* v. *Himai*, and *Queen-Empress* v. *Gobinda*. But for the reasons which I have given, I think that under the Code, as well as under the High Courts Act, this Court is competent to interfere in such a case, and that the decisions to the contrary are wrong and must be overruled. Before passing any order upon the present application we must ask the Sessions Judge for a finding as to whether the accused Hori is a Dalera as alleged both by the accused himself and by the Local Govern-[402]ment. The application will be disposed of after the receipt of the finding.

KNOX, J.—I fully concur with the learned Chief Justice that the policy and object of the Legislature in enacting s. 16 of the Reformatory Schools Act, 1897, was to exclude the interference of Courts, whether by way of appeal, or by way of revision with (1) any finding by the trying Magistrate under s. 11 of the Act, which states what such Magistrate considers the age of a youthful offender before him to be, and (2) any order passed under s. 8 of the Act, whereby, instead of undergoing a sentence of transportation or imprisonment, such youthful offender is directed to be sent to a reformatory school. The probability is that, as pointed out by the learned Chief Justice in determining these two matters, the Legislature considered the trying Magistrate to have such advantage over a Court of appeal or revision that any interference would be inexpedient. So far we are bound to promote in the fullest manner the policy and object of the Legislature. We are told in the preamble that the object, or one of the objects, of the Act was to make further provision for dealing

(1) (1878) L.R. 3 Q.B.D. 509.

(2) L. R. 5 P.C. 417 (442).

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with youthful offenders, but not with all youthful offenders. The youthful offenders intended were only those boys who had been convicted of any offence punishable with transportation or imprisonment, and who at the time of conviction might be under the age of 15 years. The Legislature further intended and provided that, even in the case of such offenders, all such should not be sent to a reformatory school, but only such of them, whom, by rules made for this purpose, having regard to the nature of their offence or other considerations, the Local Government might consider fit subjects for detention in a reformatory. It was not the intention or policy of the Legislature that any boy whom the Local Government did not, by rule made for the purpose, consider fit should be taken out of the ordinary jurisdiction of Courts of appeal or of revision. The power of superior Courts to question the finding of guilty or not guilty was not removed, and was never intended to be removed, by **[403]** s. 16, whether the person found guilty or not guilty were a youthful offender as understood by the Act or not a youthful offender. All that was excepted was the order with respect to age and the order of detention substituted. Where a Court found an offender to be at the time of conviction 18 years and still passed an order of detention substituted for imprisonment, we are, I hold, entitled to find that the offender is not a youthful offender, and therefore one to whom the order of detention substituted for imprisonment was never intended to apply, could not apply, and was null and void. So also if the offender in such case be a girl, or, in these Provinces, a Dalera, this Court is entitled to exercise its ordinary power of appeal or revision. It is necessary first to have a determination whether the accused is or is not a Dalera, and I accordingly concur in the order proposed.

BANERJI, J.—I am of the same opinion as the learned Chief Justice, but out of respect for the learned Judges from whose judgments we are differing, I deem it proper to state briefly my views on the question before us. That question is, whether s. 16 of Act No. VIII of 1897 precludes this Court from altering or reversing in appeal or revision an order for detention in a reformatory school passed in substitution for an order for transportation or imprisonment, however illegal that order may be. It seems to me that the interpretation put on the provisions of that section in *Queen-Empress* v. *Himai* (1), and *Queen-Empress* v. *Gobinda* (2) is somewhat too narrow, and, as pointed out by the learned Chief Justice, calculated to defeat the intention of the Legislature. According to well known canons of construction, an Act of the Legislature should be so interpreted as consistently with the language used by it to give effect to its intention. I do not think we should be justified in assuming that in placing upon the powers of a Court of appeal or revision the restriction which s. 16 imposes, the Legislature intended to create or overlooked the anomalies referred to by the learned Chief Justice, **[404]** which must be the inevitable result of the strict and literal interpretation placed upon that section in the two rulings mentioned above. In my opinion the order referred to in s. 16, which a Court or Magistrate has no authority to alter or reverse in appeal or revision, must be an order which the officer who made it was competent to make, and which he made in compliance with the provisions of Act No. VIII of 1897. Where a Court or Magistrate has jurisdiction to make an order for detention in a reformatory school in substitution for an order of

(1) 20 A. 158.

(2) 20 A. 159.

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transportation or imprisonment, and in the exercise of that jurisdiction the Court or Magistrate has made an order for detention in consonance with the provisions of s. 8, 9 or 10, such order is not open to interference in appeal or revision and is final. But where the order passed is not one justified by the Act and transgresses the provisions of the Act or the rules framed by the Local Government under the Act, s. 16 does not protect it from interference in appeal or revision. The protection afforded by the section only extends to the lawful exercise of the discretion vested in a Court or Magistrate to substitute in certain cases an order of detention in a reformatory school for an order of transportation or imprisonment. There cannot be any doubt that the order of conviction is open to appeal or revision. If the conviction be set aside, the order of detention must of necessity fall to the ground. But if s. 16 be considered to bar interference with an order of detention in any case, that order will stand good, although the conviction no longer subsists. Such a result could not certainly have been intended by the Legislature in enacting s. 16. I agree with the learned Chief Justice in making the order proposed by him.

BY THE COURT.—Let the record be sent down to the Sessions Judge for a finding as to whether the accused Hori is a Dalera.

[Subsequently, on the return by the Sessions Judge of a finding that Hori was a Dalera, the order under discussion was set aside.]

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21 A. 405 = 19 A.W.N. (1899) 157.

[405] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

AULIA BIBI AND OTHERS (*Decree-holders*) *v.* ABU JAFAR (*Judgment-debtor*).* [9th June, 1899.]

Civil Procedure Code, ss. 273, 268—Execution of decree—Attachment—Decree of Revenue Court not capable of attachment and sale under s. 273 in execution of a Civil Court decree.

Held, that though a decree of a Court of Revenue is not liable to attachment and sale in execution of a decree of a Civil Court under s. 273 of the Civil Procedure Code, such decree stands in the position of an ordinary debt and may be dealt with under s. 268 of the Code. *Onkar Singh* v. *Bhup Singh* (1) and *Prince Gholam Mohamed* v. *Indra Chand Jahuri* (2) referred to. *Takiya Begam* v. *Siraj-ud-daula* (3) and *Sultan Kuar* v. *Gulzari Lal* (4) distinguished.

[R., 22 A. 182 (185).]

CERTAIN decree-holders, holding a decree of a Civil Court, applied for execution of their decree by attachment and sale of a Revenue Court decree which had been passed in favour of their judgment-debtor. The Court executing the decree at first issued an injunction to the Revenue Court which had granted the decree sought to be attached, but, upon argument, dissolved that injunction, holding, with reference to the case of *Onkar Singh* v. *Bhup Singh* (1), that as a Civil Court it was not competent to order the attachment and sale of a Revenue Court's decree. The decree-holders appealed to the District Judge, who upheld the order of

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* First Appeal No. 261 of 1898. from an order of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 20th August 1898.

(1) 16 A. 496.
(2) (1871) 7 B.L.R. 318.
(3) 5 A.W.N. (1885) 123.
(4) 2 A. 290.

the Subordinate Judge. The decree-holders accordingly appealed to the High Court.

Mr. *Karamat Husain*, for the appellants.

Pandit *Sundar Lal* and Maulvi *Muhammad Ishaq*, for the respondent.

JUDGMENT.

21 A. 405 = 19 A.W.N. (1899) 15

KNOX and AIKMAN, JJ.—The question with which we have to deal in this appeal is whether a decree of a Revenue Court is property which is liable to attachment and sale in execution of a decree of a Civil Court. The Subordinate Judge **[406]** of Jaunpur relying on the precedent in the case of *Onkar Singh* v. *Bhup Singh* (1) held that the decree of a Revenue Court did not fall within the provisions of s. 273 of the Code of Civil Procedure. He accordingly upheld the objection which had been addressed to him that the decree could not be attached and sold by the Civil Court at all, and discharged an injunction which he had addressed to the Revenue Court of Jaunpur. The learned counsel for the appellants asks us to hold that a decree of a Revenue Court is liable to attachment and sale under the provisions of the Code of Civil Procedure, on the ground that the words in s. 273, namely, a "decree for money passed by any other Court" are wide enough to include decrees of Revenue Courts. We are unable to follow him in this contention. The definition given to the word "decree" in s. 2 of the Code of Civil Procedure is one which directs that subject to anything repugant in the subject or context, the word "decree" in the Code means the formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court. It is noticeable that in the corresponding definition in Act No. X of 1877, the word "civil," which is introduced in the Act of 1882, found no place. There is nothing in s. 273 repugnant in the subject or context to the definition of "decree" in s. 2 of the Code of Civil Procedure, and it must, therefore, be read as it stands into that section. The learned counsel, however, argued that it did not follow that if s. 273 did not apply, decrees of the Revenue Courts were exempted from the general provision under which property was liable to attachment and sale. He relied upon the provisions of s. 266, and contended that decrees of the Revenue Courts were certainly covered either by the word "debt" or by the words "all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which or the profits of which he has a disposing power which he may exercise for his own benefit." In this view he is certainly supported by the precedent in the case of *Prince* **[407]** *Gholam Mohamed* v. *Indra Chand Jahuri* (2), in which it was held that a decree of a Court falls within the description of "other property." The argument in reply for the other side to the effect that had the Legislature intended decrees to be property liable to attachment and sale it would certainly have mentioned them in s. 266 is met at once by the observation that the provisions of s. 273 and of similar section leave no doubt whatever but that it was intended that decrees should be liable to attachment. It was further argued that it had been held by this Court in Full Bench in the case of *Takiya Begam* v. *Siraj-ud-daula* (3) and in an early case *Sultan Kuar* v. *Gulzari Lal* (4) that a decree for money could not be sold in execution. On looking into these cases we find that all that was held there was that a special provision had been made by s. 273 for

(1) 16 A. 496.
(2) 7 B.L.R. 318.
(3) 5 A.W.N. (1885) 123.
(4) 2 A. 290.

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21 A. 405 = 19 A.W.N. (1899) 157.

dealing with decrees which had been attached in execution, such decrees could not be sold. We have, however, held that in this case s. 273 does not apply, and therefore the *ratio decidendi* of the cases relied on has no application here. The learned counsel for the appellants asks us to treat the decree as if it fell within the provisions of s. 272. This section would have been applicable had the decree of the Revenue Court been executed and the proceeds deposited in Court. So far as we know, matters have not reached this stage. The decree, while still a decree, appears to us to stand in the position of an ordinary debt, to be dealt with under the provisions of s. 268 of the Code of Civil Procedure. We decree this appeal, set aside the decree of the Court below, and remand the case to the Court below with directions to restore the application for execution to the file of pending applications, and to deal with it according to law. The appellants will have the costs of this appeal. The costs of the first Court will abide the result.

Appeal decreed and case remanded.

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21 A. 408 = 19 A.W.N. (1899) 149.

[408] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

PARSOTAM SARAN *(Plaintiff)* *v.* SANEHI LAL *(Defendant)*,*
[13th June, 1899.]

Act No. IV of 1882 *(Transfer of Property Act)*, *s.* 52 —Lis pendens—*Transfer* pendente lite—*Time when a suit becomes contentious.*

Held, that a suit becomes a 'contentious suit" within the meaning of s. 52 of the Transfer of Property Act, 1882, at the time when the summons is served on the defendant. *Radhasyam Mohapattra* v. *Situ Panda* (1) and *Abboy* v. *Annamalai* (2) followed.

[Not F., 31 B. 393 = 9 Bom. L.R. 530; **Doubted**, 28 A. 196 (198) = A.W.N. (1905) 250; **R.**, 29 A. 339 (345) **(P.C.)** = 4 A.L.J. 329 = 9 Bom. L.R. 656 = 5 C.L.J. 563 = 11 C.W.N. 561 = 17 M.L.J. 263 = 34 I.A. 102.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendra Krishna Mukerjee*), for the appellant.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

STRACHEY, C.J., and BANERJI, J.—This was a suit for sale of mortgaged property. The defendant-respondent was the purchaser at a sale in execution of a decree obtained by him upon a prior unregistered mortgage. The plaintiff's mortgage was a registered one, and it is found that he had no notice of the prior unregistered mortgage of the defendant-respondent. He is therefore *prima facie* entitled to priority for his mortgage and to enforce it against the property in the hands of the respondent. The respondent resists the claim upon the ground that the

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* Second Appeal No. 65 of 1897, from a decree of Pandit Raj Nath Shaib, Subordinate Judge of Moradabad, dated 7th December 1896, reversing a decree of Munshi Gokal Prasad, Munsif of Moradabad, dated the 4th September 1896.

(1) 15 C. 647.

(2) 12 M. 180.

plaintiff-appellant's mortgage was executed pending the suit upon the prior unregistered mortgage, and that having regard to s. 52 of the Transfer of Property Act, the property could not, pending that suit, be dealt with by the mortgagor so as to affect the rights which the respondent obtained under the decree subsequently passed upon his mortgage, and in execution of which he purchased the property. The respondent's suit was instituted on the 17th of April, 1893. The plaintiff's mortgage was executed on the 20th of April, 1893, that is, pending the respondent's suit. It is alleged on behalf of the plaintiff that at the time of the execution of the mortgage of the 20th of April, 1893, no summons had been **[409]** served in the present respondent's suit upon the mortgagor, the defendant in that suit, and consequently, having regard to the ruling of the Calcutta High Court in *Radhasyam Mohapattra* v. *Sibu Panda* (1) and of the Madras High Court in *Abboy* v. *Annamalai* (2) the mortgage was made before the suit became contentious, and therefore was not affected by the rule contained in s. 52 of the Transfer of Property Act. We are prepared to follow the rulings in question, to which there is nothing contrary in any of the decisions of this Court. There is, however, no finding as to the date of the service of summons in the present respondent's suit. We must have such finding before we can dispose of this appeal. We therefore refer the following issue to the lower appellate Court under s. 566 of the Code of Civil Procedure :—On what date was the summons served upon the defendant mortgagor in the suit brought by the present respondent upon his mortgage of the 24th November, 1891? The lower appellate Court may take such evidence as it may deem necessary for determination of this issue. Upon the return of the finding ten days will be allowed for objections.

Issue referred.

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21 A. 409 = 19 A.W.N. (1899) 150.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

ABDUS SAMAD KHAN AND OTHERS (*Applicants*) *v.* ABDUR RAZZAQ KHAN (*Opposite Party*).* [14th June, 1899.]

Act No. IV of 1893 (*Partition Act*), *s.* 10—*Partition—Offer by a party to a partition suit of compensation—Decree in partition suit when final—Civil Procedure Code*, *s.* 396.

Held, that s. 10 of Act No. IV of 1893 would apply to a suit for partition in the stage where an interlocutory decree for partition had been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose. *Shah Muhammad Khan* v. *Hanwant Singh* (3) and *Zubaida Jan* v. *Muhammad Taeb* (4) referred to.

[F., 7 Ind. Cas. 436.]

[410] THE plaintiff in this case sued the defendants for partition of certain immoveable property, and obtained an interlocutory decree declaring him to be entitled to possession of a certain share. He applied, framing

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* Second Appeal, No. 3 of 1899, from a decree of Babu Nilmadhab Roy, Judge of Small Cause Court, with powers of Subordinate Judge of Cawnpore, dated the 28th September 1898, confirming a decree of Babu Banke Behari Lal, Munsif of Fatehpur, dated the 2nd July 1898.

(1) 15 C. 647.
(2) 12 M. 180.
(3) 20 A. 311.
(4) 18 A.W.N. (1898) 99.

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his application as an application for execution of the decree, to be put into possession of a certain share of the property in suit. To this application the defendants filed several objections and, as regards a portion of the property, consisting of houses, asked that, instead of their being partitioned, he might be allowed to pay compensation to the plaintiff. The plaintiff declined to accept compensation, and the Court (Munsif of Fatehpur) held on this point that Act No. IV of 1893 did not apply where a decree had been passed. The defendants appealed to the Subordinate Judge who dismissed the appeal. The Subordinate Judge as to the defendants' plea under Act No. IV of 1893, recorded the following order:—"In this case a decree for partition has already been passed. A Court executing the decree is bound by its terms. No additions or alterations can be made in it. S. 2 of Act No. IV of 1893 cannot apply to this suit. The suit is no longer pending. A decree has already been passed."

The defendants appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

JUDGMENT.

BURKITT, J.—The decision of the Subordinate Judge in this case is entirely wrong, and if the Subordinate Judge had taken the trouble of reading the cases of *Shah Muhammad Khan* v. *Hanwant Singh* (1), and the subsequent case of *Zubaida Jan* v. *Muhammad Taieb* (2), both of which were published some months before the judgment under appeal, he would have avoided falling into the mistake he has made in this case. The Subordinate Judge evidently is under the impression that a final decree in this partition case has been passed, in that he is wrong. A final decree has not been passed. As explained in the two cases referred to above, a decree declaring the rights of the parties, *i. e.*, a decree declaring that the applicant for partition is entitled on partition, **[411]** to a specific share in certain immoveable property is all that has been done up to the present. The application now made to the Court has been wrongly made as an application for execution of that decree, and has been treated by the Court as an application for execution. The application ought to have been treated as an application to the Court to go on with and complete the decree declaring the rights of the parties by appointing an amin to prepare a scheme of partition for approval by the Court, as explained in the two cases mentioned above. It is only after a decree has been made by the Court expressing its approval of the partition scheme that there is any decree capable of execution as a partition decree. The Court below was therefore wrong in holding that the proceedirgs before it were proceedings in execution, and that it could do nothing more in the case. The present appeal is concerned with the refusal of the Courts below to accede to an application made under the provisions of Act No. IV of 1893. Under s. 10 of the Act the application should have been entertained by the Court. This suit no doubt was instituted before the Act came into force, but s. 10 of the Act provides that the Act shall apply to suits instituted before the commencement of the Act in which no scheme for the partition of the property has been finally approved by the Court. In this case no such scheme has been approved, for the very good reason that, the Court not yet having drawn up the second portion of its decree, no such scheme has ever been prepared or submitted for its

(1) 20 A. 311.

(2) 18 A.W.N. (1898) 99.

approval. The decision of the lower appellate Court is wrong, and badly wrong, from beginning to end.

I allow this appeal. I set aside with costs, the decree of the lower Court, and I remand the case to that Court for decision on the merits.

Appeal decreed and cause remanded.

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21 A. 412 (P.C.)=1 Bom. L. R. 311=3 C.W.N. 454=26 I.A. 153=7 Sar. P.C.J. 474 21 A. 409=19 A.W.N. (1899) 150.

[412] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir Richard Couch.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

BHAGWAN SINGH AND OTHERS (*Plaintiffs*) *v.* BHAGWAN SINGH, MINOR, AND OTHERS (*Defendants*).

[18th and 22nd November, 1898 and 11th March, 1899.]

Hindu law—Invalidity of the adoption of a sister's son, mother's sister's son, and of a daughter's son.

The adoption of a mother's sister's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya, and Vaisiya, equally with the adoption of a daughter's son or a sister's son, is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is now not competent to a Court to treat them as open to question in this respect.

The judgment in *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1) gives no countenance to the conclusion that in order to bring a case under any rule of law, laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it.

[**F.**, 24 A. 195 (197)=22 A.W.N. (1902) 10; 28 A. 488 (**P.C.**)=3 A.L.J. 415=8 Bom. L. R. 402=3 C.L.J. 594=10 C.W.N. 730=1 M.L.T. 171=33 I.A. 97; 7 Ind. Cas. 418; **R.**, 29 A. 495=4 A.L.J. 407=A.W.N. (1907) 121; 32 B. 619=10 Bom. L.R. 948; 34 B. 491 (495)=11 Bom. L.R. 1172=4 Ind. Cas 277; 4 Bom. L.R. 140; 113 P.L.R. 1908=53 P.W.R. 1908; 1 P.L.R. 1909=68 P.R. 1909=58 P.W.R. 1909=2 Ind. Cas. 975; 88 P.R. 1912=218 P.L.R. 1912=230 P.W.R. 1912 =17 Ind. Cas. 36 (37); **D.**, 27 A. 417=2 A.L.J. 36=A.W.N. (1905) 20; 107 P.L.R. 1901]

APPEAL from a decree (27th June 1895) of the High Court, reversing a decree (23rd September 1892) of the Subordinate Judge of Cawnpore, and remanding the suit under s. 562, Civil Procedure, for trial on the merits.

The suit out of which this appeal arose was brought by the appellants, zamindars of zilla Cawnpore, on the 3rd May 1892. They claimed as reversioners entitled to the estate of Madho Singh, who died childless on the 27th July, 1890, leaving the second defendant his widow, and having on the 23rd June of that year adopted the first defendant, a minor. Their claim was for a declaration that the alleged adoption of the appellant by Madho Singh was void and ineffectual on the ground that the boy, first defendant and now first respondent, was the son of the sister of Madho Singh's mother.

The parties were Thakurs, members of the regenerate class of Kshatriyas. It was not alleged that this adoption was valid by any custom

(1) 12 M. I.A. 397 (437).

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prevailing in the caste or in the locality to which the [413] parties belonged. The question on this appeal was whether with reference to the Hindu law governing adoption it was valid; and it was not disputed, but conceded in the appellate Court below, that the principles which applied to the question of the adoption of a daughter's son, or of a sister's son or of a mother's sister's son, applied equally to the adoption of a son of any of the three. As regarded the above there was no divergence between the Mitakshara school and the other schools of Hindu Law, the rules affecting the present question being alike applicable in the different schools. This was stated in the judgment of Banerji, J.; and also that there was no difference as regarded the application of these rules between Brahmans, Kshatriyas, and Vaisiyas. The material defence was that the prohibition in the Hindu law was "merely directory." Its breach was reprehensible, but it was not such that the adoption would be invalidated when once made.

The Subordinate Judge decreed in favour of the plaintiffs on the ground that the adoption was altogether illegal. He referred to *Parbati* v. *Sundar* (1).

In appeal the question was referred by the Division Bench (Tyrrell and Knox, JJ.) for the opinion of the Full Bench (Edge, C. J, Knox, Blair, Banerji, Burkitt, and Aikman, JJ.),—whether the adoption, by a Hindu, a Kshatriya, of one of the three regenerate classes, subject to the law of the Mitakshara, of the son of his mother's sister, was, according to that law, valid or invalid. The referring order stated that it was not alleged that the adoption was valid according to any special custom prevailing in the caste or in the locality, to which the parties belonged.

The Full Bench delivered their judgments on the 27th June 1895. Edge, C.J., and Knox, Blair and Burkitt, JJ., were of opinion that the adoption in question was not shown to be "prohibited or illegal by the law of the Benares school, which applies in these Provinces and to the parties," and held that the adoption was not prohibited in the sense of its being illegal and void.

[414] On the other hand, Banerji and Aikman, JJ., considered that the adoption of a mother's sister's son was contrary to the Hindu law applicable to the case, and had not been shown to be sanctioned by any special usage of the caste to which that son belonged. The two principal judgments were those of the Chief Justice and of Banerji, J., and all the judgments are reported in the Indian Law Reports, 17 All., 294.

All were agreed that amongst Sudras such an adoption was permissible. But that in regard to its prohibition, if that were absolute, Brahmans, Kshatriyas and Vaisiyas, or the three twice-born classes, were subject to it. And that the Dattaka Mimamsa and the Dattaka Chandrika, both contained the injunction against it.

Mr. H. Cowell for the appellant argued that the judgments of the minority of the Full Bench were right. The prohibition of the adoption of a sister's son, and of the sons of other female relations of the adopter admitted to be in the like case had been established, as applicable to three regenerate classes, under early texts in the written Hindu law, repeated by the Commentators, and accepted by the Courts of law. The prohibition was acknowledged by all the different schools. The approval of the Judicial Committee had been intimated. The exceptions were in regard to proved custom to the contrary. The general rule

(1) 8 A. 1.

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had been enforced ever since 1815, when such an adoption had been contested. In Bengal the first decision to that effect was in *Kora Shunko Takoor* v. *Beebee Munee* (1). Afterwards in the North-West came *Shib Lall* v. *Bishumber* (2); *Musammat Battas Kuar* v. *Lachman Singh* (3); *Parbati* v. *Sundar* (4). The following cases appeared to be contrary, but their effect could be explained away. The first was *Ramchunder Chatterjea* v. *Sumboo Chunder Chatterjea* (5), a case in which the doctrine laid down was soon overruled, as shown in Sir F. Macnaghten's Consid. on Hind. L. 166, 168. The next was in 1808, case No. 12 in Sir W. Macnaghten's 2 Hind. L. 85, regarded as a case in which the **[415]** parties were Sudras. The third was in 1837, the case of an adopted son in the Kritrima form, who was the son of the adopter's sister (6).

In Madras there were *Narasammal* v. *Bala Rama Chariu patia* (7); *Jivani Bhai* v. *Jivu Bhai* (8); *Gopalayyan* v. *Raghupatiayyan* (9); *Minakshi* v. *Ramanada* (10); the decision of a Full Bench. Two cases allowing the adoption in question, *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri* (11) and *Vayidinada* v. *Appu* (12) were decided upon proof of a special custom in favour of it. The cases in Bombay were *Haebut Rao Mankur* v. *Gobind Rao Mankur* (13); *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (14); *Bhargirthi Bai* v. *Radha Bai* (15). Afterwards came the Full Bench decision in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (16). Looking to the Calcutta decisions would be found *Rajendro Narain Lahoree* v. *Saroda Soonduree Debee* (17); and *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (18); showing the two Mimamsas to be highly esteemed.

No judgment upon the question, raised directly on appeal, had been passed by the Judicial Committee yet; but there was a distinct intimation of their opinion upon the point in *Sundar* v. *Parbati* (19), where the Committee, had it been necessary to determine it, would have had "probably "little difficulty in accepting the opinion that a Brahman cannot lawfully "adopt his sister's son." This point was treated as settled in *Lala Narain Das* v. *Lala Ramanuj Dayal* (20). He showed that in *Ramalinga Pillai* v. *Sadasiva Pillai* (21), where the adoption had been admitted, the question had arisen among Sudras, and not, as the report stated, among Vaisiyas, and referred to *Jivani Bhai* v. *Jiva Bhai* (22).

[416] Even if the question should be treated as an open one, and his main argument was that it was not, after so many years of decision against such adoptions, the result left was that the whole controversy rested upon the effect of the Dattaka Mimamsa, s. II, paras. 2, 74, 91, 94, 107, 108, and s. V, paras. 16, 20: and of the Dattaka Chandrika, s. I, paras. 11,17, and s. II, paras. 7,8. The authority of Sakala was there given. On this there were the writings of Mr. Mandlik, pp. 8, 13 and 15; and of West and Buhler, p. 28. For the text of Saunaka, he referred to

(1) (1815) 1 Morley Dig. No. 59, 18.
(2) (1866) S.D.A.N.W.P. 25.
(3) 7 N. W. P. H. C. R. 117.
(4) 8 A. 1.
(5) (1810) 1 Morley Dig. No. 58, 18.
(6) (1837) 1 Morley Dig. No. 61, 19.
(7) 1 M. H. C. R. 420.
(8) 2 M. H. C. R. 462.
(9) 7 M. H. C. R. 250.
(10) 11 M. 49.
(11) 7 M. 3.
(12) 9 M. 44.
(13) (1821) 2 Borrodaile Rep. 106.
(14) 3 B. 273.
(15) 3 B. 298.
(16) 14 B. 249.
(17) 15 W. R. 548.
(18) 6 C. 256.
(19) 16 I. A. 186 = 12 A. 51.
(20) 25 I. A. 46 (52) = 20 A. 209.
(21) 9 M. I. A. 510.
(22) (1922) 3 Select Cas. 144 (150).

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Manu, Instit. Chapter III, v. 16. And on this he cited *Oooman Dutt* v. *Kunhaya Singh* (1). Sakala's text was conclusive, even applying Jaimini's rule that giving a reason in the text was an indication of an admonition not amounting to law. The text of Saunaka had not been shown to have been misconstrued by the authors of the Mimamsas. In regard to the only authority suggested as supporting the disregard of the rule, that of Yama, he referred to that part of the judgment of Banerji, J., which stated that the alleged text was not found in the Yama Smriti or Sanhita, or other Dharma Shastra. He referred to the Sarasvati Vilasa, translated by Foulkes, edition of 1881, which, he said, did not contain this text. He referred also to Mandlik, p. 483, and to the Tagore law lectures for 1888, p. 334, by the Shastri, Golap Chandra Sircar. Their criticisms, he argued, could not be altogether accepted. The two Mimamsas there criticized were considered in all the Schools of Hindu law, and all over India, to be of great authority although comparatively modern. The general opinion of the Dattaka Mimamsa might be taken to be the same as that expressed in its favour by Sir F.W. and Sir W. H., Macnaghten, by Colebrooke, Sutherland and Strange, and by many native Judges in their judgments. Eight treatises written by native authors had been produced in the Court below supporting the opinion that the precept in the Shastras was a complete and legal prohibition against adopting a sister's son. And he referred to *Rangama* v. *Atchama* (2); and *The Collector* **[417]** *of Madura* v. *Moottoo Ramalinga Sathupathy* (3); as showing that the Dattaka Mimamsa was a work to which weight was attributed.

He submitted that no reason had been assigned for disregarding the text of Sakala: that no valid reason had been given for holding the text of Saunaka to have been misconstrued by Nanda Pandita: that the text of Yama, as to the point, had not been cited by any commentator, or shown to have been adopted by any school of Hindu law: and that no sufficient reason had been given for refusing to accept the authority of the Dattaka Mimamsa and the Dattaka Chandrika, which had been hitherto everywhere recognised.

Afterwards, on the 11th March, 1899, their Lordships' judgment was delivered by :—

JUDGMENT.

LORD HOBHOUSE.—There are no facts in dispute in this case. The plaintiffs now appellants brought the suit to establish their title as reversionary heirs of Madho Singh as against the first defendant, a boy who was adopted by him in the Dattaka form. The boy is the natural son of Madho's mothers' sister. The sole question is whether the adoption of such a relation is allowed by Hindu law. The Subordinate Judge held that it is not allowed. A Full Bench of six Judges of the High Court has decided that it is allowed. Four judges, *viz.*, Chief Justice Edge, and Justices Knox. Blair and Burkitt being of that opinion against Justices Banerji and Aikman who are of the contrary opinion. Their Lordships are under the disadvantage of hearing the case without any help from the respondents who have not appeared. But this disadvantage is much lessened by the elaborate fulness of the reasons assigned by Chief Justice Edge for the conclusion which he reached in favour of the respondent.

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(1) (1822) 3 Sel. Rep. 201=6 I. D. (O.S.) 820.
(2) 4 M.I.A. 1.
(3) 12 M.I.A. 397 (437).

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The question is of the same nature as that which has just been disposed of in the preceding cases from Madras and Allahabad. But it depends upon a different set of texts and the course of decision in India has been very different. It is agreed [418] on all hands that the prohibition contended for extends only to the three twice-born classes, and not to the most numerous class of all, the Sudras. The parties here are Kshatriyas governed by the Benares school of law. It is also agreed that, as regards capability to be adopted, the sons of sisters, sons of daughters, and sons of maternal aunts, stand on the same footing, and that the authorities which apply to any of these classes apply to all.

The oldest original texts bearing on the point are contained in the Dattaka Chandrika. In s. I, para. 11 of that work the author quotes the ancient sage Sakala to the following effect. After mentioning certain relatives to whom preference should be given in adoption among the regenerate tribes, he says :—" If such exist not, let him adopt one born in another family, except a daughter's son and a sister's son and the son of the mother's sister."

In para. 17 of the same section the same work quotes the sage Saunaka who, after pointing out from what classes adoptions should be made, says :—" But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son."

In s. II, paras. 7 and 8, after quoting from Saunaka the expression that the adopted boy should bear the reflection of a son, the author adds :—" The resemblance of a son, or in other words the capability to have been begotten by the adopter, through appointment and so forth."

Nanda Pandita, the author of the Dattaka Mimamsa, writing in the early part of the 17th century, some centuries later than the conjectured date of the Dattaka Chandrika, gives the same quotations from Sakala and Saunaka and similar comments upon them. (S. II, arts. 74, 107, 108 ; s. V, arts. 16 to 20.)

Their Lordships have mentioned in the prior adoption cases the views of Mr. Justice Knox as to the authority of the two Dattaka treatises just quoted. In the present case the learned Chief Justice Edge takes even more disparaging views of their [419] authority ; denying, if their Lordships rightly understand him, that these works have been recognised as any authority at all in the Benares school of law. If there were anything to show that in the Benares school of law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on the Smritis as the source from whence all schools of Hindu law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883 that learned writer says : —" The Dattaka Mimamsa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based." Both works have been received in Courts of Law including this Board as high authority. In *Rangama* v. *Atchama* (1) Lord Kingsdown says : " they enjoy, as we understand, the highest reputation throughout India." In 12 Moore, p. 437, Sir James Colvile quotes, with assent, the opinion of Sir William Macnaghten, that both works are respected all over India, that when they

(1) 4 M.I.A. 97.

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differ the Chandrika is adhered to in Bengal and by the Southern Jurists, while the Mimamsa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland of West and Buhler seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law.

The learned Chief Justice then objects that the texts of the two Rishis are detached from their context and so are rendered of no value; and that as regards Sakala there is no information where the writer of the Chandrika obtained his text, and that its genuineness is doubtful. This objection is strengthened by the fact that the greatest of the sages do not mention any such prohibition; neither Manu nor Vashistha nor Yajnavalkya nor Narada; while one ancient sage called the holy Yama, expressly asserts the right to adopt a sister's son. Those objections must **[420]** receive the same answer. It may be true, though it is impossible now to say, that the Dattaka Chandrika is the sole authority for the texts there quoted and afterwards copied by Nanda Pandita; but it still remains the fact that the texts have been so quoted for several centuries and have so been received into the body of Hindu Law.

Taking then the texts as they are given, and adding to them such weight as the commentators possess, what is enjoined by them? The learned Chief Justice points out that Saunaka may mean a legal prohibition, or a moral admonition, or merely to state a fact, or to indicate a preference for daughters' and sisters' sons among Sudras. Certainly, if the question were new, the learned Judge's argument would have to be very carefully weighed before it could be rejected. Much of the reasoning which has prevailed with their Lordships in the prior cases would apply to this case; and on some points, such as the silence of other great law-givers and the existence of a sacred text in an opposite sense. with greater force. But their Lordships find an antecedent difficulty; for they have to consider whether the present question can be treated as an open one.

It is not necessary to state in detail the course of decisions in India, because there is hardly any conflict in them and they are fully stated in the judgments below.* In 1808 there was a decision on a case from Mirzapur in favour of the validity of these disputed adoptions; but it is probable that the parties were Sudras, as Sir William Macnaghten thought they were. There was a decision in 1810 between Brahmans where an adoption of a sister's son was held valid But Sir Francis Macnaghten tells us that it was overruled in some subsequent proceeding which is not specified. In every other case that has since occurred, when the question has arisen between members of the three regenerate classes, and the adoption has been in the Dattaka form, the decision has been against its validity. The cases have occurred in all parts of India and all the High Courts have agreed. In making this general statement their Lordships have not overlooked the case decided **[421]** by the Bombay High Court in 1867 (1). Chief Justice Edge considers that, though the parties really were Sudras, the learned Judges thought they belonged to one of the twice-born classes, and so lent their authority to an adoption of a mother's sister's son among one of those classes.

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* 17 A. 294.

(1) 4 B.H.C.R. 130.

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But though there was some argument as to the true caste, their Lordships find nothing in the judgment to show that the Judges thought the caste to be other than it really was. Nor was the decision treated as a standing in the way of a subsequent decision in 1879* by the same High Court, which affirmed the invalidity of such marriages in the regenerate classes.

The arguments by which the learned Chief Justice seeks to withdraw this case from so strong a current of decision rest entirely on the peculiarity which in his opinion attaches to the Benares school of law. He does indeed subject the decided cases to a minute and able examination with a view of ascertaining the precise bearing of each and of attenuating its force. But the general result at which he arrives does not substantially vary from that which is arrived at by the minority of the Court, and which is above stated. That being so, he puts the case in this way :—

"The parties in this case are Kshatriyas and are governed by the "Benares school of Hindu law. As Kshatriyas they belong to one of "the three regenerate classes of Hindus. What we have to ascertain is, "does the Hindu law, as accepted by the Benares school, prohibit the "adoption by a Kshatriya of the son of his mother's sister, in the sense of "making such an adoption illegal and void.

"It has not been suggested that there is any evidence in this suit of "any usage in these provinces by which the adoption in the Dattaka form "of the son of a sister of the mother of the adopter, or of his sister's son "or of his daughter's son, amongst any of the three regenerate classes is "either recognised as valid or prohibited as illegal. Neither side in this "case has pleaded or relied upon any custom or usage."

[422] The learned Chief Justice then ties the plaintiffs down to the obligation of showing a custom to prohibit the adoptions in question ; and on each decided case he puts the test question whether it is founded on proof of such a custom among the regenerate classes governed by the Benares school of law. In this position he considers that he is supported by a passage in the judgment of this Board delivered by Sir James Colvile in the case of the *Collector of Madura* v. *Mootoo Ramalinga* (1). It is as follows :—"The duty, therefore, of a European Judge who is under the "obligation to administer Hindu law is not so much to inquire whether a "disputed doctrine is fairly deducible from the earliest authorities as "whether it has been received by the particular school which governs the "district with which he has to deal, and has there been sanctioned by usage. "For under the Hindu system of law clear proof of usage will outweigh "the written text of the law." The principle deduced by the learned Chief Justice from this passage and applied to the present case would have very far-reaching consequences ; and in their Lordships' opinion it is not a sound principle, nor is it properly deducible from the language of this Board.

In that judgment Sir James Colvile was dealing with the question whether a widow could adopt a son to her husband without his express authority. That is a point in the law of adoption on which legal authorities in different parts of India, all starting from the same sacred texts, have branched off into an extraordinary variety of conclusions; each marked enough and prevalent enough in its own sphere to be ascribed to

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* 3 B. 273.

(1) 12 M. I. A. 397 (436).

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some recognised school of law. Sir James Colvile addresses himself first to show how these schools came into being, and secondly, to specify books of the highest authority in them. It is in the course of this exposition that the sentences just quoted occur, as also the opinion before quoted with reference to the authority of the Dattaka Chandrika and of the work of Nanda Pandita. The decision of the Board was that the power claimed for the widow was [423] conferred on her by the school of law dominant in the Dravida country from whence the appeal came. But that law was ascertained by the usual methods of ascertaining general law; by reference to authoritative text books, to judicial decisions, and to the opinions of pandits. These authorities were found to be sufficient proof of the general Hindu law prevailing over large tracts of country and populous communities. Anybody living among them must be taken to fall under those general rules of law unless he could show some valid local, tribal, or family custom to the contrary. It was necessary for this Board to refer to the differences of schools of law, because the authorities of the recognised Bengal school denied the power which those of Southern India affirmed. The whole passage is framed with reference to the fact that different schools were found to take different views of the general law on the point before the Board. But their judgment gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove by evidence of what actually is done. In this case the learned Chief Justice tells us that there is no suggestion of a special custom. That being so he seems to have inverted the processes by which law is ascertained.

The rule of law asserted by the plaintiffs in this case is derived in the first place from the sacred texts which underlie all Hindu law; and, secondly, from books of high authority in the Benares school as well as in others. It has been affirmed by Courts of Justice in all parts of India and in many law suits in which the parties were subject to the law of the Mitakshara, which is of the highest authority in the Benares school. It has been so affirmed and applied in general terms, and not as confined to a particular school. It is not shown or even asserted that there is any thing peculiar in the Benares school to make this rule [424] inconsistent with its principles. It seems to their Lordships that to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them.

Their Lordships do not inquire whether the views so earnestly maintained by the learned Chief Justice upon the construction of the disputed texts might have been successfully maintained at the beginning of this century. For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of

Justice to treat the question now as an open one. Their Lordships will humbly advise Her Majesty to reverse the decree appealed from, and to restore that of the Subordinate Judge, with costs in both Courts. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:—Messrs. *Ranken, Ford, Ford and Chester.*

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[425] FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

RAM DAYAL (*Defendant*) *v.* MADAN MOHAN LAL (*Plaintiff*).*

[29th May, 1899.]

Res judicata—*Civil Procedure Code, s. 13, Expl. III—Suit for possession of land and mesne profits past and future—Future mesne profits not granted—Subsequent suit for such future mesne profits not barred.*

Held that where a suit has been brought for possession of immoveable property and for mesne profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of s. 13, Expl. III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (1), followed. *Jiban Das Oswal* v. *Durga Pershad Adhikari* (2); *Pratab Chandra Burua* v. *Rani Swarnamayi* (3); *Julius* v. *The Bishop of Oxford* (4); *In re Baker* (5); *Bhivrav* v. *Sitaram* (6) and *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (7), referred to; *Ramabhadra* v. *Jagannatha* (8), discussed, *Narain Das* v. *Khan Singh* (9) overruled.

[F., 32 C. 118 (122); R., 2 N.L.R. 91 (92); D., 30 A. 225=5 A.L.J. 192=A.W.N. (1908) 96; 25 B. 115 (125, 126), 34 C. 223=5 C.L.J. 192 (200).]

THIS was a suit for the recovery of mesne profits of certain zamindari property for the year 1301 Fasli, *i.e.*, from the 26th of September 1893 to the 14th of September 1894.

The facts of the case are as follows:—

The plaintiff had brought a previous suit against the same defendant on the 5th of December 1893 claiming possession of a share of zamindari property and of a dwelling-house. He also claimed mesne profits as follows,—first, mesne profits for 1298 to 1300 Fasli, both years inclusive, and, secondly, future mesne profits, that is, mesne profits from the date of the institution of the suit up to the date when possession of the property should be [426] delivered to him. The decree in that suit was passed on the 6th of June 1894. It awarded to the plaintiff possession of both the properties claimed, and awarded mesne profits up to the 25th September 1893. Then followed the words:—"The rest of the claim is dismissed." The plaintiff subsequently filed the present suit claiming mesne profits subsequent to the 25th of September as stated above. The defendant

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* Second Appeal No. 920 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 20th August 1896, confirming a decree of Pandit Girraj Kishor Dat, Munsif of Bareilly, dated the 27th June 1896.

(1) 17 C. 968. (2) 21 C. 252. (3) 4 B. L. R. 113.
(4) (1880) L. R. 5 App. Cas. 214. (5) (1890) L. R. 44 Ch. D. 262.
(6) 19 B. 532. (7) 4 M. 308. (8) 14 M. 328.
(9) 4 A.W.N. (1884) 159.

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resisted the suit on the ground that the claim for furture mesne profits was barred by the operation of s. 13, Expl. III, of the Civil Procedure Code, the claim for future mesne profits in the former suit not having been dealt with, and therefore by implication having been refused. It should be noted, as stated hereafter in the judgment, that the order in the decree above quoted—"The rest of the claim is dismissed"—did not refer to the claim for future mesne profits but to a portion of the mesne profits claimed for a period before suit.

The Court of first instance (Munsif of Bareilly) overruled the defendant's plea of *res judicata* and gave judgment for the plaintiff, though for a sum less than that which he claimed. On appeal the lower appellate Court (Subordinate Judge) upheld the decree of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, contended that the present suit was barred by the rule of *res judicata*. In the former suit for possession between the same parties, the mesne profits between the date of suit and the date when possession of the property should be delivered to the plaintiff had been expressly claimed. The decree after giving certain reliefs went on to say :—"The rest of the claim be dismissed." This was an express refusal of the relief relating to future mesne profits. Even if it be not so, Expl. III to s. 13 would bar a claim like the present, because in the former suit it was a relief claimed in the plaint which was not granted by the decree and for the purposes of *res judicata* must be deemed to have been refused. This position is supported by a ruling of this Court **[427]** directly in point—*Narain Das* v. *Khan Singh* (1) —where the learned Judges held that Expl. III to s. 13, would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. S. 211 and the last paragraph but one of s. 244 of the Code in order to make them consistent with Expl. III to s. 13 should be read as applying only to cases where the plaint does not claim mesne profits accruing after the institution of the suit. The same principle is also laid down in the case of *Ramabhadra* v. *Jagannatha* (2). When *wasilat* is claimed without further specification, it means mesne profits up to the date of delivery of possession, see *Fakhir-ud-din Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal* (3) also *Puran Chand* v. *Roy Radha Kishen* (4).

A contrary view has been taken in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (5) and in *Jiban Das Oswal* v. *Durga Pershad Adhikari* (6). The latter of these cases has no bearing on the present case as there no future mesne profits were claimed. The ruling in I. L. R., 17 Calcutta, is a doubtful one. On general principles a suit for future mesne profits would lie in cases where the plaintiff simply asks for possession, but in cases where future mesne profits are claimed and the decree expressly refuses them or is silent with reference to them no subsequent suit will lie. See also *Anund Chunder Pal* v. *Punchoo Lal Soobalah* (7), Maxwell on the interpretation of statutes (2nd edition) p. 286, and *Julius* v. *The Bishop of Oxford* (8).

Mr. *S. Sinha*, for the respondent.

In the first place the clause in the decree—"the rest of the claim is dismissed,"—if construed in conformity with the judgment, clearly

(1) 4 A.W.N. (1884) 159. (2) 14 M. 328. (3) 8 I. A. 197.
(4) 19 C. 132. (5) 17 C. 968. (6) 21 C. 252.
(7) 14 W. R. (F.B.) 33 (36). (8) (1880) L. R. 5 App. Cas. 214.

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refers, not to any mesne profits after the date of the suit, [428] but to the mesne profits claimed for the period before suit in excess of the sum to which the Court, in the previous suit, considered the plaintiff to be entitled.

But even supposing that the clause refers, as contended by the other side, to the mesne profits that might have accrued after the date of suit, still the present suit cannot be held to be barred, as Expl. III to s. 13 of the Code of Civil Procedure can have no reference to a case of this kind. The case of *Narain Das* v. *Khan Singh* (1), relied upon by the appellants, does not lay down the law on the point correctly, and is in conflict with the decision of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2) and of the Madras High Court in *Ramabhadra* v. *Jagannatha* (3). The learned Judges who decided the case of *Narain Das* v. *Khan Singh* seem to have been led to hold as they have done, under the impression that but for their so holding there would be an inconsistency between ss. 211 and 244 (penultimate paragraph), and Expl. III to s. 13. That view, it is submitted, is not correct, on the ground—supported by the Calcutta and Madras cases above referred to—that the mesne profits after the date of the suit could not be said to form part of the plaintiff's cause of action, as he was not entitled to claim as a matter of right what had not accrued due at the date of the institution of the suit. In fact, had it not been for the provisions of s. 211, which enables a plaintiff to claim mesne profits which might accrue in the future, and the object of which is merely to avoid multiplicity of suits, it would not have been open to the plaintiff to claim future mesne profits at all.

Now s. 211 is not mandatory but merely an enabling and permissive section, which gives the Court only a discretionary power which it is free to exercise or not as it thinks fit, regard being had to the circumstances of each particular case. The case of *Julius* v. *The Bishop of Oxford* (4), relied upon by the [429] appellants, lays down that the party who contends that the power givin to a Court by an enabling provision, such as the word "may" imports, is to be regarded as an imperative obligation should prove that contention. There is nothing to show that in enacting s. 211 the Legislature intended that the courts were not free to exercise their discretion in granting or refusing a relief claimed in the plaint as to future mesne profits. That being so, the dismissal of a claim for future mesne profits cannot be said to be barred by reason of Expl. III to s. 13, as the words "relief claimed" in the explanation can only be taken to apply to what has actually accrued to the plaintiff, that is, what the plaintiff could claim as a matter of right, as included in his cause of action, not to something which he could only claim as an appeal to the discretionary power of the Court, which might be granted or refused.

JUDGMENT.

STRACHEY, C.J.—The plaintiff in this case claimed a sum of money in respect of the mesne profits of a zamindari proporty for the year 1301 Fasli, that is to say, from the 26th September, 1893 to the 14th September, 1894. The suit was instituted in June 1896. In defence to the suit it was pleaded that inasmuch as the mesne profits claimed in the suit had

(1) 4 A.W.N. (1884) 159.
(2) 1y C. 968.
(3) 14 M. 328.
(4) (1880) L. R. 5 App. Cas. 214.

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been expressly claimed in a previous suit, and had not been allowed in that suit, the claim was barred as *res judicata* by virtue of Expl. III to s. 13 of the Code of Civil Procedure. That plea was overruled by both the lower Courts. It is again raised by the defendant in his Second Appeal to this Court. The only question which we have to decide is whether the Courts ought to have held the suit to be barred by s. 13 of the Code.

The former suit was brought by the same plaintiff against the same defendant on the 5th December, 1893. In the plaint the plaintiff claimed to recover possession of the same share of zamindari property, and of a dwelling-house. He also claimed mesne profits as follows—first, mesne profits for 1298 to 1300 Fasli both years inclusive; and secondly, future mesne profits that is, **[430]** mesne profits from the date of the institution of the suit up to the date when possession of the property should be delivered to him.

The decree in that suit was passed on the 6th June, 1894. It awarded possession to the plaintiff of both the properties claimed. As regards mesne profits, it awarded to the plaintiff a sum of Rs. 1,882-9-11, out of Rs. 3,089-10-10 which were claimed in the plaint as mesne profits for the Fasli years prior to the suit. That is, it awarded mesne profits up to the 25th September, 1893. Then followed the words—"The rest of the claim is dismissed." In the present suit the claim is for mesne profits for the year 1301 Fasli, that is, from the 26th September, 1893, to the 14th September, 1894, in other words, from the date up to which the decree in the first suit awarded mesne profits. The contention of the defendant is that as in the former suit the plaint included a prayer for future mesne profits subsequent to the institution of that suit and up to the date of delivery of possession, and as that claim must, in view of Expl. III to s. 13, be deemed to have been refused, the plaintiff cannot now claim any profits subsequent to the institution of that suit.

Before dealing with this contention I must again refer to the terms of the decree of the 6th June, 1894. The expression "the rest of the claim is dismissed" suggests at first sight that the dismissal expressly referred, and was intended to refer, to the claim for mesne profits after the institution of the suit. If it did so, then the prayer for such future profits was of course expressly refused. We are, however, entitled in construing the decree to look at the judgment, and when the judgment is looked at, I think it is clear that the Court in using the expression "the rest of the claim is dismissed" was referring, not to any mesne profits after suit, but to the mesne profits claimed for the period before suit in excess of the Rs. 1,882-9-11, which was all that the Court considered the plaintiff entitled to for that period. The judgment further shows that, for some unexplained reason the Court was not dealing at all with the claim for future mesne profits. It **[431]** either overlooked that claim or purposely refrained from dealing with it. However, if the argument of the learned advocate for the appellant is correct, the present claim is none the less barred by Expl. III to s. 13, because in the former suit it was a relief claimed in the plaint which was not expressly granted by the decree, and which, therefore, for the purpose of *res judicata* must be deemed to have been refused.

This case has been referred to a Full Bench for the purpose of considering a ruling of this Court which is directly in point, according to which the argument for the appellant would be correct. That is the case of

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Narain Das v. *Khan Singh* (1). In that case the learned Judges undoubtedly held that Expl. III to s. 13 would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. They appear to have thought that s. 211 and the last paragraph but one of s. 244 of the Code, in order to make them consistent with Expl. III to s. 13, must be read as limited to cases where there is no prayer in the plaint for mesne profits accruing after the institution of the suit. The question is whether that view is right. The conclusion at which I have arrived is that Expl. III to s. 13 does not apply to a case like this. It is necessary to see what was the nature of the claim in the first suit to the mesne profits asked for accruing due after the institution of that suit. Those mesne profits formed no part of the cause of action on which the plaintiff came into Court. The cause of action on which he came into Court was the trespass committed by the withholding from him of the possession of land to which he was entitled, and the mesne profits corresponding to that cause of action were the profits appropriated by the defendant during the continuance of that trespass, that is to say, mesne profits up to and ending with the institution of the suit. In the absence of any specific provision in the Code, that is where his **[432]** claim would have had to stop, he could not in that suit have anticipated any cause of action which might subsequently have accrued to him by the continuance of the trespass, or claimed further mesne profits by way of damages for such subsequent trespass. The object of s. 211 was that, in order to avoid multiplicity of suits, a Court in a suit for recovery of possession of immoveable property yielding rent or other profit should be competent to provide in the decree, not only for the mesne profits for which the plaintiff is entitled to sue as forming part of his cause of action, that is, mesne profits prior to the suit, but also mesne profits which, but for s. 211, he could not have claimed in the suit at all, mesne profits from the institution of the suit until the delivery of possession, or until the expiration of three years from the date of the decree, whichever event first occurs.

Now it appears to me that s. 211 is a purely enabling section and gives the Court a discretion to award future mesne profits which it is free to exercise or not according to all the circumstances of the particular case. It was argued that in cases where a plaintiff expressly asks in his plaint for mesne profits after the institution of the suit, the Court, notwithstanding the enabling language of s. 211, has no discretion in the matter, but is bound, if it awards possession of the property, to make a decree for future mesne profits in the terms of the section. I do not agree with this argument. In the decision of the Full Bench of the Calcutta High Court in *Pratab Chandra Burua* v. *Rani Swarnamayi* (2), the Court had to consider the language of the corresponding section (s. 196) of the Code of 1859, and it was there held that the section was enabling and permissive, and only gave the Court a discretionary power. As shown by the case of *Julius* v. *The Bishop of Oxford* (3) and by the case of *In re Baker* (4), it lies upon the party who contends that the power or authority given to a Court by enabling language such as the **[433]** word "may" is coupled with an imperative obligation to use it, to prove that contention. There is nothing in my opinion, in s. 211, or in the objects which the Legislature

(1) 4 A.W.N. (1884) 159.
(2) 4 B.L.R. 113 (126 and 129).
(3) (1880) L. R. 5 App. Cas. 214.
(4) (1890) L.R. 44 Ch. D. 262.

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in passing that section had in view, to suggest that a Court acting under s. 211 is not free to grant or to refuse a prayer in the plaint for mesne profits accruing after the institution of the suit.

Turning to s. 244 I cannot agree that the penultimate paragraph of that section is limited to cases in which the plaint omits to ask for future mesne profits. The earlier part of s. 244 refers to cases in which the decree deals with mesne profits (*a*) under s. 212 (*b*) under s. 211. In those cases, as well as in those falling under (*c*) the questions referred to can only be dealt with in execution, and a separate suit is expressly barred. The latter portion of the section, on the other hand, refers to cases of mesne profits accruing after the institution of the suit, which the decree does not deal with, and a separate suit is expressly authorized. The learned Judges in *Narain Das* v. *Khan Singh* adopted the construction to which I have referred, apparently because they saw no other way of reconciling s. 244 with Expl. III of s. 13. The reconciliation which I suggest is this. The words "relief claimed" in Expl. III apply only to something which forms part of the "claim," strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action, and which, if he establishes his cause of action, the Court has no discretion to refuse. The words "relief claimed" do not, in my opinion, include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court, and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise, even if the cause of action is fully established. As was pointed out by Sir Barnes Peacock in the Full Bench case to which I have referred, the future mesne profits accruing after the institution of the suit do not form [434] part of the cause of action, cannot be claimed as of right, could not, but for s. 211, be asked for at all, and may in any case be refused by the Court at its discretion.

There is no other case besides that of *Narain Das* v. *Khan Singh* (1) which fully supports the appellant's contention. The case of *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2) on which the lower Courts have relied, is fully in accord with the views which I have expressed. When that case is compared with the later case of *Jiban Das Oswal* v. *Durga Pershad Adhikari* (3) the view of Expl. III of s. 13 becomes, I think, very clear. In the later case the former suit was for recovery of possession and for mesne profits prior to the institution of the suit. The decree awarded possession, but was silent as regards mesne profits. The plaintiff brought a subsequent suit in which he claimed both mesne profits prior to the institution of the first suit and also mesne profits for a period subsequent to that suit. It was held that the claim for mesne profits prior to the institution of the first suit was barred by s. 13 of the Code, but that the claim for subsequent mesne profits was not. The case of *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* was distinguished with reference to the essential difference between a claim for mesne profits accrued due before the institution of a suit and subsequent mesne profits asked for in the plaint by reason of s. 211, but not then accrued due. In the former case a refusal or an omission by the decree to grant relief falls within Expl. III, because it is a refusal to grant a relief, which, if the plaintiff had made out his case, the Court would have been bound to grant, which related to matters in

(1) 4 A. W. N. (1884) 159. (2) 17 C. 968. (3) 21 C. 252.

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respect of which he had a complete cause of action—a claim in the sense of a claim as of right. In the latter case these conditions are not satisfied, and if it is proper to describe the prayer in plaint as "claiming" arelief, it is not a relief "claimed" in the sense of Explanation III.

[435] The case of *Ramabhadra* v. *Jagannatha* (1) has been referred to. I must say, with all respect, that I find it extremely difficult to understand that decison. There was a suit for partition brought in September, 1883. The plaintiffs in that suit asked for mesne profits for ten years prior to the suit and subsequent profits. The decree in that suit awarded the plaintiffs mesne profits for three years prior to the suit, but was silent as to the subsequent profits. There is nothing in the report which suggests that the subsequent profits claimed were only profits up to the date of the decree, or were not in respect of the whole period up to the time when the plaintiffs should obtain possession. In 1888 the same plaintiffs brought another suit to recover mesne profits for five years from the date of the former suit. The question before the High Court was whether the suit was barred on the ground that the mesne profits claimed must be deemed to have been refused by the decree in the partition suit, having regard to s. 13, Explanation III of the Code. In the earlier part of the judgment the learned Judges came to the conclusion that the decision of the Court below was right "so far as it treats the decree in the partition suit on a construction of Explanation III, s. 13, as if it expressly refused subsequent mesne profits." So far the judgment is in accord with the view expressed in *Narain Das* v. *Khan Singh*. Having then arrived at the conclusion that the first decree must be construed as if there were inserted in it by reason of Explanation III to s. 13 the words "subsequent profits are refused," the learned Judges proceed to ask, "what is the construction to be placed on the decree as to the period for which mesne profits where refused? Was it the intention to refuse subsequent profits up to the date of decree or for all time to come until partition is effected and separate possession is awarded of appellant's moiety? In ascertaining the intention two things have to be kept in view, *viz.*, (1) the terms of the latter portion of the decree, so that words inserted with reference to Explanation III may fit into it; and (2) the provisions of **[436]** s. 211 as to the extent to which subsequent profits accruing after suit may be claimed and adjudged." They came to the conclusion that the true construction of the first decree was that it refused the subsequent mesne profits claimed only up to the date of the decree, and therefore that the claim before them was only to that extent barred by s. 13. It appears to me that on the principles stated by the learned Judges themselves, what they had to look to was the plaint. If the plaint in asking for subsequent profits only meant profits from the institution of the suit until decree, then, no doubt, the decision would be correct, that the decree refusing subsequent profits refused no more than that. But if as one would gather from the report, and as one would naturally expect, the plaintiffs in asking for subsequent profits meant the subsequent profits referred to in s. 211 of the Code, that is, from the institution of the suit until delivery of possession, then the words inserted in the decree "subsequent profits are refused" must have been a refusal to award profits after the decree as well as profits between the institution of the suit and the passing of the decree. Assuming that for the reasons given by the learned Judges, the decree could otherwise be

(1) 14 M. 328.

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construed as only refusing mesne profits up to its date, still if the plaint asked for mesne profits after that date, it follows that the decree, as to that prayer, was silent, and, if so, then on the principles laid down in the earlier part of the judgment, that silence must itself be treated as a further refusal. Having regard to the nature of the claim in the former suit, I cannot understand the importance attached by the High Court to the date of decree or the distinction between the subsequent profits prior to decree and the subsequent profits after decree. At p. 331 of the report they say :—"It is clear that if subsequent mesne profits were expressly refused by that decree the claim in respect of them *up to the date of that decree* would clearly be *res judicata*, the parties and the title under which the claim is made being the same in both suits." I cannot understand why they say "up to the date of that decree." There is an important distinction between the mesne [437] profits before institution of the suit which, but for s. 211, are all that the plaintiff could claim, and the subsequent mesne profits which by reason of s. 211 he can further ask for, but as regards the latter, there is, so far as I am aware, no further distinction in principle between subsequent mesne profits between institution and decree, and subsequently mesne profits between decree and possession. In this respect there is a material difference between s. 211 and s. 209 to which I shall presently refer.

The only other decisions which I need mention are the cases of *Bhivrav* v. *Sitaram* (1), in which the decision in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* is approved, and the case of *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (2), where it was held that "Explanation III of s. 13 of the Code of Civil Procedure refers to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue."

I think that s. 209 of the Code affords some support to the views which I have expressed with regard to ss. 13, 211 and 244. Section 209 allows the Court in the case of decrees for the payment of money to order interest from the date of the suit to the date of the decree in addition to interest for any period prior to the institution of the suit with further interest on the aggregate sum so adjusted until payment. The second paragraph of the section provided that "where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie." This express provision that the silence of the decree as to further interest on the aggregate sum adjudged is to be deemed a refusal and this express prohibition of a separate suit therefor show that the Legislature did not consider s. 13, Explanation III, applicable to such a case. When this is compared with the absence [438] of any similar provision in s. 211 coupled with the express allowance in s. 244 of a separate suit for future mesne profits not dealt with by the decree, I infer that, as regards a claim for such future mesne profits, the silence of the decree is not to be deemed a refusal, and that a separate suit in respect of such a claim will lie.

On the whole case I think that the lower Courts were right in following the decision in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (3), that the case of *Narain Das* v. *Khan Singh* (4) was

(1) 19 B. 522.
(2) 4 M. 308.
(3) 17 C. 968.
(4) 4 A.W.N. (1884) 159.

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decided wrongly and must be overruled, and that this appeal must be dismissed with costs.

BANERJI, J.—I agree with the learned Chief Justice that the plea of *res judicata* raised in this appeal should be overruled, and the appeal dismissed. It is contended that as in the former suit brought by the present plaintiff he claimed mesne profits, not only for the period prior to the date of the suit, but also for the period subsequent to that date, the present claim, which relates to the period subsequent to the date of the former suit, is not maintainable under the rule of *res judicata*. It is urged that the relief which was claimed in respect of future mesne profits in the former suit was expressly refused, and that if it be not held to have been expressly refused, it must be deemed to have been refused having regard to the provisions of Explanation III to s. 13 of the Code of Civil Procedure. In the former suit the plaintiff must be held to have claimed mesne profits for the period subsequent to the date of the suit, although the 4th relief claimed in the plaint in that suit was not happily worded. In the decree, no doubt, the Court after decreeing a portion of the amount claimed as mesne profits for the period prior to the date of the suit proceeded to declare that the remainder of the suit was dismissed, but, reading the decree by the light of the judgment, it is clear that the dismissal related only to that portion of the mesne profits claimed for the period preceding the date of the suit which the plaintiff had failed **[439]** to prove. I therefore agree with the learned Chief Justice that the relief sought in the present suit was not expressly refused in the former suit. The next question which arises is—should that relief be deemed to have been refused in the former suit? The contention of the learned counsel for the appellant is no doubt supported by the ruling of this Court in *Narain Das* v. *Khan Singh* (1), but with reference to that ruling it may be observed that no other ruling has been cited to us in which the same view was adopted in its entirety. With all deference, I am unable to agree with the view which the learned Judges who decided that case took of the question before us. That view is opposed to the ruling of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2), which was approved by the same Court in *Jiban Das Oswal* v. *Durga Pershad Adhikari* (3) and by the Bombay High Court in *Bhivrav* v. *Sitaram* (4). I agree with the learned Chief Justice in the construction which he would place on the third explanation to s. 13 of the Code of Civil Procedure. That explanation refers, as held by the Madras High Court in *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (5), to a relief applied for by the plaintiff, which it would be the duty of the Court to grant if the cause of action on which the relief was claimed was established. In the present instance the plaintiff was not entitled in his suit for possession to claim as of right mesne profits for the period subsequent to the date of the suit. No cause of action had on that date accrued to him for those mesne profits, and it was only by virtue of the provisions of s. 211 of the Code that he could claim and the Court could award to him such mesne profits in his suit for possession. That section has been repeatedly held to be an enabling section. It was held to be so even by the Madras High Court in *Ramabhadra* v. *Jagannatha* (6), which the learned Chief Justice has criticised. As that

(1) 4 A. W. N. (1884) 159. (2) 17 C. 968. (3) 21 C. 252.
(4) 19 B. 532. (5) 4 M. 309. (6) 14 M. 328.

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section only vests the Court with a discretion [440] and there was no obligation on the Court to make a decree for mesne profits for the period subsequent to the date of the suit for possession, the omission to grant such mesne profits cannot by virtue of Explanation III to s. 13 preclude a subsequent suit for mesne profits.

AIKMAN, J.—I am of the same opinion and had little to add to what has been said by the learned Chief Justice and my brother Banerji. The question which we have to consider is whether when in a suit for the recovery of immoveable property the plaintiff has claimed future mesne profits, that is mesne profits subsequent to the date of the institution of the suit, and his claim has either been refused or has not been expressly granted, a subsequent suit for those mesne profits is barred by the provisions of s. 13 of the Code of Civil Procedure. It cannot be said that in the present case the issue as to the plaintiff's right to the mesne profits now claimed was ever heard and finally decided, but reliance is placed on Explanation III to s. 13, and it is contended that as the mesne profits claimed were not granted they must be deemed to have been refused. Whether this is so or not depends upon whether the plaintiff can as of right ask the Court to adjudicate on his claim for future mesne profits. In my opinion he cannot. Section 211 of the Code gives a Court a discretionary power of providing in its decree for the payment of mesne profits which had not accrued due at the date of the suit. If it has refused to exercise this discretion, there is nothing, in my judgment, to bar a subsequent suit. Section 209 of the Code of Civil Procedure, gives the Court a somewhat similar discretionary power where a decree is made for payment of money, to award future interest from the date of the decree to the date of payment. The last paragraph of that section provides that when a Court has not chosen to exercise this power, and when its decree is silent as to the payment of future interest, it shall be deemed to have refused such interest and no separate suit therefor shall lie. The absence of any such provision in s. 211 makes it clear to me that the Legislature did not intend to bar a subsequent suit in cases [441] where a Court had not seen fit to exercise the discretion conferred upon it by that section. For these reasons I am of opinion that the appeal should be dismissed.

BY THE COURT.—The appeal is dimissed with costs.

Appeal dismissed.

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21 A. 441 = 19 A.W.N. (1899) 163.

APPELLATE CIVIL.

fore Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

RAM GOPAL (*Defendant*) *v.* PIARI LAL (*Plaintiff*).*

[14th June, 1899.]

Pre-emption—Wajib-ul-arz—Plaintiff's title to sue for pre-emption lost after suit but before decree—Suit to be dismissed.

Where a plaintiff who had filed a suit for pre-emption based on the provisions of a wajib-ul-arz lost during the pendency of the suit, the right to pre-empt by

* Second Appeal No. 64 of 1897, from a decree of Maulvi Syed Tajammal Husain, Subordinate Judge of Saharanpur, dated the 10th December 1896, confirming a decree of Munshi Sheo Sahai, Munsif of Kairana, dated the 19th September 1895.

reason of the mahal in which both properties were originally comprised having become the subject of a perfect partition, it was *held* that the suit for pre-emption should be dismissed. *Sakina Bibi* v. *Amiran* (1) distinguished.

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[**Appl.**, 26 A. 389=1 A.L.J. 209=24 A.W.N. (1904) 68; **R.**, 24 A. 119 (125, 126); 25 A. 421 (428, 429); 3 Ind. Cas. 546=12 O.C. 229; 4 Ind. Cas. 337=91 P.R. 1909 (F.B.)=148 P.L.R. 1909=161 P.W.R. 1909; 2 N L R. 150 (152,153); 5 N.L. R. 136 (140)=3 Ind Cas. 923; 7 O C. 61 (63); 124 P L.R. 1901; 157 P L.R. 1901=49 P.R. 1901; 30 P L R. 1902=32 P.R. 1902, 3 P L R. 1907=124 P.R. 1907=48 P.W.R. 1907; **D.**, 31 A. 111=6 A L.J. 51; 1 Ind. Cas. 819; 31 A. 530 (532)=6 A.L.J. 699=3 Ind. Cas. 42.]

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

The Hon'ble Mr. *Conlan* and Mr. *E. Chamier*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

STRACHEY, C.J.—This was a suit for pre-emption in respect of a sale of a share in a mahal, the sale having been made on 20th of March, 1894. The suit was based upon a provision of the wajib-ul-arz giving a right of pre-emption to co-sharers in the mahal. At the time of the sale the plaintiff was a co-sharer of the mahal with the vendor. Before the sale, proceedings for perfect partition of the mahal had begun. The suit was instituted on the 19th of March, 1895. On the 1st of July, 1895, while the suit was pending, the partition proceedings were completed and [442] the partition took effect from that date. By that partition the mahal was sub-divided into four mahals and the property sold was included in a mahal in which the plaintiff was not a co-sharer. The suit proceeded, and on the 19th of September, 1895, a decree was passed in the plaintiff's favour by the Court of first instance, which was subsequently affirmed on appeal by the lower appellate Court. The question to be determined in this appeal is whether the decrees in the plaintiff's favour can be maintained, having regard to the fact that at the date of the first Court's decree the plaintiff had ceased to be a co-sharer with the vendor in the mahal in which the property sold is situated and therefore did not fall within the category of persons entitled to pre-emption under the wajib-ul-arz. In the recent Full Bench decision in *Janki Prasad* v. *Ishar Das* (2), it was held that the plaintiff in a suit for pre-emption based on a clause in the wajib-ul-arz giving pre-emptive rights to co-sharers, must shew that his right and his status as a co-sharer subsisted not only at the date of the sale, but also at the date of the institution of the suit. The question whether the plaintiff must go farther and show that his right and his status as a co-sharer upon which the right is based still continue up to the date of the decree, or whether the defendant can obtain the dismissal of the suit by showing that the plaintiff's right and status have been lost by partition or otherwise during the pendency of the suit was expressly left open by the judgment of the Full Bench. Upon this question there appears to be no authority, and we must therefore determine it upon principle. The analogy of the Muhammadan law of pre-emption and the case of *Sakina Bibi* v. *Amiran* (1), with reference to that law, have been discussed. It appears to me that they afford us little or no guidance. In that case the plaintiff had lost her share by a sale in execution of a decree in another suit pending the Second Appeal in this Court in the pre-emption suit; and it was held that what the Court had to determine was only the

(1) 10 A. 472.

(2) 19 A.W.N. (1899) 126.

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correctness or otherwise of the decree appealed against, and that in determining that question events [443] which had occurred subsequently to the decree could not be taken into account. That of course completely distinguishes that case from the present. Mr. Justice Mahmood in his judgment referred to a passage in the Hedaya which he construed as showing that if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the tenement by virtue of which he claimed pre-emption, then the decree could not be given in his favour. He expressed some doubt as to whether that principle would apply to a compulsory sale, such as a sale in execution of a decree. It appears from Baillie's Digest of Muhammudan Law (2nd edition, p. 505), that "the right of pre-emption is rendered void in two different ways after it has been established. One of these is termed *ikhtiyaree*, or voluntary, the other *zurooree*, or necessary." But no instance is given for the loss of the right of pre-emption in the latter way except the death of the pre-emptor, and the result is that we get no light from the Muhammadan law as to the effect upon the right of pre-emption of a pre-emptor parting with the property, by virtue of which he claims the right, by a partition or any mode other than a voluntary sale. In the absence of authority on the subject, and in dealing with claims for pre-emption arising under the wajib-ul-arz, it seems to me that the only safe course is to see what mode of deciding the question would be most in furtherance of the contract or custom of pre-emption, and the principles upon which such a contract or custom is based. There can be no question that the effect of a decree in the plaintiff's favour in this suit would be to enforce the right of pre-emption in favour of a person who does not now form one of the class to whom alone the right of pre-emption is given by the wajib-ul-arz. The custom is one in favour of co-sharers of the undivided mahal, and no others. The object was to give such persons a preference over strangers, that is, over persons not co-sharers of the undivided mahal, and to exclude such strangers as much as possible. The plaintiff is not a co-sharer in the undivided mahal any longer. He is not even a co-sharer with the vendor in the new mahal in which the property sold [444] is situate. He is just as much a stranger in the sense of the wajib-ul-arz as the defendant to whom the property was sold. That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on that date the plaintiff was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law. On the contrary, there are many provisions of the Code of Civil Procedure which clearly show that matters may arise after the institution of the suit which either destroy or materially affect the rights which the plaintiff possessed when the suit was brought, and which may be pleaded successfully by the defendant in answer to the suit. In England the Rules of the Supreme Court provide in detail for grounds of defence which have arisen after action brought, and Order XXIV, which deals with the subject, only embodies a much older principle. In Daniell's Chancery Practice (6th edition, volume I, p. 307), it is said that "if plaintiff has a title

to relief at the time of the issue of the writ, the mere fact that, owing to change of circumstances, that title has before trial expired or determined, will not prevent him obtaining a judgment in his favour for some relief, or for costs only, at the trial." The cases cited in the foot-note are cases of suits for an injunction, in which the right to the injunction, or the wrongful act to restrain which it was claimed, had ceased during the pendency of the suit. It was held that although, in consequence of what had happened, an injunction could not be granted, the Court could still order an inquiry as to the damage sustained by the plaintiff, and could, for the purpose of deciding how the costs of the suit were to be borne, decide whether the bill had been properly filed. That does not affect the point before [445] us in this case. There is therefore nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the wajib-ul-arz upon which the suit was based. For these reasons I am of opinion that the decrees of the Courts below were wrong, and I would allow this appeal, set aside the decrees of both the Courts below, and dismiss the suit with costs in all Courts.

BANERJI, J.—I am of the same opinion. The object of the pre-emption clause recorded in the wajib-ul-arz was to exclude a stranger from the co-parcenary body. That object would be defeated were we to decree the plaintiff's claim for pre-emption in this suit, for since the sub-division of the mahal into four mahals subsequently to the institution of the suit the plaintiff has ceased to be a co-sharer with the vendor in the mahal to which the property in suit appertains. In order to justify us in maintaining a decree which would defeat the object of pre-emption in a case of this kind, we should be satisfied that a rule of law or procedure exists, which makes it obligatory on us to make such a decree. We have not been referred to any such rule. The analogy of the Muhammadan law is not in favour of the plaintiff. The learned advocate who appeared for the respondent urged upon us to regard the date of the institution of the suit as the date to which we must refer for the purpose of determining the rights of the parties on the date of the decree, but he has not been able to point to any authority in support of that contention. The instances to which the learned Chief Justice has referred, clearly show that the mere fact of the plaintiff's having a right of action on the date of the suit would not entitle him to a decree if he had ceased to have that right subsequently to the institution of the suit and before decree. I concur with the learned Chief Justice in holding that in a suit for pre-emption if after the institution of the suit and before decree the plaintiff has lost the [446] status by virtue of which he could claim pre-emption, his claim must be dismissed. I agree in the order proposed by the learned Chief Justice.

Appeal dismissed.

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APPEL-
LATE
CIVIL.

21 A. 446 = 19 A.W.N. (1899) 164.

21 A. 446=19 A.W.N. (1899) 164.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

KANAHAI LAL (*Plaintiff*) *v.* SURAJ KUNWAR AND ANOTHER (*Defendants*).* [20th June, 1899.]

Res judicata—*Appeal—Plea of* res judicata *taken for the first time in appeal—Court not bound to entertain it if by so doing further findings of fact will be rendered necessary—Practice.*

Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court. *Muhammad Ismail* v. *Chattar Singh* (1) and *Tek Narain Rai* v. *Dhondh Bahadur Rai* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Knox, J.

The Hon'ble Mr. *Conlan* and Mr. *D. N. Banerji*, for the appellant.

Mr. *E. Chamier* and Babu *Jogindro Nath Chaudhri*, for the respondents.

JUDGMENT.

KNOX, J.—The sole plea raised in this Second Appeal is that the matter in issue in the present suit has become *res judicata*, inasmuch as the issues in the suit now under appeal were also raised and determined in appellant's favour in a connected suit, and the decision in that suit has now become final. The suit before us was a suit for the balance of money due under a bond. That bond was executed by Musammat Suraj Kunwar and Sheo Prasad, both of whom are respondents to this appeal. The suit was instituted on the 6th of March, 1896, against the [447] obligors of the bond. On the 25th of the same month Musammat Suraj Kunwar instituted a suit in another district for the cancelment of the very same bond on the allegation that it had been satisfied. Both suits were eventually, under orders obtained from this Court, heard by one and the same Subordinate Judge, who, on the 13th of August, 1896, decreed the claim brought by Kanahai Lal and dismissed the suit brought by Musammat Suraj Kunwar. Appeals were filed from the decrees in both the suits, both the defendants to the suit brought by Kanahai Lal appealing from the decree passed in that suit. In the appeal filed by the Musammat she was required by the Court, acting under s. 549 of the Code of Civil Procedure, to find security for the respondent's costs. She failed to do so, and on 18th November, 1896, her appeal was rejected. The other appeal, namely, the one filed by the obligors of the bond went to hearing, with the result that the Judge found on the evidence that nothing was due under the bond. He accordingly set aside the decree of the Court of first instance, decreed the appeal, and dismissed the suit. Before the Judge, no allusion was made to, and no plea raised, based upon the order of the 18th November, 1896, whereby the Musammat's appeal was rejected owing to her failure to find security. On the record, as it stands,

* Second Appeal No. 180 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 22nd January 1897, reversing the decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Shahjahanpur, dated the 13th August 1896.

(1) 4 A. 69.

(2) 18 A.W.N. (1898) 104.

there is no paper and no evidence by which the appellant can substantiate the plea which he has now raised in the appeal before us. His learned counsel to remove this difficulty asked us to exercise our powers under s. 568 of the Code of Civil Procedure and to accept in evidence certain papers, namely, (1), plaint; (2), judgment and decree of the Court of first instance in suit No. 46 of 1890; and also 3, the decree of the appellate Court. These are papers in the suit filed by the Musammat praying that the bond be cancelled. The other side objected to the reception of these papers, and we should have had no difficulty whatever in coming to the conclusion at which we have now arrived, but for a judgment of this Court which was laid before us with much earnestness by the learned counsel for the appellant. That judgment is the Full [448] Bench judgment in *Muhammad Ismail* v. *Chattar Singh* (1), a judgment which, we are told, has been followed by this Court in *Tek Narain Rai* v. *Dondh Bahadur Rai* (2). There are certain passages in some of the judgments of the Judges who composed the Full Bench which would seem at first sight to favour the contention raised by the learned counsel. We do not question, and could not question, the decision of the Bench that the plea of *res judicata* may be raised for the first time in Second Appeal. This was the only point referred to the Full Bench. Any other passages in the judgments which may seem to go further and to furnish authority for the contention that that plea when so raised must be considered and determined either upon the record, as it stands, or after a remand for findings of fact must be deemed to be *obiter dicta*. Indeed the present case, if an example were required, would furnish a very good illustration of the danger of accepting any such rule. Here we have a finding of fact which is irreversible to the effect that the bond in suit has been fully discharged and nothing remains due under it. In the Court below when it was arriving at that finding nothing whatever was said as to, nor was the Court allowed an opportunity of considering, the fact that simply because one obligor had not been able to furnish security, the appeal in which the other appellant was indirectly, but vitally, interested had been rejected without any consideration of the merits. Even if we were to accept the contention of the appellant it would not advantage him.

We dismiss the appeal with costs.

AIKMAN, J.—I have also arrived at the same conclusion. In some of the judgments in the Full Bench which has been cited there are expressions which seem to imply that when a plea of *res judicata* is raised for the first time in Second Appeal, and when, in order to support that plea, findings of fact are necessary, this Court must remand the case for such findings. These expressions of opinion, as has been pointed out by my learned colleague, were unnecessary for the determination of the question [449] referred for the consideration of the Full Bench. They seem to me to lose sight of the opening words of s. 568 of the Code of Civil Procedure, which enacts that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. If they are not entitled to produce additional evidence, I do not see how they can claim as of right to have a case remanded for additional evidence in order to support a plea raised for the first time in Second Appeal. But even if we did admit the additional evidence I do not see how it would advantage the appellant. The plaintiff's suit has been dismissed by the

(1) 4 A. 69.

(2) 18 A.W.N. (1898) 104.

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lower appellate Court upon a finding of fact, which cannot be disturbed in Second Appeal, namely, that the defendants respondents have discharged the bond upon which the plaintiff appellant came into Court. That finding is in favour of both the respondents. It is true that one of the respondents did bring a suit which entailed a finding upon the issue whether or not the bond had been discharged ; that her suit was dismissed, and that her appeal from the decree dismissing the suit was, owing to her failure to find security of costs, rejected by the lower appellate Court. But I do not see how this can affect her co-obligor Sheo Prasad. He was, it is true, made a *pro forma* defendant to Musammat Suraj Kunwar's suit, but he was in no way interested in resisting that suit, and the fact that an appeal from the decree in that suit was rejected owing to the appellant's failure to give security cannot damnify him. We have then a judgment and decree which are valid so far as one of the co-obligors is concerned to the effect that the plaintiff's bond had been discharged. In the face of this valid decree it appears to me futile to allow this appeal to proceed.

For the above reasons I concur in the decree proposed by my brother Knox.

By THE COURT :—

The appeal is dismissed with costs.

Appeal dismissed.

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21 A. 450=19 A.W.N. (1899) 167.

[450] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

PHUL CHAND AND ANOTHER (*Plaintiffs*) *v.* GANGA GHULAM (*Defendant*).* [21st June, 1899.]

Act No. XXVI of 1881 *(Negotiable Instruments Act), ss.* 64, 66—*Promissory note not presented for payment at maturity—Effect of non-presentment.*

Held, that the non-presentment for payment at maturity of a promissory note, the presentment of which is required by s. 66 of the Negotiable Instruments Act, 1881, has not the effect of relieving from liability the maker of the note. *Farzand Ali* v. *The Agra Savings Bank* (1) and *Ramakristnayya* v. *Kassim* (2), followed.

[R., 39 P.R. 1911=10 Ind. Cas. 133 (135).]

THIS was a suit to recover Rs. 2,069-9-6 on a promissory note for Rs. 1,600, dated Sawan badi 5th, 1950 Sambat, corresponding to the 2nd August, 1893, and payable 90 days after date. The principal defences to the suit were, first, that the plaint was not signed and verified as required by law, having been signed and verified, not by the plaintiffs themselves, but by a mukhtar ; and, secondly, that the plaintiffs not having presented the note for payment at due date could not recover on it.

The Court of first instance (Subordinate Judge of Cawnpore) found that the plaint was properly signed and verified with the permission of the Court, under s. 51 of the Code of Civil Procedure, the plaintiffs being

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* Second Appeal No. 132 of 1897, from a decree of J.E. Gill, Esq., District Judge of Cawnpore, dated the 24th November 1896, reversing a decree of Maulvi Syed Zainul-Abdin, Subordinate Judge of Cawnpore, dated the 15th February 1896.

(1) 16 A.W.N. (1896) 201.

(2) 13 M. 172.

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residents of another district, namely, Aligarh; and also that the non-presentation of the note was covered by s. 76 of Act No. XXVI of 1881, and gave a decree in favour of the plaintiffs.

The defendant appealed, and the lower appellate Court found both the above issues in favour of the defendant, and, decreeing the appeal, dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the appellants.

[451] Munshi *Gokul Prasad*, (for whom Pandit *Tej Bahadur Sapru*), for the respondent.

JUDGMENT.

STRACHEY, C. J (BANERJI, J., concurring)—The learned Judge has reversed the decree of the Court of first instance and has dismissed the suit upon two grounds. The first is that, with reference to the ruling in *Mahabir Prasad* v. *Shah Wahid Alam* (1), the fact that the plaint was not signed by the plaintiff was fatal to the suit. As to that point no objection was raised in the first Court by the defendant that the plaint was not properly signed, nor was any such objection taken by the defendant in the grounds of appeal to the lower appellate Court. However, the first Court finds that the plaintiffs, who resided at Hathras, were absent from Cawnpore, where the suit was filed, and that the general attorney, Nanhu Mal, who signed and verified the plaint, was duly authorized in that behalf by his power of attorney. We take that to mean that the plaintiffs were by reason of absence unable to sign the plaint, and that the plaint was signed by a person duly authorized by them in that behalf. That being so, the provisions of s. 51 of the Code of Civil Procedure appear to us to have been complied with. The decree, in our opinion, ought not to have been set aside and the suit dismissed upon the first ground stated by the Judge. One of the questions raised by the defendant's written statement, paragraph 9, is in substance, whether the institution of this suit was authorized by the plaintiffs, or whether the suit was instituted by Nanhu Mal without authority from them. As to this the learned Judge merely says that there is nothing in the evidence of Durga Prasad, munib, to show that the plaintiffs had any knowledge of the promissory note or authorized the suit. If it is necessary for the learned Judge to determine whether the suit was or was not instituted by Nanhu Mal with the authority of the plaintiffs, it will be necessary to consider, not only the evidence of Durga Prasad, but the terms of the general power-of-attorney, upon which Nanhu Mal bases his alleged authority to institute the suit on behalf of the plaintiffs.

[452] The second ground upon which the learned Judge has dismissed the suit was based on s. 66 of the Negotiable Instruments Act, No. XXVI of 1881. The suit was brought upon a promissory note against the maker of the note. Section 66 directs that "a promissory note or bill of exchange, made payable at a specified period after date or sight thereof, must be presented for payment at maturity." Here the promissory note, which was made payable ninety days after date, was not presented, the learned Judge finds, at maturity, and he holds that the suit was liable to dismissal on that account. Section 66 does not state what are the consequences of a promissory note such as it describes not being presented for payment at maturity. Section 64 provides that "promissory notes, bills of exchange and cheques must be presented for payment to

(1) 11 A.W.N. (1891) 152.

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the maker, acceptor or drawee thereof, respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment the other parties thereto are not liable thereon to such holder." It is clear that that section only exempts from liability to the holder in default of presentment parties other than the maker, acceptor or drawee of a promissory note, bill of exchange and cheque, respectively. It does not relieve from liability in the case of such default the maker of a promissory note like the present defendant. Therefore no presentment of the note for payment was necessary to make the defendant liable to a decree in this suit. This view is in accordance with the ruling of this Court in *Farzand Ali* v. *The Agra Savings Bank* (1), and of the Madras High Court in *Ramakistnayya* v. *Kassim* (2). We must allow this appeal, set aside the decree of the lower appellate Court, and remand the case to that Court, for disposal under s. 562 of the Code of Civil Procedure. The appellant will get the costs of this appeal. Other costs will abide the result.

Appeal decreed and cause remanded.

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21 A. 453=19 A.W.N. (1899) 166.

[453] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

RAM SARUP AND ANOTHER (*Decree-holders*) *v.* GHAURANI AND ANOTHER (*Judgment-debtors*).* [23rd June, 1899.]

Act No. IV *of* 1882 (*Transfer of Property Act*), *s.* 90—*Application for a decree under s.* 90—*Limitation—Act No.* XV *of* 1877 (*Indian Limitation Act*), *sch. ii, art.* 178.

Held, that the limitation governing an application for a decree under s. 90 of the Transfer of Property Act is that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877.

[**Diss.**, 33 C. 867=4 C.L.J. 141; **Not F.**, 1 N.L.R. 143 (145); **F.**, 6 O.C. 114 (116); **Appr.**, 24 A. 542 (546); **R.**, 6 C.L.J. 119 (120)=11 C.W.N. 674.]

THE decree-holders in this case obtained a decree against the judgment-debtors under s. 88 of the Transfer of Property Act, on the 10th of December, 1888, the suit having been instituted on the 15th of August, 1888. The mortgaged property was brought to sale on the 25th of February, 1895, and the sale was confirmed on the 3rd of May, 1895. On the 1st of December, 1898, the decree-holders applied for a decree under s. 90 of the Transfer of Property Act. The Court to which the application was made Subordinate Judge of Farrukhabad, dismissed it as barred by limitation under art. 179 of the second schedule to Act No. XV of 1877. From this order the decree-holders appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Moti Lal*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—The only question which arises in this case is, whether an application made by the appellants to obtain the decree

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* First Appeal No. 13 of 1899, from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 21st December, 1898.

(1) 16 A.W.N. (1896) 201. (2) 13 M. 172.

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21 A. 453 = 19 A.W.N. (1899) 166.

provided for by s. 90 of the Transfer of Property Act is or is not barred by limitation. The lower Court has found that it is so barred. The first question which we have to consider is whether an application of this nature is one made in the course of proceedings in execution of a decree passed under s. 88 of that Act. Upon this point we are concluded by the authority of two cases—*Durga Dai* v. *Bhagwat Prasad* (1) and *Musaheb Zaman Khan* v. *Inayatullah* (2). The latter case has specially laid down that such an application is a proceeding in the **[454]** execution of the original decree. Then so much being granted the question arises what is the limitation article applicable to such an application? The appellants contend that the article applicable is 179, while for the respondents it is argued that art. 178 applies. Now art. 179 is an article which provides a period of limitation for an application "for the execution of a decree or order of a Civil Court." It seems to us that the application we are considering, namely one to obtain a decree under s. 90, cannot by any straining of language be considered to be an application "for the execution of a decree" under s. 88. Neither in substance nor in form does such an application ask for execution of that decree. What it does ask is that, certain events being ascertained to have occurred, a subsidiary decree for money may be passed, in execution of which the amount still remaining due on the principal decree under s. 88 may be recovered. But as we have before remarked, such an application, though undoubtedly an application in an execution proceeding, is not an application "for the execution" of the principal decree. We hold therefore that this application is not governed by the limitation rule to be found in art. 179. That being so, the only other article of the Indian Limitation Act applicable is art. 178, and there can be no doubt in this case that, that article being applicable, the present application is time-barred. We therefore dismiss this appeal with costs.

Appeal dismissed.

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21 A. 454 = 19 A.W.N. (1899) 170.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

HAR LAL (*Plaintiff*) *v.* MUHAMDI (*Defendant*).* [30th June, 1899.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 55, *sub-s.* 4 (*b*)—*Vendor's lien—Suit to enforce charge against the property—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *sch.* II, *arts.* 132, 111.

Held, that a suit by a vendor of immoveable property to enforce against the property his lien for the unpaid purchase money under s. 55, sub-s. 4 **[455]** (*b*) of the Transfer of Property Act, 1882, falls within art. 132 of the second schedule to the Indian Limitation Act, 1877. *Virchand Lalchand* v. *Kumaji* (3) and *Chunilal* v. *Bai Jethi* (4) followed. *Natesan Chetti* v. *Soundararaja Ayyangar* (5), dissented from. *Ramdin* v. *Kalka Pershad* (6), *Sutton* v. *Sutton* (7), and *Toft* v. *Stevenson* (8) referred to.

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* Second Appeal No. 78 of 1897, from a decree of Pandit Rajnath Saheb, Subordinate Judge of Moradabad, dated the 15th December, 1896, modifying a decree of Babu Sheo Prasad, Munsif of Bijnor, dated the 12th September, 1896.

(1) 13 A. 356. (2) 14 A. 513 (516). (3) 18 B. 48.
(4) 22 B. 846. (5) 21 M. 141. (6) 12 I. A. 12.
(7) L.R. (1882) 22 Ch. D. 511. (8) (1854) 5 De. G. M. and G. 735.

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[Diss., 24 M. 233 (236)=10 M.L.J. 349; F., 30 A. 172 (173, 174)=5 A.L.J.243= A.W.N. (1908) 71=3 M.L.T. 374; 9 O.C. 284; R., 2 A.L.J. 379=A.W.N. (1905) 144; 3 N.L.R. 81 (82, 83).]

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Pandit *Moti Lal*, for the appellant.

Mr. *Amiruddin*, for the respondent.

JUDGMENT.

STRACHEY, C. J.—This was a suit by a vendor of immoveable property to recover the balance of unpaid purchase-money by enforcement of the lien or charge conferred by s. 55, sub-s. 4 (*b*) of the Transfer of Property Act, 1882. The Court of first instance found that only Rs. 149 of the purchase-money remained unpaid. That Court held that the claim, so far as it sought to enforce the lien by sale of the property, was barred by art. 111 of the second schedule of the Limitation Act, 1877. But it also held that the claim for a personal remedy was not barred, as it fell within art. 116, the sale-deed being a registered instrument. It therefore gave the plaintiff a personal decree for Rs. 149. On appeal the lower appellate Court held that art. 111 was equally applicable to the claim for the personal remedy and to the claim to enforce the charge against the land, and accordingly dismisssd the whole suit. The plaintiff now appeals against that decision.

The sale-deed was executed on the 7th of June, 1893. The suit was brought on the 17th of July, 1896. The question is whether art. 111 or art. 132 prescribes the limitation applicable to a suit by a vendor to enforce his lien by a sale of the property to which the lien attaches. In the former case the suit is barred, in the latter it is within time. In this Court there appears to be no authority in point. In the case of *Baldeo Prasad* v. *Jit Singh* (1), to which the lower appellate Court refers, there is no ruling on the point with which we have to deal, and the Court evidently **[456]** found it extremely difficult to determine the real nature of the suit. On the question before us there is a conflict of authority between the High Court of Bombay and the High Court of Madras. In *Virchand Lalchand* v. *Kumaji* (2) and in *Chunilal* v. *Bai Jethi* (3) the Bombay High Court held in effect that a suit by the vendor to enforce his charge against the land falls within art. 132, while his suit for the personal remedy falls within art. 111. I gather from the report of the argument in the latter case that the same view was taken in two unreported cases published in the printed judgments of the Court. On the other hand, the Madras High Court has held in *Natesan Chetti* v. *Soundararaja Ayyangar* (4), dissenting from the first of the Bombay cases, that the suit to enforce the charge against the land falls within art. 111 and not art. 132. We have now to decide which of these conflicting views we ought to adopt.

The difficulty arises from the fact that both art. 111 and art. 132 use language sufficiently wide to cover a suit of this description. No doubt the words in art. 111 "to enforce his lien for unpaid purchase-money" would, in the ordinary sense of the expression "enforcement of lien," include a suit to enforce it against the land as well as against the defendant personally; but a suit limited to a claim for the personal remedy would

(1) 11 A.W.N. (1891) 130.
(2) 18 B. 48.
(3) 22 B. 846.
(4) 21 M. 141.

undoubtedly answer the description. Now it is noticeable that art. 111 is placed in Part VI of the schedule among a number of articles, all of which relate exclusively to suits for a personal remedy, and prescribe the same period of limitation, that is a period of three years. In *Ramdin* v. *Kalka Pershad* (1) the Privy Council say:—"The second schedule places simple money demands generally under the three years' limitation. The twelve years' period is made applicable principally to suits in respect of immoveable property." And they add that art. 132 has reference only to suits for money charged on immoveable property to raise it out of that property. There can be no doubt (See Darby and **[457]** Bosanquet's Law of Limitation, 2nd edition, pp. 170—175), that in England a suit to enforce a vendor's lien would come within s. 8 of the Real Property Limitation Act, 1874, which prescribes a period of twelve years for a suit "to recover any sum of money secured by any mortgage, judgment, or lien or otherwise charged upon or payable out of any land or rent at law or in equity." That closely corresponds, both in language and in regard to the period prescribed, to art 132 of the second schedule of the Limitation Act. The difference is, that whereas in England the twelve years' limitation has been held to apply both to suits for the personal remedy and to the remedy against the land—see *Sutton* v. *Sutton* (2), in India, art. 132 has been held to apply only to suits for the recovery of the money out of the property charged, while suits for the personal remedy fall within the limitation applicable to simple money demands. As pointed out by Mr. Whitley Stokes and Mr. Mitra, the third column of art. 111 is based on *Toft* v. *Stevenson* (3), the effect of which it states almost in the exact terms of a passage at p. 175 of Darby and Bosanquet's work; but the vendor's claim which the first column of art. 111 describes as one "to enforce his lien for unpaid purchase-money," is in the passage in Darby and Bosanquet called the right of a vendor to receive his purchase-money which is secured by his lien on the land sold. It seems probable that the first column of art. 111 was intended to have the same effect as these words, which, however, point rather to a personal claim to receive the purchase-money than to a claim to realize it by sale of the property. On the other hand, it seems improbable that the Legislature should have intended by art. 132 to give all other charges on land the same twelve years' limitation as in England, but to exclude therefrom the vendor's remedy against the land, which in England has been expressly held to fall within the same category and to be covered by the same words. It also seems improbable that a vendor should have a shorter period of limitation than is given to every other charge-holder, while under s. 100 of the **[458]** Transfer of Property Act, all charge-holders are put as nearly as possible on the same footing as a mortgagee. There can be no doubt, for instance, that the limitation applicable to a suit for enforcement against the land of the purchaser's charge conferred by s. 55, sub-section 6 (*b*) of the Transfer of Property Act would be governed by art. 132, and so would all other charges on land under the Transfer of Property Act or otherwise. It is difficult to see why the vendor should have a shorter time for suing than the purchaser and the other charge-holders mentioned. Again, in all other cases provided for by the Limitation Act, where there is a charge against land and also a personal remedy, a longer period of limitation is allowed for the claim

(1) 12 I. A. 12.
(2) L. R. (1882) 22 Ch. D. 511.
(3) (1854) 5 De G. M. and G. 735.

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21 A. 454 = 19 A.W.N. (1899) 170.

against the land than for the merely personal claim. On the construction adopted by the Madras High Court, either both claims stand on the same footing under art. 111, or else a longer period is allowed for the personal remedy, in the case of a registered instrument, for instance, under art. 116. For some reason which does not appear from the report, the Madras High Court, while dismissing the suit before them, so far as regards the charge, as barred by art. 111, confirmed the first Court's personal decree against defendant No. 1, though the suit was brought more than three years from the date mentioned in the third column of art. 111. To apply art. 111 to suits like the present might lead to various difficulties and anomalies. Apart from the difficulty of applying to ordinary sales in the mofassil the second date mentioned in the third column—the date of the acceptance of the title—cases might occur in which the first date, "the time fixed for completing the sale," could not be applied without absurdity or injustice. It must be remembered that under s. 55 (4) (*b*) of the Transfer of Property Act the vendor's charge does not arise, as in England, as soon as there is a valid contract for sale, though there may be no actual conveyance, and the time for completing the sale has arrived without payment of the purchase-money. It arises only "where the ownership of the property has passed," that is, not until the actual completion of the sale by (where the property is worth Rs. 100 **[459]** or upwards,) a registered instrument. If, for any reason, the sale were not completed, and if consequently the charge did not arise until more than three years after "the time fixed for completing the sale," the effect of applying art. 111 would be that the remedy was barred before the right had come into existence. In many, if not most, cases the right would not come into existence until some part at least of the prescribed period had elapsed. On the whole, although there are difficulties in the way of either interpretation, I have come to the conclusion that that adopted by the Bombay High Court is supported by stronger reasons and involves fewer anomalies than that of the Madras High Court. In this view of the case I think that the decree of the lower appellate Court dismissing the suit was wrong, that this appeal should be allowed, the decree of the lower appellate Court set aside, and the case remanded to that Court under s. 562 of the Code of Civil Procedure for disposal of the appeal on the merits. The appellant to have his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I concur in the order proposed by the learned Chief Justice and in the reasons by which it is supported. The question is not one free from difficulty; but any other conclusion would create anomalies which we are not justified in assuming the Legislature contemplated.

Appeal decreed and cause remanded.

21 A. 460 (P.C.)=1 Bom.L.R. 226=3 C.W.N. 427=22 M. 398=9 M.L.J. 67=26 I.A. 113=7 Sar. P.C.J. 330.

[460] PRIVY COUNCIL.

PRESENT AT THE HEARING OF THE APPEAL FROM MADRAS:

Lords Hobhouse and Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SRI BALUSU GURULINGASWAMI (*Appellant*) *v.* SRI BALUSU RAMALAKSHMAMMA AND OTHERS (*Respondents*).

[11th, 15th and 16th February, 1898, 11th March, 1899]

PRESENT AT THE HEARING OF THE APPEAL FROM THE N.W.P.:

Lords Herschell, Watson, Hobhouse and Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

RADHA MOHAN, REPRESENTATIVE OF BENI PRASAD, DECEASED, (*Appellant*) *v.* HARDAI BIBI AND ANOTHER (*Respondents*).

[6th and 18th July, 1898, and 11th March, 1899.]

Hindu law—Adoption—Validity of the adoption of the only son of his natural father.

On the general question as to the validity by Hindu law of the adoption of the only son of his natural father decided in one judgment upon these two appeals, *held* that such an adoption is valid by that law.

The authority of a widow, in reference to adoption, not being indentical in different schools of Hindu law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widow of his natural father that, unless there has been some express prohibition by the husband, the wife's power with the concurrence of sapindas, where the concurrence of sapindas is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

[**F.**, 24 B. 367 (**F.B.**); 25 B. 537 (541); **Rel.**, 19 Ind. Cas. 254 (255); **R.**, 30 A. 197=5 A.L.J. 200=A.W.N. (1908) 79; 23 B. 789 (795); 32 B. 619=10 Bom.L.R. 948; 30 C. 965 (971); 26 M. 291 (308); 31 M. 446 (450); 7 C.W.N. 871; 3 Ind. Cas. 207 (219).]

THE first appeal heard on the 11th, 15th and 16th February, 1898, was from a decree (25th September, 1894) of the High Court of Madras affirming a decree (20th September, 1893)* of the District Judge of Godavari.

The decree from which this appeal was preferred, affirmed on appeal the dismissal by the original Court of the suit, which was brought to have set aside an adoption made on the 10th November, 1881, by the first defendant-respondent, Ramalakshmamma, the childless widow of Butchi Sarvarayuda, the last male owner of two villages, now claimed by the plaintiff-appellant as the nearest collateral relation of the deceased's husband.

[461] The adopted son, Pattabhiraya, the second defendant-respondent, was the only son of a kinsman of the deceased. The widow had adopted him with the assent of her late husband's sapindas, several of whom had assented in writing. The natural father of the boy had died

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An abridged report is here given of the appeal from Madras. The full report of it will be found in its place in the I.L.R. 22 Mad. 398.

* 18 M. 53.

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when the latter was a few months old. It was found below that he had expressed his approval of this adoption.

The first and principal question raised in both the appeals, in which one judgment dealing with both was given by their Lordships, was whether the adoption of an only son was valid by Hindu law. In the first, or Madras appeal, a further question related to the power of the widow respectively to give and take with legal effect.

An appeal from the judgment of the first Court, which had upheld the adoption as valid, was heard by a Division Bench (Muttusami Ayyar and Shephard, JJ.) whose judgments are reported at length in *Gurulingaswami* v. *Ramalakshmama* (1). They followed a series of decisions in Madras in favour of the validity of an only son's adoption, but did not examine the judgments of the High Courts elsewhere, some of which were to the contrary.

On this appeal Mr. *J. D. Mayne* appeared for the appellant.

Mr. *J. H. A. Branson* and Mr. *A. Phillips*, for the respondents.

The arguments are reported in I. L. R., 22 Mad., for the year 1899.

Their Lordships' judgment was given after the second appeal had been heard.

The second appeal, heard on the 6th and 18th July, 1898, was from a decree (2) (18th March, 1892) of the High Court of the North-Western Provinces at Allahabad, affirming a decree (21st November, 1887) of the Subordinate Judge of Benares.

The appellant was the son of the original plaintiff Beni Prasad who brought his suit on the 31st March, 1886, to have it declared that Ram Prasad, the second defendant-respondent, was not the **[462]** adopted son of Chaudhri Jaganath Prasad, the deceased husband of Hardai Bibi, the first defendant-respondent. The ground of the suit was that Ram Prasad having been the only son of his father the adoption was invalid and void.

Chaudhri Jaganath Prasad died without issue in 1858, leaving Hardai Bibi, his childless widow, and heiress, in possession for life of his property.

To her he had given a power to adopt. This power she exercised on the 16th December, 1858, on which date Govind Prasad, the natural father, executed a deed signifying the gift in adoption.

The adoption was in the Dattaka form. The parties were Agarwala Banias of Benares. It was not suggested that there was, apart from the Hindu law, any special custom that would affect the validity of the adoption.

The Subordinate Judge, following the judgment of a majority of the Judges of a Full Bench of the High Court in *Hanuman Tiwari* v. *Chirai* (3) upheld the adoption, and, refusing the relief sought, dismissed the suit.

On an appeal to the High Court a Division Bench (Mahmood and Young, JJ.) referred the following questions to the Full Court (Edge, C. J., Straight, Mahmood and Knox, JJ.). The referring order (10th June, 1894) stated that of the Full Bench in 1879 (Stuart, C.J., Spankie, Pearson, Turner and Oldfield, JJ.) Turner, J., had not concurred in the judgment; that there had been no reported case since 1879 to show that this judgment had been followed; that there had been, on the other hand, two unreported cases referred to the Full Court by Division Benches, but these had been disposed of on points other than the question referred, the validity

(1) 18 M. 53. (2) *Beni Prasad* v. *Hardai Bibi*, 14 A. 67. (3) 2 A. 164.

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or invalidity of the adoption. The following were the questions now referred.

First, the adoption of an only son having taken place, in fact, is such an adoption null and void? Second, if so, generally, does the subsequent birth of sons to the natural parents of the son given in adoption have retrospective effect to validate it. **[463]** Third, does the circumstance that the adopted son is Sagotra, or descended from one common ancestor with the adopted father, render his case an exception to the general rule of prohibition against the adoption of only sons?

The unanimous opinion of the Court, delivered on February 4th, 1892, was that the adoption of an only son, which had in fact taken place, was not null or void under the Hindu law applicable. The first question having been so answered it was not necessary that the second or third question should be answered.

This having been returned the appeal was accordingly dismissed by the Division Bench on the 18th March, 1892.

On this appeal, preferred by the son and representative of Beni Prasad, Mr. *C. W. Arathoon*, for the appellant, argued that the adoption of an only son was altogether void under the Hindu law. The absolute prohibition which had come down from the Smritis had received effect in many modern decisions. For the general principles of adoption he referred to *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1). The religious and legal aspects of adoption were inseparable. In Manu, Chapter IX, vv. 137, 138, 168, although the adoption of an only son was not expressly forbidden, the duties to be performed of a religious character were inconsistent with such an adoption. It was, however, to the texts of Baudhayana, of Vasishtha, and of Saunaka, that the prohibition was mainly to be referred. The adopted son's duty, as that of a son, was to perform rites, which would, according to the Hindu religion, benefit three preceding generations, the father, grandfather, and great-grandfather; Colebrooke's Digest, Vol. III, 242, 296; Baudhayana's texts was against such an adoption. The other text was that of Saunaka; Dattaka Mimamsa, s. IV, cls. 1 to 7. Vasishtha was quoted on the Mitakshara only to the extent that it said: "Let no man give, or accept, an only son;" Mitakshara, ch. 1, ss. 11 and 12, Stokes' Hindu Law Books, 416; Dattaka Chandrika, s. 1, cl. 27; Vyavahara Mayuka, ch. IV, cl. 9.

[464] Taking the European writers, Sir F. W. Macnaghten in his "Considerations on Hindu Law," p. 147; Strange, J., in his Manual, p. 23; Sutherland in his "Synopsis"; Steel in "Laws and Customs of Hindus in the Deccan," p. 183; West and Buhler in their "Hindu Law," pp. 908, 1040, had stated their belief that the adoption of an only son was contrary to the Hindu law. It was submitted that Sir W. H. Macnaghten came to the same conclusion Sir T. Strange only, at the time when he wrote the comments found in ch. IV of Vol. I of his Hindu Law, seemed to be of the contrary opinion. West and Buhler had added that the Mitakshara did not recognise the distinction that the adoption may be valid, however improper, after having been made. It pronounced against the adoption without reserve. Jaganatha pointed out that, according to the Mithila Shasters, the gift of an only son was illegal. Colebrooke's Digest, Book V, T. 275; 1 Strange Hindu Law 87; 1 W. Macnaghten's Hindu Law 67. The Shastris, expounding the law, had pronounced against this adoption, except in certain cases in which they had been

(1) 4 M.I.A. 414.

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embarrassed by the inapplicable doctrine "*factum valet.*" The Tagore Law Lectures, 1880, p. 534, by Mr. Rajkumar Sarvadhikari, referred to the Dattaka Chandrika III, 17, as to the prohibition "Let not a man give his only son."

The argument for the appellant then was that the Full Bench judgment of the majority of the Judges in the North-Western Provinces High Court in *Hanuman Tiwari* v. *Chirai* (1), had been mainly based on a judgment of the Madras High Court in *Chinna Gaundan* v. *Kumara Gaundan* (2), where the Chief Justice, Sir C. Scotland, had considered himself bound by previous decisions. That case was afterwards followed by another in Madras, *V. Singamma* v. *Vinjamuri Venkatacharlu* (3), with the same result, the support of the adoption. But the true view of the law was afterwards taken in the Bengal case, *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (4), by Dwarkanath **[465]** Mitter, J. The current of decisions in Madras had commenced with the cases of 1862 and of 1868, having since then been in the direction of upholding the validity of the adoption.

The last cited Bengal case was followed by *Manick Chunder Dutt* v. *Bhuggobutty Dosee* (5). in which the authorities were examined by Markby, J., in a judgment in which Garth, C.J., had concurred against the validity of the adoption. In fact, whilst the Madras and North-West Provinces Courts had, in the majority of cases, supported the adoption of an only son, the Bengal and Bombay Courts had in the main, concluded to the contrary, and had denied its validity.

It was then argued that, in the judgments now under appeal, the High Court had attributed too much to new interpretations of Sanskrit texts by eminent Sanskrit scholars, but who had not hitherto been recognised as of weight equal to that of Sutherland, Colebrooke, and Ellis Reference was made to Mr. Mandlik's work, and to the Tagore Law Lectures of 1888 by Golap Chandra Sarcar Sastri. *Thakoorain Sahiba* v. *Mohun Lall* (6) was next cited in which the danger of superseding former well-settled authorities was pointed out by Sir J. Colvile. Again, in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (7) the High Court of Bombay declined to be guided by new readings of old texts, at variance with the accepted authority. Also reference was made to *Minakshi* v. *Ramanada* (8) in which Muttusami Ayyar, J., had spoken of commentaries generally received as authorities, among which he had reckoned the Dattaka Mimamsa. That treatise, and the Chandrika especially, had been, without sufficient grounds, underrated in the judgment now appealed from. These works had for more than a hundred years been recognised by all the Indian Courts as of great authority on questions of adoption. Reference was then made to *Rungama* v. *Atchama* (9), and to *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (10). In connection with the estimation in which the two last **[466]** mentioned treatises, which were, it was true, comparatively modern, were held, the observations of Banerji, J., in his judgment in *Bhagwan Singh* v. *Bhagwan Singh* (11), where he sets forth repeated recognitions of their value by the Courts, should be regarded.

Again, a new rule had been applied, or canon of construction, termed Jaimini's rule: to the effect that, in construing the ancient Sanskrit texts,

(1) 2 A. 164. (2) 1 M. H. C. R. 54. (3) 4 M. C. H. R. 165.
(4) 1 B.L.R. 221. (5) 3 C. 443. (6) 11 M I.A. 386 (403).
(7) 14 B. 249. (8) 11 M. 49 (52). (9) 4 M.I.A. 96.
(10) 12 M.I.A. 397. (11) 17 A. 294.

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a precept was to be held only a recommendation, and not to be obligatory as a law, where a reason for the precept was given. This rule had not yet been applied by any Court.

The judgment now appealed from could hardly be said to be founded on the same grounds that were taken in the Madras High Court, though the same result had been arrived at. In the Madras cases, at least in those preceding the latter few, support of this adoption had been found in the maxim "*factum valet*," at all events to some considerable extent. But that maxim could not be applied to give legal effect to such an act as the adoption of a man's only son. It was definitely prohibited in the sacred texts, and was therefore contrary to Hindu law.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the respondent. Ram Prasad argued that the Courts below had rightly held that the adoption was valid in law. The following of this precept of the Sanskrit texts depended on the degree of strictness with which the Hindu system prevailed among varying classes. In Bengal where Brahmanism was the guide, this was the basis on which rested the unanimity with which the pandits and the law courts adhered to the rule excluding the only son from being adopted. In connection with this the judgment of Mitter, J., in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (1) was referred to. In other provinces the precept was more often disregarded, and the terms in which it was expressed were open to the doubt whether it was of the greater or less obligation. It might be that the less strict observance of it corresponded with a more lax degree **[467]** of Hinduism. In Madras, for instance, the admonition, or prohibition, whichever it might be, was not regarded by the Dravidian races, who were not, in adopting a son, influenced by the purposes of their religion at all. That the father's position in a future existence would be improved by the performance of ceremonies which a son, natural or adopted, alone could perform, was not in their thoughts. The Manual of Madras Administration, p. 71, and the Madras Census of 1891, XIII, p. 128, were referred to. In Bombay the Full Bench decision in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (2) followed a decision upon an application for a certificate of succession, where the parties were Lingayets. A similar question arising in a suit between parties of that caste, it was established that the custom among them was to make no exception of the only son as being one not to be adopted. In the present case the parties were Agarwalas. The majority of that caste appeared to be Jains. Reference was made to Sherring's "Castes of the Hindus," p. 285, and to Golap Chandra Sarcar Sastri on adoption, p. 452. The Jains performed no ceremonies for the dead. The fact that the admonition against the adoption of an only son, as given by Vasishtha and the other Rishis, was observed by those who in religion were Hindus, did not lead to the inference that the texts were applicable to those who in name only were Hindus. Counsel would not again state the different views of the authorities which had been discussed in the appeal from Madras. They referred again to the Tagore Law Lectures of the Sastri Golap Chandra Sarcar and they argued that only admonition was intended as prescribed in the texts. The comparatively recent date of the Mimamsas, 1623 A. D., should be considered, and the apparently modern stress laid on the religious feeling in connection with the law should not be allowed to control every aspect of the question.

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(1) 1 B.L.R. 221.

(2) 14 B. 249.

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Mr. *C. W. Arathoon* replied.

Their Lordships' judgment on both the appeals was delivered on the 11th March, 1899, by Lord Hobhouse.

JUDGMENT.

[468] The first of these two cases, which comes from Madras, was argued in February, 1898, but the judgment was postponed for the hearing of the second, which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family gnatis or sapindas. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorized his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms :—

"The case illustrates how the people of this Presidency have settled "down under the law as enunciated by the Madras High Court so long "ago as 1862, and re-affirmed in 1887, and it is impossible to say how "many adoptions of only sons may have been made during the last thirty "years on the faith of such enunciation of the law, and what innumerable "rights might be disturbed by any contrary decision after such a lapse of "time."

The case was heard on appeal before the late Judge, Sir T. Muttusami Ayyar and Mr Justice Shephard, who affirmed the **[469]** decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel because at the date of the adoption nobody thought of its being illegal. As to its legal validity they found that all the Madras decisions had been in its favour, and that the Madras Courts were right in following an unbroken current of authority in that Presidency, notwithstanding differences of view in other Courts.

At this Bar two points have been taken : first that the gift or reception of an only son in adoption is invalid in law ; and secondly that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that in the absence of express authority given by a husband his widow has no power to effect it.

In the Allahabad appeal it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows :—

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"The adoption of an only son having taken place in fact, is such "adoption null and void under the Hindu law?' That abstract question is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. *Arathoon* has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the arguments of the appellants is the opinion of the late Sir Michael Westropp, delivered in the case of *Lakshmappa* v. *Ramava*, which was decided in the High Court of Bombay in the year 1875, and a report of which was after long delay inserted in the 12th Bomb. H. C. R., page 364. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. **[470]** Now the authority of a widow to give or take in adoption differs in different schools of Hindu law. Their Lordships are not re-trying this Bombay decision. In Madras it is established, as the learned Judge Muttusami Ayyar shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C.J., appears to have been quite novel, and also at variance with a decision by his predecessor, Sir Mathew Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordship's notice, but if there is any such it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which during the last quarter of a century have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have, **[471]** however, one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books and closer examinations of texts previously translated. And in the Allahabad case especially, the appellants' side was argued in the High Court by Mr. Banerji, who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice Knox, who is a student of Sanskrit, and as he tells us has paid special attention to the

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books of Manu and Vasishtha. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have with these aids been brought.

The most revered of all the Rishis or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passages cited are as follows. They are in Ch. IX:—

"By the eldest son as soon as born a man becomes the father of "male issue, and discharges his debt to his pitris or progenitors. That "son alone by whose birth he discharges his debt to his fore-fathers and "through whom he attains immortality, was begotten from a sense of "duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family."—*VV.* 106—109.

"By a son a man obtains victory over all people, by a son's son he "attains immortality, then by the son of that son he reaches the region "of Brahma."—*V.* 137.

"Since the son delivers the father from the region called Put, he "was therefore called Putra by Brahma himself."—*V.* 128.

"Whom the mother or the father give with water a son in distress similarly endowed with affection he is to be deemed a datrima one brought forth."

In the three last quotations their Lordships have followed the words of Mr. Justice Knox, who says that he has attempted to **[472]** follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough.—(*See Record,* and Golap Chandra, Treatise on Adoption, p.* 282.)

Near to Manu in point of antiquity and of authority comes Vasishtha, around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Buhler and published in the work entitled "Sacred Books of the East" which has been edited by Professor Max Muller. The passage in that translation is as follows, Ch. XV:—

(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(2) Therefore the father and the mother have power to give, to sell, and to abandon their son.

(3) But let him not give or receive in adoption an only son.

(4) For he must remain to continue the line of ancestors.

(5) Let a woman neither give or receive a son except with her husband's permission.

On the record † Mr. Justice Knox gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Buhler.

Another ancient sage is Saunaka, of whom a text is quoted in the Dattaka Mimamsa of Nanda Pandita as follows:—

Section IV, Para 1. "In reply to the question as to the qualification "of the person to be affiliated Saunaka declares: 'By no man having an "'only son (eka putra)is the gift of a son to be ever made; by a man having "'several sons (bahu putra) such gift is to be made on account of diffi-"'culty (prayab natas).'"

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* [IX, 247, 248.—ED.]

† [p. 249.—ED.]

Next in time is Yajnavalkya, whose writings, with comments by Vijnanesvara, constitute the Mitakshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Ch. 1, Sec. XI :—

Para. 9. "So Manu declares 'He is called a son given (datrima) "'whom his father or mother affectionately gives as a son "[473] being alike [by class] and in a time of distress, confirming the "'gift with water.'"

Para. 10. "By specifying distress it is intimated that the son should "not be given unless there be distress. This prohibition regards the "giver [not the taker]."

Para. 11. "For an only son must not be given [nor accepted] for "Vasishtha ordains 'Let no man give or accept an only son.'"

Para. 12. "Nor though a numerous progeny exist should an eldest "son be given, for he chiefly fulfils the office of a son, as is shown by "the following text 'By the eldest son as soon as born a man becomes "the father of male issue."

The above mentioned writings are all classed among the Smritis, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the Sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations, and has been, and is, the subject of much dispute, which must be determined by ordinary processes of reason. The Dattaka Mimamsa stands on a different footing. It is not older than the 17th century A.D. and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is," As its name denotes, an argumen-"tative treatise or disquisition on the subject of adoption; and though from "the author's extravagant affectation of logic the work is always tedious, and "his arguments often weak and superfluous, and though the style is frequent-"ly obscure and not unrarely inaccurate, it is on the whole complied with "ability and minute attention to the subject, and seems not unworthy of the celebrity which it has attained." Moreover it was written during Muhammadan rule and cannot be the work of a law-giver or judge. The date of the Dattaka Chandrika is not certain, but it is at all events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West and Buhler in their valuable work on Hindu Law (3rd Edition, page 11) [474] speak thus: "The Dattaka Mimamsa and the Dattaka Chandrika, the latter less than the former, are supple-"mentary authorities on the Law of Adoption. Their opinions however "are not considered of so great importance but that they may be set aside "on general grounds in case they are opposed to the doctrines of the "Vyavahara Mayukha or the Dharmasindhu and Nirnayesindhu." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they

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deviate from or add to the Smritis their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka Mimamsa are as follows: They are contained in S. IV, Para. 1, is that which gives the saying of Saunaka already quoted. Para. 2.—"He, who has one son only, is '*eka-*"*putra*' or one having an only son: by such a one the gift of that son "must not be made; for a text of Vasishtha declares 'an only son let no "man give &c.'" Para. 6. The writer comments on the word "ever" as used by Saunaka thus: "In a time of calamity: accordingly, Narada says "'a deposit, a son, and a wife, the whole estate of a man who has issue "'living, the sages have declared unalienable, even by a man oppressed "'by grievous calamities: although the property be solely that of the man "'himself.' This text also regards an only son, for it is declaratory of "the same import as the texts of Saunaka and Vasishtha." Para. 8.—"The writer **[475]** comments on Saunaka's words:—"By no man having "an only son," thus:—"From this prohibition the gift by one having two "sons being inferrible, this part of the text ('By one having several "sons, &c.') is subjoined, to prohibit the same by one having two sons also."

The Dattaka Chandrika (S. 1, para. 27) only repeats Vasishtha's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the Smritis is only moral and not legal. That also is the opinion of the two latest writers, both deeply versed in the Sanskrit language—Mr. Mandlik, who appears to have translated the texts of Saunaka, and Mr. Golab Chandra Sarkar, who has written a treatise on adoption. Sir Thomas Strange writing in the year 1830 expresses an opinion in the body of his treatise that the prohibition is monitory only—Vol. 1, page 87. On the other hand the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice Strange is also cited to the same effect, and is supposed by some to express the latest opinions of his father, Sir Thomas Strange. But it may be observed that Sir Francis Macnaghten and Mr. Justice Strange found their opinions on the wickedness of the act in question, and that the adoption of an eldest son is placed by Mr. Justice Strange on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous crime, though not so heinous as the adoption of an only son. Their Lordships think that the authority **[476]** of recent text writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Buhler. Expressing no opinion of their own, those learned writers, say "if he have but one son, the gift of that one "is everywhere reprobated "as a grave spiritual crime. By most the gift is thought invalid." Their Lordships turn now to the more solid ground of judicial decision.

In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was

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valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court consisting of Sir Robert Stuart and Sir Charles Turner, who were English barristers, and three eminent civilians—Justices Pearson, Spankie, and Oldfield. The Court decided in favour of the adoption, Sir C. Turner dissenting. In the year 1889, some doubts were expressed on the point by Justices Straight and Mahmood, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a Full Bench, of which Mr. Justice Mahmood was one. The result has been a unanimous decision supported by judgments of the Chief Justice and Mr. Justice Knox, which are remarkable for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little **[477]** use now to examine the earlier decisions in the Sudder Dewani Adalut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices Dwarkanath Mitter and Louis Jackson. The judgment was delivered by Mr. Justice Mitter. After quoting passages from the two above-mentioned Dattaka treatises the learned Judge lays the law down thus: "The institution of adoption as it exists among the Hindus is essentially "a religious institution. It originated chiefly, if not wholly, from motives "of religion; and an act of adoption is to all intents and purposes a reli-"gious act, but one of such a nature that its religious and temporal aspects "are wholly inseparable. 'By a man destitute of male issue only' says "Manu, 'must the substitute for a son of some one description always be "'anxiously adopted for the sake of the funeral cake, water and solemn "'rites.' It is clear therefore that the subject of adoption is inseparable "from the Hindu religion itself and all distinction between religious and "legal injunctions must be inapplicable to it."

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoption originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the question is whether certain precepts have a legal or only a religious bearing. What is there in the subject matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books apart from decision, and to decided cases. **[478]** Indeed

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to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though of course differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice Mitter this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion, and law in the Smritis. *Rao Balvant Singh* v. *Rani Kishori* (1). They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said: —"All these old text books and commentaries are apt to mingle religious "and moral considerations not being positive laws, with rules intended "for positive laws. In the preface to his valuable work on Hindu law "Sir William Macnaghten (2) says 'it by no means follows that because "'an act has been prohibited it should therefore be considered as illegal. "'The distinction between the "vinculum juris" and the "vinculum "'pudoris" is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers, accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal [479] to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.* those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insists on the same view, and Mr. Justice Knox says that he originally took a contrary view but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice Mitter's principle accords with actual decisions. The controversy respecting eldest sons, whether or not they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

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(1) 25 I. A. 54 at p. 69.

(2) ["Principles and Precedents of Hindu Law," Volume I, Preliminary Remarks, Page VI.—ED.]

No specific prohibition is contained in these passages, but the reasonable inference from them is given in the Mitakshara in Ch. 1, Sec. XI, Para. 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight as before stated, and in legal decisions. It would certainly fall within Mr. Justice Mitter's principle. But it is quite abandoned; all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices Markby and Romesh Chander Mitter in the case of *Janokee Debea* v. *Gopaul Acharjea* (1).

[480] Again it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (Bahuputra). The Dattaka Mimansa, Sec. IV. 8 lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka Chandrika Sec. 1, 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimansa and the Dattaka Chandrika, and they are founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text-writers to support them. No decision in point was cited, and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasized in the Mitakshara, Chap. 1, s. 11, Para. 10: "The son shall not be given unless there be distress," which appears to mean that the giver must be in distress." "This prohibition," it continues, "regards the giver," and than occur the words "not the taker," apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimansa, s. IV, 20 says: "No distress existing, the giver commits a sin on account of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently **[481]** no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle laid down so confidently by Mr. Justice Mitter as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited the learned Judges while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice Mitter is not consistent with the prevalence of exceptional customs or other interferences with the law. The extent to which the Smritis admit of special customs has

(1) 2 C. 365.

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not been argued in these cases and their Lordships cannot easily form any judicial opinion about it. But in a discussion about the sources of Hindu law by Dr. Jolly published in 1883 (*see* p. 33), that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smritis when they do not contravene divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that power has said that certain modes of adoption shall be null and void, how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs, and others) who live there; and that, though the sources of their law are the same Smritis which are followed in other parts of India. The inference is that among numerous Hindu communities the prohibition of the Smritis on this point has not been received as invalidating the transaction.

Again, if the religious and legal injunctions were co-extensive, it would place both Courts of justice and legislatures in a very **[482]** delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time; then the legislature would be interfering to bar the working of a divine law. In each case a separation would have been made between those religious and temporal aspects which Mitter, J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession of property and the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw the distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. But the mere fact that a transaction is condemned in books like the Smirtis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

[483] It is true that the learned Judges Mitter and Jackson refer to the texts of the Dattaka Mimamsa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in

one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice Garth and Mr. Justice Markby, *Manick Chunder Dutt* v. *Bhuggobutty Dossee* (1). In delivering judgment Sir W. Markby reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption; so apparently did the Bombay High Court, for the judgment of Chief Justice Westropp which threw doubt upon the point, though delivered in 1875, was not reported as early as 1878. The learned Judge states the ground of his decision thus: "It appears to me "therefore that the vast preponderance of authority, if not the entire "authority in Bengal, is against the validity of the adoption of an only "son, and if we were to hold the adoption of the plaintiff in this case to "be valid it would be necessary to overrule both the carefully considered "decision of Jackson and Dwarkanath Mitter, JJ., and equally careful "decision of four Judges of the Sudder Court. This of course could only "be done by a Full Bench. But we could only refer the case to a Full "Bench if there is a conflict of authority, or if we ourselves differ from "these decisions. Having gone through all the cases with great care I do "not think it can be said that there is any such conflict of authority in "Bengal as to justify us in referring the case to a Full Bench on that "ground, and I am not prepared to refer the case to a Full Bench upon the "ground that I myself think the adoption of an only son valid. On the "contrary, on the best consideration I [484] have been able to give to "the authorities, I think such an adoption ought in Bengal to be held to "be invalid wherever the effect of holding such adoption to be valid would "be to extinguish the lineage of the natural father and so to deprive the "ancestors of the adopted son of the means of salvation."

This is a very instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal, there were only two decided cases. One was before the Sudder Dewani Adalat and is reported in 3 Select Reports, p. 232 (2). The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of Pandits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before in the case of *Janokee Debea* (3). Moreover the Court in 1878, hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir W. Markby says that while the latter prohibition is only monitory the former is clear; referring, as their Lordships suppose, to the differences of expressing in Colebrooke's translation of the Mitakshara. In 1878 he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious

(1) 3 C. 443 (460, 461). (2) *Nundram* v. *Kashee Pande*, 6 I.D. (O.S.) 906. (3) 2 C. 365.

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grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times Manu says that by the eldest son as soon as born a man discharges his debt to his [485] progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the firstborn son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishtha, whose text is the fundamental one, does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "Put" here, or, if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards, if he was so minded, adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a Full Bench, and it seems to their Lordships that there is only one decision, *viz.*, that of 1878, to which great weight is to be attached.

In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench in the year 1875; *Lakshmappa* v. *Ramava* (1). The case was decided on another ground, as has been mentioned above. But the Chief Justice, Sir M. Westropp, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid Those reasons appear to have been adopted by the Court including Sir M. Westropp himself in [486] a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a Full Bench, who simply followed the unreported case. See I.L.R. 14 Bom. 249 (2). Sir C. Sarjent, then Chief Justice, delivered judgment. He pointed out that prior to *Lakshmappa* v. *Ramava* (1) the decisions in Bombay were in favour of validity; that the judgment of Sir M. Westropp in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a Full Bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879, which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the Smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's

(1) 12 B.H.C.R. 364.
(2) *Waman Raghupathi Bova* v. *Krishnaji Kashiraj Bova*, 14 B. 249.

translation of the Mitakshara, showing that with regard to the only son the expression "must not," and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha, which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not re-trying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of Smritis and law books and English text-writers with which we have now been made familar. And his decision apparently is founded on the language of Colebrooke's Mitakshara and on the judgment of Mr. Justice Mitter. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. **[487]** They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

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Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that in the early days of the Chief Court Judges have pronounced opinions in favour of the adoption under general Hindu law ; and in 1874 Melville and Thornton, JJ., pointed out that the turning point of the controversy was Mr. Justice Mitter's judgment of 1868. But after the first reported case in 1867, the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of the learned Judges Mitter, Markby and Westropp. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides, it is not available for either. The foregoing remarks represent all **[488]** the light which has been thrown on the Smritis to which after all we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice Knox upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption.

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The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, a heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the first-born should have overlooked the point altogether.

The crucial text is that of Vasishtha. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishtha, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II, Patala 6, Khanda 13, paras. 6—11.* A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation, *viz.*, that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishtha intended to except an only son from the father's power to give in adoption why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial [489] of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishtha seems to regard a son. The power is given, while the action is condemned in terms consistent with actual prohibition. After long controversy it has been settled by a great preponderance of Indian authority culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishtha's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule, which is so much relied on by Chief Justice Edge. That author who wrote in the 13th century appears to have been received as a high authority on the interpretation of Smriti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishtha's text. But it is rather startling, and a very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case form Allahabad. It may, however, fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty

* [Sacred Books of the East, Volume II, pages 130, 131.—ED.]

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of implicit obedience. So far Vasishtha's reason, founded as it is on temporal and not on religious considerations, gives some, though not every strong, support to the respondent's theory.

The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be **[490]** obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimamsa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the appellants, but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir M. Westropp emphatically, and Sir W. Markby possibly, rely on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the passages from the Mitakshara (Sec. 1, Ch. XI, paras. 10, 11, 12). Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Muller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the first and third and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrook should have used different English words to represent the same Sanskrit word. He has certainly misled at least one judge in a leading case. As the matter is now shown to stand, the Mitakshara must be taken to bear strongly against the appellants.

In intimating that Sir M. Westropp was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir C. Sarjent thought that Sir M. Westropp was aware of the state of the Sanskrit text. It seems, however, next to impossible that Sir M. Westropp should have known that Colebrooke's variations of expression were not authorised by the original, **[491]** and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities, then, though, as Mr. Justice Knox points out, such comments should be received with some caution, they should also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the Smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt

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only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise written some centuries earlier than the Dattaka Mimamsa must have made the latter of the writers, if not both, familiar with the importance of that distinction.

It is, however, worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar," and he says (s. II, paras. 22, 23), "Hence it is established that one of a different class cannot be adopted as a son." In s. III, he recurs to that prohibition and asks "should this rule be transgressed what would be the case?" Then he deduces from texts of Saunaka and Katyayana, that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception **[492]** which favours the appellants' theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavery says "the people have settled down under the law enunciated in 1862." He can hardly recollect the state of things prior to 1862; but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decisions, a result which is usually of very slow growth if it takes place at all, or whether, as is more probable, that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was twenty years old and no caste penalties had followed it. These things do not prove a custom, but they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise lawgiver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

[493] Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoption is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the

general law. In other very large portions it is held to be part of the general Hindu law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay 1875) is grounded in part on the first and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal 1878) is grounded partly on the first, and to that extent shares its infirmity, but it rests in **[494]** great measure on more solid ground, *viz.*, an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the byways of them, command their Lordships' assent. Upon their own examination of the Smritis their Lordships find them by no means equally balanced between the two constructions, but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men,

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[495] arrived at after public and anxious discussion carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals and the appellants must pay the costs.

Solicitors for appellant—in the appeal from the North-West Provinces: Messrs. *T. L. Wilson and Co.*

Solicitors for respondents: Messrs. *Pyke and Parrott.*

Solicitor for appellant—in the appeal from Madras: Mr. *R. T. Tasker.*

Solicitors for respondents: Messrs. *Keen, Rogers, and Co.*

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[496] PRIVY COUNCIL.

PRESENT:

Lords Watson and Hobhouse, and Sir Richard Couch.

[On appeal from the High Court for the North-Western Provinces.]

BENI RAM AND ANOTHER (*Plaintiffs*) *v.* KUNDAN LAL AND OTHERS (*Defendants*). [16th and 20th February and 11th March, 1899.]

Law of landlord and tenant as to building by the tenant on the land—Acquiescence of lessor—Terms of special leave to appeal in this suit.

A lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired, merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it.

To raise an equitable estoppel against the lessor precluding him from suing, on the determination of the tenancy, for possesison, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of

permanent occupancy. Acquiescence by the lessor in this case was a legal inference to be drawn from such facts as were found. The onus of establishing sufficient cause for an equitable estoppel had not been discharged by the tenant in this instance.

Ramsden v. *Dyson* (1), and s. 108 of the Transfer of Property Act, 1882, referred to.

Special leave to appeal had been granted on terms that the appellants should be liable to pay the respondents' costs in any event, if directed so to do. Costs were, however, directed to be paid by the respondents.

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[F., 28 C. 738 = 5 C.W.N. 858 (862) ; 33 C. 1119 = 3 C.L.J. 616 = 10 C.W.N. 765 ; 6 A.L.J. 57 = A.W.N. (1908) 282 = 1 Ind. Cas. 821 ; 4 C.L.J. 198 ; Appl., 29 A. 652 (657, 658) = 4 A.L.J. 556 = (1907) A.W.N. 231 ; 28 B. 440 (446) = 6 Bom. L.R. 440 ; A.W.N. (1904) 70 ; R., 23 B. 789 (795) ; 35 B. 182 = 13 Bom. L.R. 92 (99) = 9 Ind. Cas. 765 ; 27 C. 570 (584) ; 37 C. 662 (665) ; 27 M. 211 (213, 214) = 14 M.L.J. 25 ; 4 A.L.J. 252-N ; 19 A.W.N. (1899) 191 ; 20 A.W.N. (1900) 191 ; 24 A.W.N. (1904) 70 ; 5 C.W.N. 846 (857) ; 6 C.W.N. 134 (140) ; 6 C.W.N. 352 (356) ; 8 C.W.N 235 (237) ; 21 M.L.J. 891 = 10 M.L.T. 193 (202) = 11 Ind. Cas. 745 ; 8 M.L.T. 258 = 7 Ind. Cas. 202 ; 17 Ind. Cas. 208 (209) = 121 P.R. 1912 = 209 P.L.R. 1912 = 197 P.W.R 1912 ; P.L.R. (1900) 303 (308) ; 100 P.L.R. 1908 = 31 P.W.R. 1908 ; D., 22 A.W.N. (1902) 60.]

APPEAL by special leave, on terms, from a decree (26th January 1894) of the High Court affirming a decree (21st April 1892) of the Subordinate Judge of Aligarh, who affirmed a decree (27th July 1891) of the Munsif of Hathras, dismissing the appellant's suit with costs.

This suit was brought on the 30th August 1890 by the representatives of the original lessors of six bighas of land to dispossess the successors of the original lessees, and to obtain the removal of the houses built on the land. Special leave to appeal had been obtained by the plaintiffs, whose suit had been dismissed on the ground that an equitable estoppel against them caused by their having acquiesced in the building, had been established.

This leave to appeal was granted in regard to the question of law which the case presented. This was whether it was a good **[497]** ground of defence that predecessors in the tenancy had erected permanent buildings on the land, without the owners having interfered to prevent the building, which was within their knowledge. There was no stipulation that the tenants should have an extended term.

The appellate Courts below had decided in favour of the defendants, on the ground of there having been an equitable estoppel upon the plaintiffs in consequence of their predecessors having acquiesced in the building. The original lease had been made in 1858, for the term of the settlement then current. The successors of the former owners of the land served the defendants with notice to quit possession on the 30th June 1890, with which notice the defendants had not complied.

The facts of the case, the expiration of the original lease, and the bringing of the subsequent tenancy-at-will to an end, appear in their Lordships' judgment, as well as the decisions of the courts below.

Mr. *H. Cowell*, for the appellants, argued that the lease of 1858 having expired and the subsequent tenancy having been determined by notice, the respondents had no right to resist eviction by the owner of the land. The tenants had built without having any good reason for believing that the land would be subject to their permanent occupancy. The inference drawn by the Courts below that the plaintiffs' predecessors had acquiesced in the acts of the defendants in building on the land was not the well-founded, or legal, inference. The facts found by the two Courts

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must be accepted, but not the conclusion that the facts amounted to permission or acquiescence. He cited *Ramsden* v. *Dyson* (1), where it was decided that if a tenant so builds he does not, in the absence of special circumstances, acquire a right to prevent the landlord from taking possession of the land when the tenancy has been determined. The case was distinctly different from this, where a tenant builds in the belief that he is entitled [498] to claim, afterwards, a lease, and the landlord allows him so to build, knowing that the tenant is acting in that belief, and does not interfere to correct the error. There it might be that the tenant had an equity to claim a lease. But nothing of the kind occurred here.

Mr. *W. H. Upjohn*, Q. C., and Mr. *G. E. A. Ross*, for the respondents, referred to the kabuliyat containing the terms of the lease of 1858. Therein was a clause which, they contended, should be read as written in contemplation of a continuance of the relation of landlord and tenant after the time of the settlement then current. The lower appellate Court and the High Court in concurrence had found that the plaintiff's predecessors in interest had acquiesced in the erection of the buildings; and it was argued that the above clause, coming from the lessors had justified the lessees in concluding that they would have some further interest after the expiration of the original term. There were then special circumstances. Again, the finding of acquiescence had been before the Court on a second appeal, which was confined to the question of law, and the High Court had rightly held that under the circumstances the appellants were estopped from suing to eject the respondents. Reference was made to the Transfer of Property Act, IV of 1882, s. 108, cls. (*h*) and (*p*), and to *Shibdas Bandapadhya* v. *Bamandas Mukhapadhya* (2).

Mr. *H. Cowell*, in reply, submitted that the respondents' long resistance to a just claim was a ground for their being required to pay the costs of this appeal, notwithstanding that the special leave to appeal had been obtained on the terms that, if ordered so to do, the appellants would pay those costs.

JUDGMENT.

Their lordships' judgment was afterwards, on the 11th March, given by

LORD WATSON.—In November 1858, Bhawain Das, and Dhani Ram, bankers of Hathras, and owners of the mauza Ramanpur, let to five tenants, whose interests are now represented by the respondents in this appeal, six bighas of land, for the term of the current [499] settlement, for the construction thereon of a saltpetre factory, at the annual rent of Rs. 28. The conditions of the lease appear from the kabuliyat executed by the tenants, on the 17th November 1858, which, so far as material, are as follows:—"That, until the lease money is continued to be paid, "the malguzars (persons who pay the revenue) shall not be competent to "dispossess me within the foresaid term, nor shall I be competent within "it to give up the land. After the settlement, the parties shall be bound "to carry out the order of the Government, if any, issued by it. I have "therefore executed these presents, by way of a kabuliyat, in order that "they may serve as evidence, and be of use in time of need."

The appellants having acquired, by purchase, the interest of the original lessors, on the 1st August 1859, served a notice upon the respondents requiring them to quit possession of the lands upon the 30th June 1890. The respondents did not comply with the notice; and the appellants, on

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(2) 8 B.L.R. 237.

the 30th August 1890, brought a suit for their ejectment in the Court of the Munsif of Hathras. The plaint *inter alia* craves decree for removal of the material of the houses built by the ancestors of the respondents lying on the said lands.

The respondents, in their written statement, amongst other defences to the action, pleaded that the predecessors of the appellants, "after the "completion of the saltpetre factory for which the lands were taken on "lease, saw that from time to time houses were built, and the defendants, "and the ancestors of the defendants, spent several thousands of rupees "on building, and they instead of objecting, or prohibiting, induced the "defendants and their ancestors to build."

The Munsif received evidence on nine issues, but in his judgment, which was given on the 29th June 1886, he only dealt with the first and second of them. Upon the first, which related to an amendment obtained by the appellants, he found in their favor. Upon the second, he found that the notice of removal given by the appellants upon the 1st August 1889 was not according to **[500]** law. With regard to the remaining issues, from three to nine inclusive, the learned Judge observed :—There is sufficient material to dispose of all these issues, but since issue No. 2 "is decided against the plaintiffs, and it is held that the suit must fail, "there is no further necessity to enter into the trial of these issues." Accordingly, in respect of his finding upon his second issue, he dismissed the suit.

An appeal was taken from the Munsif's judgment to the first appellate Court, being that of the Subordinate Judge of Aligarh, who, on the 21st April 1892, affirmed the decree appealed from, although on a different ground. The Subordinate Judge dealt with three issues, the first and third having reference to the validity of the notice upon which the action of ejectment was based, and the second being :—"Was the land in dispute "only let for the construction of a saltpetre factory, and what is the "effect of the plaintiffs or their predecessors having acquiesced in the "defendants or their predecessors having built upon the land after the saltpetre factory had ceased to exist?"

The Subordinate Judge, differing in opinion from the learned Munsif, held that the notice to quit possession, which the appellants had given, was valid in law. Upon the second issue, he found the following facts, upon which the decision of this appeal has come to depend :—"The tenancy, as I have already stated, was originally created for the "construction of a saltpetre factory, but we have the evidence of the "plaintiffs' own witness Khyali Ram and Chokey Lal, patwari of the "village, to show that saltpetre was only manufactured here for four or five "years ; that since 20 years shops have existed on the land, and that "since 12 or 14 years pacca shops have been built. Inside the enclosure, "the evidence shows, are rooms (?) erected 18 or 20 years ago, a pacca as "well as a katcha well. It is also proved in the most unmistakable manner "that the former owner of the land saw the buildings and did not "prohibit their construction. The plaintiffs' evidence, moreover, shows "that, even on their calculations the buildings cost Rs. 1,000, or Rs. 1,500. "**[501]** The evidence of Gobind Prasad, their witness, is that the buildings "cost about Rs. 900. Jugal Kishore makes them worth Rs. 800. Khyali "Ram says nothing on the point, while the patwari deposes that the "buildings are worth Rs. 1,000 or Rs. 1,500. On the other hand, the "defendant Kundan Lal and his witnesses' evidence shows that there are "12 shops, some katcha and some pacca, now standing on this land ; that

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"they have been built between Sambat 1918 and 1935; that in addition "to the shops are dalans and kothas, two wells, the one katcha and the "other pacca, and a temple, all costing between three and four thousand "rupees. The evidence also shows in the most unmistakeable manner, "that not only did the original lessee not object to the enclosing of these "buildings when they were being erected, and stood by, but that by "continuing to receive rents from the lessees, even after the erection of "the buildings, and even though the saltpetre factory, for which the land "was let, had ceased to exist, he sanctioned the lessees doing so. His "successors are therefore equitably estopped from now suing for the "lessee's ejectment. The case is governed by what was said in *Gopi* v. "*Bisheshwar* (Weekly Notes for 1885, page 100)."

The rule or principle thus adopted by the Subordinate Judge, which is reported to have been laid down in *Gopi* v. *Bisheshwar*, is thus stated by him :—"If a man permits another to build upon his land, and, with "the knowledge that the building is being erected, stands by and does "not prevent the other from doing so, then, no doubt, equity comes in, "and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person."

The case was then carried, by the present appellants, before the second appellate tribunal, the High Court at Allahabad, who, on the 26th January 1894, confirmed the decision of the Subordinate Judge of Aligarh and dismissed the appeal, with costs. The learned Judges of the High Court, without entering into any discussion of the other issue which the first appellate **[502]** Court had decided in favour of the present appellants "said :—We need not go further into the construction that should be "placed upon that lease, because we are of opinion that upon the finding "of acquiescence, which we think was a right finding in this case, the "appeal will have to be dismissed." They accordingly disposed of the appeal on that ground alone.

It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi* v. *Bisheshwar* should have been accepted, apparently without much consideration, by the learned Judges of both appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected. The findings of fact pronounced by the Subordinate Judge, which were conclusive in the second appellate Court, and are equally binding upon this Board, show that the present is not a case of that kind. The respondents knew that the predecessors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants, upon the terms and for the periods provided by the original lease of 1858. In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation.

Their Lordships have had no difficulty in coming to the

conclusion that the respondents have failed to discharge themselves of that *onus*. If there be one point settled in the equity law of England, it is, that in circumstances similar to those of **[503]** the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below. It must also be kept in view that, in Indian law, the maxim "*quicquid inaedificatur solo, solocedit*," has no application to the present case. The rule established in India is that of s. 108 of the Transfer of Property Act, which provides that, "the lessee may remove, at any time during the continuance of the "lease, all things which he has attached to the earth ; provided he leaves "the property in the state in which he received it."

The leading authority of the law of England upon the point, in *Ramsden* v. *Dyson and Thornton* (1). In that case, the Vice-Chancellor (Sir J. Stuart) had held that Sir J. Ramsden, the owner, was estopped in equity from bringing ejectment against the defendants, his tenants, by reason of the defendants having been permitted, in the knowledge of their lessor, to build valuable and permanent structures upon the land demised to them. The judgment of the Vice-Chancellor was reversed in the House of Lords, by the Lord Chancellor (Cranworth), Lord Wensleydale and Lord Westbury, *dissentiente* Lord Kingsdown.

The Lord Chancellor (L.R. 1 E. and I.A. at p. 141 of the report) said :—"It follows as a corollary from these rules, or, perhaps, it would be "more accurate to say it forms part of them, that if my tenant builds on "land which he holds under me, he does not thereby, in the absence of "special circumstances, acquire any right to prevent me from taking "possession of the land and buildings when the tenancy has determined. "He knew the extent of his interest, and it was his folly to expend "money upon a title which he knew would or might soon come to "an end." The noble and learned Lord, in his opinion, which is expressed at considerable length, appears to me to indicate some **[504]** at least of the special circumstances which might suffice to raise an estoppel against the lessor. It was strongly urged for the defendants, at the Bar of the House, that Sir J. Ramsden had made representations "which might fairly be supposed to lead his tenants at will or from year "to year to expend money in building, in the belief that by building they "acquired a title which he could never disturb." I do not find that the noble and learned Lord indicated any opinion that, if such representations had actually been made by the lessor, they would not have been sufficient to show the terms of a contract which might be enforced in a Court of Equity. But he rejected the plea on the double ground (1) that the alleged communications were not proved to have been sufficient for that purpose, and (2) that the representations, if they had been sufficient to raise an implied contract, were not binding upon the lessor, inasmuch as they proceeded from an estate agent, and were not shown to have been made by him, in the knowledge and with the authority of the lessor.

The respondents, in their appeal case lodged before this Board, relied exclusively upon their plea of acquiescence, which had been sustained by both the appellate Courts below. In their argument, the learned

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Counsel by whom they were represented, ably urged that plea, but frequently digressed into other points raised in the case, always with the explanation that these digressions were meant to aid the plea of acquiescence. They also argued that their Lordships could not competently disturb the judgment to the effect that there had been acquiescence, inasmuch as it was a concurrent finding of the appellate Courts. The argument was palpably erroneous. Their Lordships were bound by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found; and upon it the judgments of the appellate Courts are not final.

[505] Their Lordships will therefore humbly advise Her Majesty to reverse all the judgments appealed from, and to give the appellants decree of ejectment in terms of their plaint; to order that the costs, if any, already paid by the appellants, under the decrees respectively of the Munsif of Hathras, the Subordinate Judge of Aligarh, and the High Court at Allahabad, be repaid to the appellants by the respondents; and that there be no costs of suit in the Courts below paid to or by either of the parties. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants—Messrs. *Ranken, Ford, Ford* and *Chester.*

Solicitors for the respondents, Kundan Lal and Birj Lal.—Messrs. *Barrow* and *Rogers.*

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

On appeal from the High Court for the North-Western Provinces.

PARSOTAM GIR (*Plaintiff*) *v.* NARBADA GIR (*Defendant*).*

[22nd February, and 24th March, 1899.]

Res judicata—*Civil Procedure Code*. s. 13—*Prior decree between the same parties in the same claim, not arriving at a final decision.*

In a former suit between the same parties that were now in litigation, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. *Held*, that the prior decree was not a final decision within the meaning of s. 13 of the Code of Civil Procedure, and the defence of *res judicata* was not maintained.

[R., 2 Ind. Cas. 622; 15 Ind. Cas. 930 (932)=56 P.R. 1912=251 P.L.R. 1912=245 P.W.R. 1912; U. B. R. (1897—1901) 443; D., 4 Bom. L.R. 25 (26)]

APPEAL from a decree (4th November 1895) of the High Court reversing a decree (29th June 1893) of the Subordinate Judge of Allahabad.

This suit was filed on the 3rd January 1893 by one Nepal Gir, upon whose decease during the proceedings the present appellant was brought upon the record. The claim was against the respondent Narbada Gir,

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representative of Prasad Gir, deceased, for possession with mesne profits, of lands belonging to a religious institution, which lands had been in the possession [506] of Prasad Gir in his lifetime. The plaint, which was based on an agreement registered on the 30th March, 1868, stated the proceedings in a prior suit of 1885, disposed of by the High Court on the 8th March 1886, between the same parties.

The defendant in his written statement pleaded adjudication in that suit of the matters now in issue.

The facts of the case, as well as the proceedings in both the suits, sufficiently appear in their Lordships' judgment on this appeal.

The only questions now raised were whether or not this suit was barred, within s. 13 of the Code of Civil Procedure, by the decree of the 8th March 1886, and whether or not there was any estoppel from the former proceedings.

The Subordinate Judge held that the suit was not barred by that decree. He found in favour of the plaintiff on all the issues; and decreed possession with mesne profits for three years.

On an appeal by the defendant to the High Court, the above was reversed.

On the plaintiff's appeal, Mr. *A. Cohen*, Q. C., and Mr. *G. E. A. Ross*, for the appellant, urged that there was nothing in the judgment and decree of the High Court of the 8th March 1886 to prevent the plaintiff from bringing the present suit.

Mr. *J. D. Mayne* and Mr. *J. F. Kershaw*, for the respondent, argued that the High Court was right in holding that material contentions of the appellant had been decided against him sufficiently to cause an estoppel, so that the present suit was barred.

Mr. *A. Cohen*, Q. C., was not heard in reply.

Their Lordships' judgment was afterwards, on the 24th March, delivered by LORD MACNAGHTEN.

JUDGMENT.

This is an appeal from a decree of the High Court at Allahabad. The plaintiff, Mahant Nepal Gir, who is now represented by the appellant, sued for recovery of possession of four villages. The suit was brought in the Court of the Judge of Small Causes at Allahabad exercising the powers of a [507] Subordinate Judge. He gave the plaintiff a decree which has been reversed by the learned Judges of the High Court, who dismissed the suit with costs.

The facts of the case are few and simple and not in dispute. The whole argument before this Board turned upon the meaning and effect of a judgment of the High Court in a previous litigation between Mahant Nepal Gir and Prasad Gir, the person whom the defendant Narbada Gir claims to represent.

The parties to the present suit are sannyasis or aseetics of a sect known as Baghambari from the name of their founder, who lived more than a hundred years ago. The gaddi or shrine of Baghambari, which appears to have been endowed with considerable property, was originally established in a house below the fort of Allahabad. This house was destroyed in the Mutiny and the gaddi was removed in consequence to an adjoining mauza called Baski. The manager of the gaddi at this time was Baba Bhola Gir. Bhola Gir died on the 8th of March 1868, leaving four chelas or disciples, Nepal Gir, Bijai Gir, Moti Gir and Prasad Gir. There seems to have been at first some dispute about the succession,

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but the differences, whatever they were, were soon arranged. On the 25th of March 1868 the four chelas executed an ikrarnama or deed of arrangement providing for the administration of the gaddi and division of offices between them. Nepal Gir became gaddi-nashin or head Mahant, Moti Gir Bhandari or treasurer and manager at Allahabad; Bijai Gir manager of certain villages, and Prasad Gir manager of the villages in dispute.

This ikrarnama was duly registered on the 30th of March 1868. It recites that Bhola Gir before his death gave the following direction to his four chelas in the presence of respectable people:—"After me you "four persons should by common consent become proprietors of all the "properties belonging to the gaddi of Baba Baghambari and should main-"tain the property and management thereof as usual like myself." It then goes on to declare that in compliance with that direction **[508]** and in order to avoid future disputes and to keep up the name and prestige of the gaddi and properties the four persons parties to the deed unanimously covenanted in the terms expressed in the following clauses. Clause 1 provided that Nepal Gir having been appointed Mahant should be installed as gaddi-nashin. Clause 2 so far as material was in the following words:—

"2ndly, that as formerly the name of Baba Bhola Gir was entered in respect of "the ilakas (villages) and the Mahant's name was not entered, so the names of Bijai "Gir and Prasad Gir be entered in respect of the ilakas and they should be peshwakars "(heads) and managers of the property (ilakas) and other affairs and should maintain "the management of receipts and disbursements in the same way as it had been before. "But they on account of their names being entered or any other person for any reason "neither have nor shall have any right whatever nor even the Mahant himself shall "have any power of partition or temporary or permanent transfer in respect of the whole "or any part of the moveable or immoveable property because all the properties belong "to the gaddi of Baba Baghambari and they are not meant for person or for any parti-"cular individual."

Clause 1 had provided for the expulsion of the gaddi-nashin in certain events. Clause 2 provided for the expulsion of any of the other three "discovered doing any vicious act or any act disgracing the gaddi, or contrary to the customs of the Math." Clause 3 provided that—

"As at present the disciples stay at ilakas (villages) and look after the management "of cultivation and making collections of the ilakas like managers, so Bijai Gir and "Prasad Gir should in the like manner live there as munsarims and managers and "carry on the current affairs as usual. In case of their proving unfaithful and of mis-"conduct the Mahant Moti Gir and the third person who might be left of good "behaviour have and shall have power to turn them out with their mutual consent and "consultation as an owner has in respect of the manager."

Clause 4 provided for the duties to be undertaken by Moti Gir. Clause 5 so far as material was as follows:—

"5thly, that none of us either gaddi-nashin, peshwakar or another disciple or any "one who may be the successive representative or disciple of any person shall have any "power to act contrary to any of the terms of this document . . . and those who are "our disciples should also live as usual in those ilakas of which we are the managers in "our stead; but in case of misbehaviour the Mahant and Peshwakar have and shall "have in every case authority to turn them out."

[509] On the terms of this ikrarnama Prasad Gir entered into possession of the villages in dispute. One of his first acts after he obtained possession was to join with the other three persons parties to the deed in a petition for a certificate to enable the four to collect the debts due to the estate of Bhola Gir. The petition was verified by a declaration signed by Prasad Gir himself. It set out Bhola Gir's will as contained in the ikrarnama and proceeded to state that the petitioners in union among themselves for giving additional strength to the will having executed an

ikrarnama on the 25th March 1868 " with the conditions entered therein," got it registered and according to the same mutation of names in their favour was effected, and that under the same they had been in possession and enjoyment as proprietors of all goods and properties (imlak) appertaining to the gaddi of Baghambari left by the deceased goshain.

Whether in the interval between the execution of the ikrarnama and the end of the year 1881 Prasad Gir remitted any contribution in money or in kind from the estates under his management to the gaddi of Baghambari at Baski is a question about which a good deal of evidence was adduced which left the matter still in doubt. For the purpose of the present suit that question seems to be wholly immaterial. It is clear that from the commencement of the year 1882, Prasad Gir made no remittance to the gaddi of Baghambari. In June 1884 there was a meeting of the persons interested, to which Prasad Gir Moti Gir, and the representatives of Bijai Gir, who was then dead, were summoned. Moti Gir and the representatives of Bijai Gir attended and formally acknowledged the obligation incumbent upon them to act in conformity with the terms of the ikrarnama. Prasad Gir absented himself without making any excuse or sending any explanation of bis conduct. The parties present resolved that Prasad Gir should be requested to state his intentions and furnish an account of the property under his management within a limited time and that then a further meeting should be convened to consider future proceedings. A notice to that effect with a copy of the **[510]** proceedings of the meeting of June 1884 was accordingly sent to Prasad Gir. Prasad Gir, however, paid no attention to the summons, and treated the matter with absolute indifference. Thereupon the Mahant Nepal Gir, Moti Gir and the representatives of Bijai Gir brought a suit to recover possession of the villages in dispute and for an account.

Prasad Gir filed a written statement. He alleged that the villages in dispute did not belong to the gaddi of Baba Baghambari at Baski, but to the gaddi of Baba Baghambari at Niria, one of the villages in dispute where Prasad Gir lived. He denied that he had executed the ikrarnama of March 1868. He pleaded that he had been in adverse possession for twelve years and that the plaintiffs' claim was barred by limitation.

While the suit was pending, and after it had been partly heard, Prasad Gir died. On his death Narbada Gir who had taken possession of the villages in dispute claiming under Prasad Gir brought was upon the record, but no amendment was made, nor was any fresh issue directed. The Subordinate Judge found that the villages in dispute belonged to the gaddi of Baba Baghambari at Baski, the ikrarnama of March 1868 was executed by Prasad Gir and that he never challenged its genuineness or validity until he filed his written statement. He negatived the plea of adverse possession. He held that if Prasad Gir had been alive the plaintiffs would have been entitled under the terms of the ikrarnama to oust him from the villages in dispute on account of his misconduct in not rendering account and sending profits to the gaddi and in claiming them as his own property. He further held that Narbada, assuming that he was Prasad Gir's heir, could not retain possession of the villages in dispute against the will of the plaintiffs who were entitled to resume possession of the villages and to make a fresh arrangement for their management. He dismissed the claim for an account. Narbada, he said, had not misappropriated the profits which the plaintiffs claimed, and as it was not proved that any personal estate of Prasad Gir had come to his hands he could **[511]** not be made accountable for the profits received by Prasad Gir. In

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the result therefore the claim for an account was dismissed, but the claim for possession was granted.

Against this decree Narbada appealed. On the 8th of March 1886 the learned Judges who heard the appeal pronounced a judgment which unfortunately neither the High Court on the appeal in the present suit nor the learned counsel at the bar nor their Lordships are able to understand. They seem to have misapprehended the grounds of the Subordinate Judge's decision. They held Prasad Gir absolved apparently because it was not proved to their satisfaction that he "had acted as a person accountable to the gaddi." "The impression left upon our minds," they said, "is that " . . . there is good reason for believing that from 1868 down to his "death Prasad Gir occupied and asserted an independent position "in respect of the Niria Shrine." So they held that the suit would have failed against Prasad Gir if he had been alive, and accordingly they reversed the decree and dismissed the suit against Narbada Gir as the legal representative of Prasad Gir with costs. But they concluded their judgment with the following announcement—We think that the Subordinate Judge, "should, as we propose to do, have left it open to the plaintiffs, or rather "Nepal Gir, to institute a suit against Narbada Gir personally in which a "number of questions which as yet have never been raised or considered "can be properly dealt with and determined, and in holding that the "present suit failed as against Prasad Gir, we leave untouched and "undecided all matters affecting the rights of the plaintiff Nepal Gir on "the one side and of Narbada Gir, on the other."

On the 30th of July 1892 Nepal Gir sent a notice to Narbada Gir, requesting him under threat of legal proceeding to come in and submit his accounts, treating him as "manager and agent in charge" of property belonging to the gaddi of Baghambari. As Narbada Gir paid no attention to this notice the present suit was brought for the purpose [512] of recovering possession of the villages in dispute. Narbada pleaded the defence of *res judicata*, adverse possession by Prasad Gir and title under Prasad Gir's will, and refused to admit the validity and existence of the ikrarnama of March 1868.

The Subordinate Judge held that the suit was not barred by the decree of the High Court of the 8th of March 1886. He found in favour of the plaintiff on all the issues and gave a decree for possession with mesne profit for three years.

Narbada Gir appealed to the High Court. On the 14th November 1895 the learned Judges of the High Court pronounced a judgment which is almost, if not quite, as difficult to understand as the judgment of their predecessors in 1886. They observe that the difficulty which they had felt in the case had been "in trying to ascertain from the judgment of the "Court in the previous suit what were the findings upon which this Court "in that suit made its decree dismissing the suit." They then address themselves to the solution of that problem. They begin by rejecting the only part of the former judgment which is absolutely clear, and they express their opinion that "the only possible construction of that judgment "which would make it consistent throughout and would not suggest abso-"lutely inconsistent findings" is a construction which (if their Lordships have rightly apprehended its effect), leaves it undetermined whether the ikrarnama of 1868 was or was not proved or was or was not binding on the parties and attributes to learned Judges of one of the highest Courts of Appeal in India the view that a person who executes a solemn instrument in the terms of such an ikrarnama and accepts the management of property

on the conditions therein contained is at liberty to repudiate the trust and to set up an adverse title in some other religious foundation if not in himself without being liable to removal either by the parties interested or by the Court. Having placed this construction on the earlier judgment and finding that the only charge against Narbada Gir was that he obtained possession under the ikrarnama of 1868, and then wholly repudiated the obligations of that instrument the [513] learned Judges of the High Court treated the matter as *res judicata* and dismissed the suit with costs in all Courts.

The High Court placed some reliance on the notice of the 30th of July 1892. Narbada Gir did not accept it or act upon it. It seems to their Lordships to have no bearing on the question between the parties.

Their Lordships think that it would be an idle and a hopeless task to speculate upon the grounds of the judgment of the High Court in 1886. Whatever the grounds may have been, they are certainly not apparent on the face of the judgment. One thing, however, is plain; the learned Judges in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir. They "left it open to Nepal "Gir to institute a suit against Narbada Gir personally." They said in so many words: "We leave untouched and undecided all matters "affecting the rights of the plaintiff Nepal Gir on the one side and Narbada "Gir on the other." The only reason why the High Court in 1895 refused to give effect to those words was because they considered that if they construed them according to their plain meaning they "should be holding "that the decree of this Court in the previous suit was simply what is "known in England as a decree of non-suit." Such a decree, they say, no Court in India has power to make. Now the objection to a judgment of non-suit under the old practice in this country—there was no such thing as "a decree of non-suit" for the term "non-suit" was not known in Chancery—was this:—It enabled a plaintiff after he had dragged the defendant into Court, if he found the case going against him or that he had not the requisite materials to support his claim, to elect to be non-suited, with the result that he could bring a fresh action and so harass the defendant with further litigation. The Judge at the trial was powerless: the plaintiff was *dominus litis*. There can be no room for such an objection when the Judge has the matter in his own hands. But however that may be, the real answer to the difficulty propounded by the High Court is this:—The question is not whether the judgment of the High Court in 1886 was [514] right, but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left "untouched and undecided."

Mr. Mayne for the respondent did not go so far as to contend that the judgment of 1886 as it stands, and of itself would support a plea of *res judicata*. Following the arguments or suggestions contained in the judgment under appeal, he endeavoured to persuade their Lordships that there must have been some grounds for the decision of the High Court in 1886 or some findings underlying that decision which would support a case of what may be called constructive estoppel. It is enough to say that there is no such thing known to the law as constructive estoppel and if there were it would not satisfy the requirements of s. 13 of the Code of Civil Procedure (XIV of 1882). "The conditions for the exclusion of "jurisdiction on the ground of *res judicata* are" as Willes, J., says, "that "the same identical matters shall have come in question already in a

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" Court of competent jurisdiction, that the matter shall have been contro- " verted and that it shall have been finally decided " (1). That is just what s. 13 requires; there must be a final decision.

Their Lordships are of opinion that the view taken by the Subordinate Judge was correct. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, the decree of the High Court reversed, and the appeal to it dismissed with costs, and the judgment of the Subordinate Judge restored.

The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant—*Messrs. T. L. Wilson and Co.*
Solicitors for the respondents—*Messrs. Barrow and Rogers.*

(1) *Langmead* v. *Maple*, (1865) 18 C.B.N.S. 255 (270).

22 A. 1 (F.B.)=19 A.W.N. (1899) 111.

FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

DALGANJAN SINGH (*Plaintiff*) *v.* KALKA SINGH AND OTHERS (*Defendants*).* [15th May, 1899.]

Pre-emption—Wajib-ul-arz—*Perfect partition of mahal—Act No. XIX of* 1873 (*N.W.P. Land Revenue Act*), *s.* 191—*No new* wajib-ul-arz *framed on partition—Pre emption claimed under* wajib-ul-arz *of undivided mahal—Custom—Co-sharers—"Hissadar deh."*

Where, on the perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the *wajib-ul arz* of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer. It depends in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. But there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co-sharers of the vendor; and where the language of the *wajib-ul-arz* is ambiguous this presumption may be decisive.

The *wajib-ul-arz* of a village forming one undivided mahal recorded a right of pre-emption by custom as existing in favour of "*hissadaran deh*" in cases of transfer by a "*hissadar*" of his share or "*hissa*" to a stranger. After a perfect partition, on which no new *wajib-ul-arz* was framed, and after a subsequent sale to a stranger of land in one of the new mahals, a person who, prior to the partition, was a co-sharer of the vendor in the undivided mahal, but who, since the partition, owned a share only in another of the new mahals, claimed pre-emption under the old *wajib-ul-arz* as a "*hissadar deh.*"

Held by the Full Bench, upon the construction of the *wajib-ul-arz*, that he was not entitled to pre-emption.

[F., 27 A. 602=2 A.L.J. 313=A.W.N. (1905) 115; 32 A. 63=4 Ind. Cas. 138=6 A.L.J. 958; 1 A.L.J. 33 (36); 2 A.L.J. 261; 1 Ind. Cas. 504; 3 Ind. Cas. 327; R., 29 A. 295=4 A.L.J. 137=A.W.N. (1907) 39; 32 A. 265=7 A.L.J. 133=6 Ind. Cas. 17; 33 A. 196 (201)=7 A.L.J. 1040=7 Ind. Cas. 680; 33 A. 605 (607)=8 A.L.J. 996 (1001); 34 A. 13 (17)=8 A.L.J. 1072=11 Ind. Cas. 305 (306)=34 A. 434 (435)=9 A.L.J. 670=14 Ind. Cas. 278; 6 A.L.J. 715=3 Ind. Cas. 534; 16 Ind. Cas. 361 (364); 133 P.R. 1907=188 P.L.R. 1908=84 P.W.R. 1907; D., 28 A. 286=2 A.L.J. 833=A.W.N. (1906) 2; 28 A. 614=A.W.N. (1906) 134; 31 A. 274=6 A.L.J. 180=2 Ind. Cas. 208.]

[2] THIS was an appeal under s. 10 of the Letters Patent arising out of a suit for pre-emption of a piece of land in the village of Serai Sitam in the Jaunpur district, the suit being based on a custom recorded in the *wajib-ul-arz* of that village framed at the last Settlement in 1880-81. The suit was brought in September 1896. The village, which at the time of

* Appeal No. 34 of 1898, under s. 10 of the Letters Patent.

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the settlement had consisted of only a single mahal, was divided by perfect partition, in 1888 or 1889, into three mahals, but no new *wajib-ul-arz* was framed for any of the new mahals. The plaintiff pre-emptor was not a sharer in the mahal in which the property sold was situated. The Court of first instance (Munsif of Jaunpur) and the lower appellate Court (Subordinate Judge) held that the plaintiff was entitled to pre-emption by the custom of the village notwithstanding the partition, and decreed the claim. On appeal by the defendants to the High Court, a single Judge of the Court allowed the appeal and dismissed the suit. From that decree the present appeal under s. 10 of the Letters Patent was preferred by the plaintiff. The facts of the case will be found stated in greater detail in the judgment of the Chief Justice. The substantial question raised by the appeal was—what is the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the *wajib-ul-arz* where no new *wajib-ul-arz* for any of the new mahals has been framed at or since the partition?

Babu *Durga Charan Banerji*, for the appellant (pre-emptor).

The learned Judge has dismissed the appellant's suit upon the solitary ground that upon perfect partition the old *wajib-ul-arz* disappears with the legal entity to which it applied, and therefore no suit will lie for pre-emption. I submit that there is no such rule of law. The Land Revenue Act gives no sanction to such a view. On the other hand the Land Revenue Act and the case law support the contention that a record-of-rights may remain in force even after the term for which it was prepared. S. 191 of the Land Revenue Act lays down that if no new **[3]** *wajib-ul-arz* is prepared, the existing *wajib-ul-arz* remains in force, even after the settlement, when it is not superseded by a new one—*Shiam Sundar* v. *Amanant Begam* (1). In *Sadhu Sahu* v. *Raja Ram* (2) it has been held that even after the expiration of the term for which a *wajib-ul-arz* is prepared, the old *wajib-ul-arz* may be good evidence of custom.

If the *wajib-ul-arz* is in force, the plaintiff who is still a shareholder in the village (though not in the mahal) is entitled to pre-empt as a *hissadar deh*. The entity *deh* (village) has not ceased to exist with the partition. The area still exists, though for fiscal purposes it has been divided into separate portions which for such purposes are independent of one another.

If the *wajib-ul-arz* recorded a contract, such contract ran with the land and would not be abrogated, there having been no novation in the shape of a fresh *wajib-ul-arz*. If it is a record of custom, such custom applied to the area *deh*, and partition for revenue purposes would not affect such custom. The *wajib-ul-arz* is a record-of-right prepared under the Land Revenue Act. The Collector has to keep and maintain the record, and he is required to note any changes which may occur during the term of the settlement for which such record is prepared. This evidently contemplates alteration in the existing record. Changes in such record consequent upon partition should be noted,—see ss. 94 to 102 of the Act.

Upon the construction of the particular *wajib-ul-arz* in question, *hissadar* means a shareholder and not necessarily a co-sharer. The plaintiff still holds a share in the village, and upon that account he is entitled to claim pre-emption.

(1) 9 A. 234.

(2) 16 A. 40.

I rely upon *Gokal Singh* v. *Mannu Lal* (1), *Ramjiwan Sahu* v. *Raturaj Singh* (2), *Shiam Sundar* v. *Amanant Begam* (3), *Kuar Dat Prasad Singh* v. *Nahar Singh* (4)', *Abbas Ali* v. *Ghulam Nabi* (5), *Mata Din* v. *Mahesh Prasad* (6). [4] In *Lachcho* v. *Maya Ram* (7), relied upon by the other side, a new wajib-ul-arz had been prepared which abrogated the old one.

I also rely on *Ghure* v. *Man Singh* (8), which indirectly supports my contention.

Mr. *Abdul Majid*, for the respondents :—

The question is, what is the meaning of the word village (*deh*) and what is the meaning of the word share (*hissa*) and shareholder (*hissadar*) used in the wajib-ul-arz? The wajib-ul-arz was framed for the mahal of Serai Sitam. The co-sharers before the village was partitioned were the existing co-sharers of the mahal Serai Sitam. The village and mahal Serai Sitam were both one and the same. But when the village was partitioned and divided into several mahals, the co-sharers of the separated mahals could not be said to remain still co-sharers of the old mahal Serai Sitam. There is nothing joint between them now in the new mehals. The words '*deh*' and '*hissa*' and '*hissadar*' must be used in one sense in the whole wajib-ul-arz whenever those words are used.

The old wajib-ul-arz which was framed for the mahal Serai Sitam has disappeared when the said mahal was partitioned into these new mahals, inasmuch as the mahal for which it was prepared has disappeared.

The following cases cited are distinguishable from the present case.

Gokal Singh v. *Mannu Lal* (1), *Ramjiawan Sahu* v. *Raturaj Singh* (2), *Shiam Sundar* v. *Amanant Begam* (3), *Kuar Dat Prasad Singh* v. *Nahar Singh* (4), *Abbas Ali* v. *Ghulam Nabi* (5) and *Mata Din* v. *Mahesh Prasad* (6).

I rely on the following cases :—

Motee Sah v. *Mussumat Goklee* (9), *Moolchund* v. *Rugha Singh* (10), *Joobraj Singh* v. *Tookun Singh* (11), *Shaikh Bundey* [5] *Hossein* v. *Lalla Puriag Dutt* (12), *Ram Pershad* v. *Buljeet Singh* (13), *Jai Ram* v. *Mahabir Rai* (14), *Abdul Rahim Khan* v. *Kharag Singh* (15), *Nazir-ud-din* v. *Kadir Baksh* (16), *Abdul Aziz Khan* v. *Husen Ali Khan* (17), *Abdul Hai* v. *Nain Singh* (18), *Ghure* v. *Man Singh* (19) and *Mithu Lal* v. *Muhammad Ahmad Said Khan* (20).

JUDGMENT.

STRACHEY, C. J.—This appeal raises a question which has been discussed in many previous decisions of this Court, the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the wajib-ul-arz, where no new wajib-ul-arz for any of the new mahals has been framed at or since the partition. The present suit for pre-emption

(1) 7 A. 772.
(2) 9 A.W.N. (1889) 81.
(3) 9 A. 234.
(4) 11 A. 257.
(5) 11 A.W.N. (1891) 137.
(6) 12 A.W.N. (1892) 100.
(7) 17 A. 226.
(8) 5 A. 158.
(9) S.D.A.N.W.P. (1861) Vol. I, 506.
(10) S.D.A.N.W.P. (1864) Vol. I, 96.
(11) 14 W.R.C.R. 476.
(12) 16 W.R.C.R. 110.
(13) N.W.P.H.C.R. (1867) 252 = 2 Agra 252.
(14) 7 A. 720.
(15) 12 A.W.N. (1892) 240.
(16) 14 A.W.N. (1894) 193.
(17) 15 A.W.N. (1895) 233.
(18) 20 A. 92.
(19) 17 A. 226.
(20) 19 A.W.N. (1899) 19.

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is based on the wajib-ul-arz of a village, Serai Sitam, in the Jaunpur district. The sale which it seeks to avoid was a sale of 7 bighas of land in that village, and was made on the 29th September 1896. The wajib-ul-arz was framed at the last settlement in 1880-81. The part of it relating to pre-emption is contained in chapter 11, which is headed "As to the rights of co-sharers among themselves based on custom or agreement." S. 13 of the chapter is headed "As to the custom of right of pre-emption." In regard to the precise English equivalents of some of the expressions used in the pre-emption clause, there has been some dispute. The following is a translation of the clause, leaving the disputed terms as they stand in the original :—

"If any *hissadar* wishes to transfer his share (*hissa*), first he will transfer it to his own brother, then to his near relatives, thirdly, to owners in the village who are partners in the same *khata* (*malikan sharik khata*), fourthly, to the *hissadaran deh* : if none of these purchase, then he is competent to transfer it to any one he likes."

[6] The plaintiff claims pre-emption as one of the fourth class of pre-emptors mentioned in the clause, the *hissadaran deh*. The defendant vendee is admittedly a stranger to the village. It is not disputed that until 1888 or 1889 the plaintiff would have been entitled to pre-emption under the wajib-ul-arz as a *hissadar deh* in respect of such a sale as that of the 29th September 1896. Up to that time the village Serai Sitam formed a single mahal, of which both the plaintiff and the defendant vendor were co-sharers. But in 1888 or 1889 the mahal was divided by a perfect partition into three separate mahals. The plaintiff is a co-sharer in one of the new mahals : the property in suit is situate in another, in which he is not a co-sharer. No new wajib-ul-arz has been framed for any of the new mahals. The suit is based upon the custom of pre-emption alleged by the plaintiff to prevail in the village Serai Sitam, and upon the status of the plaintiff as a *hissadar* of the village within the meaning of the wajib-ul-arz. The principal defence was that no such custom existed, and that upon the partition of Serai Sitam the pre-emption clause of the wajib-ul-arz of 1880-81 ceased to have effect. No evidence of the custom except the wajib-ul-arz was produced. Upon that document the Courts below decided that the custom was proved, and that the plaintiff was entitled to pre-emption in accordance with the wajib-ul-arz, notwithstanding the partition. On appeal by the defendants to this Court, Mr. Justice Blair stated the question involved as "whether the wajib-ul-arz of a mahal before partition applies to each part which is partitioned off into a separate mahal," and said that there had been of late years a *cursus curiæ* according to which many, if not all, of the Judges of this Court had held in principle "that the old wajib-ul-arz disappears with the legal entity to which it applied." He accordingly set aside the decree of the Court below and dismissed the suit, and in this appeal under the Letters Patent we have to say whether his decision was right.

It appears to me to be incorrect to say that, upon a perfect partition of a mahal, the wajib-ul-arz necessarily "disappears" **[7]** or ceases to exist. There is no such general rule of law. The wajib-ul-arz forms part of the record-of-rights which the settlement officer has to frame for each mahal under s. 62 of the Land Revenue Act. It is true that both that section and s. 3 (1) speak of this document as the record-of-rights for the mahal, and this suggests that when the mahal is destroyed by perfect partition the record-of-rights becomes inoperative. But s. 191 provides that "in all cases the existing record-of-rights

shall remain in force until a new record-of-rights is framed." It was held by this Court in *Kedar Nath* v. *Ram Dial* (1), that the Collector had an implied power, upon the partition of a mahal, to frame a new record-of-rights for each of the new mahals so constituted. It was further held in *Abdul Hai* v. *Nain Singh* (2) that it was the duty of the Collector or Assistant Collector to do so. Where that is done, the old wajib-ul-arz is, of course, superseded. But it is often not done, and, in the absence of any such new wajib-ul-arz, the old wajib-ul-arz remains in force except so far as its provisions are inconsistent with the state of things which the partion has created. That was expressly held to be "clear law" by Mr. Justice Blair in *Mithu Lal* v. *Muhammad Ahmad Said Khan* (3). Then, if the wajib-ul-arz as a whole is not necessarily abrogated by a perfect partition, is there any more ground for holding that the pre-emption clause of it is so abrogated? In the case just referred to, Mr. Justice Aikman said that he could not draw the conclusion that the custom of pre-emption recorded in the old wajib-ul-arz had fallen into abeyance from the fact that the officer who carried out the partition omitted to prepare a new wajib-ul-arz. If the custom may still be in force, the wajib-ul-arz is still good evidence of it. Some of the decisions cited to us appear to lay down a general rule of law that, after a perfect partition, no claim for pre-emption can be successfully made on the basis of the old wajib-ul-arz. Others, going to the opposite extreme, [8] appear to regard partition as a purely fiscal arrangement concerned exclusively with the collection of the Government revenue, and having no possible bearing upon any contract or custom of pre-emption. Both views appear to me equally open to the objection that they treat as an abstract question of law what is really a question of the construction of a particular contract or the interpretation and application of a particular custom. In many of the cases the terms of the particular pre-emption clause upon which the decision properly depended are not even referred to. This mistaken way of looking at the subject appears to me to account for much of the conflict of authority which undoubtedly exists. The pre-emption clause of a wajib-ul-arz may constitute either a contract of the co-sharers or the record of a custom found by the settlement officer to prevail among them. In all that follows, I assume that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. Upon that supposition, where the clause constitutes a contract, the question whether or how far it is applicable after a perfect partition is one of the proper construction of its terms. In other words, the question is whether the intention of the parties as expressed in the clause was that the right of pre emption should exist only so long as the village remained a single mahal, of which they were the co-sharers, or that it should be wholly unaffected by the destruction of the mahal and the severance of that co-parcenary bond, or that it should be claimable after partition by those only who continued to be co-sharers in any of the separate mahals. If the contract unmistakeably confined the right to the existing co-parcenary body, there can be no doubt that it would not survive the partition. If it contained this express covenant —"no person hereby entitled to pre-emption shall be deprived of his right by any perfect partition of the mahal"—it would be difficult to contend that partition would affect the right. If it expressly

(1) 15 A. 410. (2) 20 A. 92. (3) 19 A.W.N. (1899) 19.

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provided that all who were still co-sharers should have the right notwithstanding any perfect partition, then those who continued to be [9] co-sharers in any of the new mahals, but no others, would have a good claim. If, in any of these three cases, the terms used were less clear, the question would still be whether the same intention was to be inferred from them. Again, where the clause does not constitute a contract but records a custom, the question is still one of its true meaning, though in this case, considering that the wording of the clause is often the composition of some ignorant subordinate whose accuracy cannot be assumed, the only safe course is to look to the substance of the thing, and not to attach undue weight to the particular expressions used. The question is whether the custom is one which necessarily presupposes the continuance of the co-parcenary body existing at the time when the clause was framed. If the custom recorded is one by which the right of pre-emption is confined to co-sharers of the then existing mahal, then it appears to me that it can no more exist in favour of others after the mahal and that particular co-parcenary body have been destroyed by perfect partition than any other custom can continue after the class among which it has always prevailed has perished. On the other hand, it is possible to imagine a custom of pre-emption which does not depend upon the continued existence of the undivided mahal and its co-parcenary body. A custom in favour of the brothers, or other near relatives of the vendor, might be an instance. Again, when a settlement officer records a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognized as still applicable within the new mahal. In one of the cases cited to us, and no doubt in a great many other cases, the settlement officer simply copied *verbatim* in the new wajib-ul-arz the pre-emption clause of the old one. This implies that the old custom thus continued is regarded as a custom [10] of the co-sharers, still applicable to all who, notwithstanding the partition, stand in the relation of co-sharers, not a custom necessarily confined to co-sharers while members of the co-parcenary body of the old undivided mahal. For these reasons, the decisions which treat the question of the effect of a perfect partition upon the pre-emption clause as capable of an absolute and invariable answer appear to me to be based upon a wrong principle.

At the same time, it would be a mistake to conclude that in deciding whether a contract or a custom of pre-emption recorded in the wajib-ul-arz is applicable after a perfect partition, no general considerations are of any value. In every case we must place ourselves as nearly as possible in the position of the parties and have regard to the surrounding circumstances. In particular, one must remember what is the nature of the co-parcenary body in an undivided mahal, the nature of the wajib-ul-arz prepared by the settlement officer, the meaning and object of pre-emotion, and the meaning and object of perfect partition. The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled in cases of zamindari tenure with the holding and management of the whole of the lands of the mahal by all

the co-sharers in common. It is for the mahal, for the "local area held under a separate engagement for the payment of the land revenue," not for a village or other local area not being a mahal, that the settlement officer frames the wajib-ul-arz. It is meant as a record of the contracts or the customs of the co-sharers of the mahal. This being its object, it is *prima facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit or of the co-parcenary body for which it is framed. Next, what is pre-emption? It is a right very closely connected with the objects of the co-parcenary system. Its essential purpose is the exclusion of strangers and the maintenance of the existing proprietary body throughout all changes of ownership. It thus *prima facie* [11] implies that the co-parceners desire to preserve and not to destroy their mutual connection, and is *prima facie* inapplicable after that connection has been severed by a perfect partition. Lastly, what is a perfect partition? It is defined by s. 107 of the Act as "the division of a mahal into two or more mahals." Its object is the exact opposite of the object of pre-emption; it is to completely break up the connection hitherto existing between the co-sharers; to put an end to their joint and several responsibility for payment of Government reveuue; to destroy altogether the distinction between them and strangers. Sometimes partition is effected in order to get rid of a quarrelsome or litigious co-sharer who seeks to take more than the others consider him entitled to: *Ghure* v. *Man Singh* (1), *Mithu Lal* v. *Muhammad Ahmad Said Khan* (2). Sometimes it is because some of the co-sharers "do not pay their quota of the Government revenue regularly, thereby bringing liability for their arrears upon all the co-sharers of the mahal:" *Abdul Hai* v. *Nain Singh* (3). Whatever the reason, the co-sharers can no longer get on comfortably together, and partition is the process which enables them to separate. It is therefore *prima facie* unlikely that, in the case of a contract, the co-sharers should intend that pre-emption, which implies the distinction between the co-parceners and outsiders, should continue after a partition by which that distinction is abolished. It is also unlikely, as pointed out by Mr. Justice Knox in *Ghure* v. *Man Singh*, that a custom "recorded at a time when the village bore its natural and, from a Hindu point of view, proper form of an undivided village and an undivided mahal," would be applicable "when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place." I agree with him that it would require "strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and [12] provides when these circumstances have been wholly altered." I also agree with the learned Judges who decided *Abdul Hai* v. *Nain Singh* that "it would require very strong evidence to satisfy us that after shareholders in a mahal have applied for and obtained partition and consequent separation of their interest from other shareholders in the mahal, they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal, and become again their co-sharers." Some of these considerations obviously do not apply where the right is claimed after partition by persons who, having been co-sharers in the undivided mahal, are still co-sharers with the vendor in one of the separate mahals. Partition has

(1) 17 A. 226. (2) 19 A.W.N. (1899) 19 (21). (3) 20 A. 92 (94).

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not, as regards them, made so radical a change, they are as closely united as before, though by a new bond; there is still the distinction between them and strangers which it is the object of pre-emption to preserve. The inference which I draw is that while it depends in every case on the particular circumstances and especially upon the terms of the particular wajib-ul-arz, whether or how far pre-emption can be claimed under it after a perfect partition, there is a strong presumption against such a claim, when made by persons who are no longer co-sharers of the vendors. Where the language of the wajib-ul-arz is ambiguous, this presumption may be decisive.

The earliest case which was cited to us is *Motee Sah* v. *Musummat Goklee* (1). The terms of the wajib-ul-arz are not stated in the report, and it does not appear whether the claim for pre-emption was based upon contract or upon custom. The judgment contains this passage:—"Now, an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." I infer that the wajib-ul-arz in that case confined the right of pre-emption to co-parceners [13] of the vendor, and that after the partition the plaintiff was not such a co-parcener in one of the new mahals. Upon that assumption the decision was no doubt right. If, however, the passage means that, whatever the terms of the wajib-ul-arz, no one can in any case successfully claim pre-emption who is not a co-parcener of the vendor, it is, in my opinion, too widely expressed. The unreported case of *Abdullah Khan* v. *Halimunnissa* (F.A. No. 69 of 1882) is cited in *Shiam Sunder* v. *Amanant Begam* (2) as laying down the rule that, despite the partition of a village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. No such proposition is to be found in any of the three judgments successively remanding the case, nor in the judgment finally disposing of the appeal. The precise terms of the pre-emption clause do not appear from the paper-book, but it was a contract giving the right to "sharers" or "owners." The plaintiffs, did not, after the partition, own any share in the new mahal in which the property sold was situate. The remand order of the 22nd April, 1884, contained this passage:—"In our opinion the wajib-ul-arz, never having been withdrawn, is still binding, and the plaintiff's appellants are entitled to come into Court to enforce its terms, if they can show themselves to be, and this is admitted that they are, co-sharers in the villages of Khushalpur and Majri." As, however, the High Court apparently accepted the lower Court's finding on remand that the villages in question had not been partitioned in the manner and with the formalities required by the Land Revenue Act, I cannot regard that case as instructive. The next case is *Gokal Singh* v. *Mannu Lal* (3) decided by Petharam, C. J., and Mahmood, J., in 1885. The pre-emption clause is not set out in the report, but apparently it contained a contract, and gave the right of pre-emption to persons described in the report as "share-holders" or "partners" in the "village" but in the Subordinate Judge's judgment as "co-sharers" or [14] "co-parceners." In the undivided village the two plaintiff's held a one-third share, and the vendor and another person one-third each. There was a

(1) S.D.A.N.W.P. (1861) Vol. I. p. 506. (2) 9 A. 234 (238). (3) 7 A. 772.

perfect partition by which each one-third share was divided from the others and made a separate mahal. After the partition, therefore, the plaintiffs were still co-sharers, but no one was a co-sharer of the vendor, who was the sole proprietor of one of the separate mahals. The sale to which the suit related was of the whole of that mahal. The judgment of Petheram, C.J., appears to have been based, first on the use of the word "village" as distinguished from "mahal," and secondly, on the view that the word "shareholder," "partner" or the like would, notwithstanding the partition, still apply to persons "living in" the village and sharing in the common use of roads, drains and other public things. The interpretation of the word share-holder as referring not to proprietary interest but to residence and participation in the use of roads and drains is very singular. Mahmood, J., whom the report represents as simply concurring with Petheram, C.J., delivered a separate written judgment, which appears to have escaped the Reporter's notice. He apparently held that the partition was not "perfected" or complete so as to constitute the separate mahals until a new wajib-ul-arz had been framed for each divided portion of the original mahal. So far as I know, there is no other authority for that view. The learned Judge further held that the pre-emption clause of the old wajib-ul-arz, not having been superseded by any new covenant, was still in force. "The mere apportionment of revenue and the disseverance of the liability to that revenue could not, *ipso facto*, defeat a covenant relating to pre-emption entered into by all the co-sharers for the time being, and which covenant ran as an incident of the tenure of the lands owned by them before such partition. In the second place, the terms of the pre-emption clause of the wajib-ul-arz speak not of the co-sharers of the mahal but of the village, and the distinction between these two terms seems to me sufficiently obvious, as explained by the learned Chief Justice." It appears to me that the whole question was whether the plaintiffs, **[15]** when they brought their suit, were co-sharers of the village within the meaning of the contract. That depended on whether the pre-emption clause meant by co-sharers of the village all persons owning shares within any part of the village area, or all whose shares were co-extensive with the whole of that area, or all who, whether in the whole or in part of the village, were co-sharers of the vendor. If it had the first meaning, then the plaintiffs, being co-sharers of one of the mahals into which the village was divided, were entitled to pre-emption. If it had the second meaning, neither the plaintiffs nor any one else were entitled to pre-emption, for the class of co-sharers of the village in that sense ceased to exist when the partition was made. If it had the third meaning, the plaintiffs were not entitled to pre-emption, for they were not co-sharers of the vendor, who was the sole proprietor of his mahal. The next case is *Jai Ram* v. *Mahabir Rai* (1). The terms of the wajib-ul-arz are not stated in the report. From the paper book it appears that the pre-emption clause gave a right of pre-emption (apparently by custom) "to brothers and sharers of of the thoke, and if the thoke-walah refuses, then to other shareholders." There was a partition by which one of the pattis of the mahal was divided from the rest and made a separate mahal. A new wajib-ul-arz was framed for the new mahal, giving a right of pre-emption to the co-sharers of that mahal, but not to the co-sharers of the pattis remaining with the original mahal. There was a sale of property, part of which was in the

(1) 7 A. 720.

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new mahal and part in the other pattis. A co-sharer in those pattis, but not in the new mahal, sued for pre-emption, excluding from the suit so much of the property sold as was situate in the new mahal. The defendant pleaded that, according to certain rulings of this Court, a suit for pre-emption could not be maintained in respect of part only of the property sold. The plea was overruled and the suit decreed, on the ground that as the suit included all the property sold which the plaintiff was entitled to pre-empt, the rulings referred to were inapplicable. Mahmood, J., held that the effect of the partition [16] was to exclude property in the new mahal from the operation of the old wajib-ul-arz, and to place it under the new wajib-ul-arz which gave the plaintiff no right of pre-emption. Oldfield, J., without referring to the new wajib-ul-arz, held as to the old one that "the condition as to pre-emption only affected the share-holders of the mahal so long as they remained shareholders, and ceased to have effect upon those share holders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could, after the separation, exercise no right of pre-emption against and in respect of share-holders and property so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated." It is noticeable that no suggestion appears to have been made that the partition affected the plaintiff's right under the old wajib-ul-arz to pre-empt the property not situate in what was called "the new mahal." The judgments treat the partition not as destroying the "old mahal"—that is, the undivided mahal—but as merely detaching from it and converting into a new and separate mahal one of its pattis. It follows, however, from the definition in the Land Revenue Act of perfect partition as "the division of a mahal into two or more mahals," that after the partition both the mahals were "new," the old mahal with its co-parcenary body had disappeared, and for it were substituted two new mahals, each with a separate co-parcenary body of its own. Whether in that view the right of pre-emption given by the old wajib-ul-arz to the co-sharers of the original undivided mahal could be claimed by a co-sharer of the larger of the two mahals into which it was divided, was a question not considered by the Court. In *Siam Shundar* v. *Amanant Begam* (1) decided by Straight and Tyrrell, JJ., in 1887, the pre-emption clause was described as a contract. At the time when the wajib-ul-arz was framed, the plaintiff was a co-sharer with the vendor in the three villages to which it related. It gave a right of pre-emption to "shareholders" [17] or "co-sharers" in the village or mauza. Afterwards there was a perfect partition by which the plaintiff's shares were formed into a separate mahal, of which he was the sole proprietor, but no new wajib-ul-arz was made. The judgments do not discuss the terms of the wajib-ul-arz upon which the claim was based. They state the question for decision as "whether, this partition having taken place, the conditions of the wajib-ul-arz which subsisted prior thereto, and which has not been replaced by another, are still effectual and binding on all the persons who were originally co-sharers in the villages." Upon this they observe:—"The question is by no means without difficulty, and, were it *res integra*, we should have had some doubts in deciding it. There are, however, two rulings of Division Benches of this Court—one *Gokal Singh* v. *Mannu Lal* (2) and the other an unreported case, F. A. No. 69 of 1882—the

(1) 9 A. 234.

(2) 7 A. 772.

former of which has been followed in the present suit by the Court below, that are directly in point. We are not prepared, as at present advised, to reconsider the rule therein laid down, to the effect that despite the partition of the village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. We may add that this view is supported by the terms of the second paragraph of s. 191 of the Revenue Act of 1873." In this passage the effect of the two cases cited is not, in my opinion, accurately stated. No such rule or presumption is laid down in either. The second paragraph of s. 191 only provides that the existing record-of-rights shall remain in force until a new record-of-rights is made. It implies no presumption as to the construction to be placed on the terms of the wajib-ul-arz, nor as to whether co-sharers in the separate mahals, or even a sole proprietor of one of them, can claim the benefit of a pre-emption clause in favour of co-sharers in the undivided mahal. The case of *Kuar Dat Prasad Singh* v. *Nahar Singh* (1) decided by Straight and Mahmood, JJ., in 1888, does not throw much **[18]** light on the subject. There was no question of the application after partition of a wajib-ul-arz framed for an undivided mahal. There was a perfect partition of a village into two separate mahals, for each of which a wajib-ul-arz was framed. The suit was based on one of these wajib-ul-arzes; it was brought by a co-sharer in the mahal, though not in that patti of the mahal in which the property sold was situate; and the question was whether, according to the pre-emption clause, such a co-sharer was entitled to preference over the vendee who was a co-sharer in a patti of the other mahal. The judgment was based on the terms of the wajib-ul-arz, but it contained this passage:—"It must be distinctly understood that this view of this particular wajib-ul-arz in no way ignores any other decision that may have been passed in cases where one wajib-ul-arz having existed for the purpose of a common village area, and that village area having been divided into separate revenue areas, and no new wajib-ul-arz having been drawn up, such wajib-ul-arz has been held to apply generally to the new area. The principle upon which that view of the law is based is to be found stated in the case of *Gokal Singh* v. *Mannu Lal*, and this principle, which is further elaborated in another ruling at page 720 of the same volume (*Jai Prasad* v. *Mahabir Rai*) is that this pre-emptive right runs with the land and the division of that land for the purposes of the revenue in no way affects any covenant or agreement existing between the co-sharers." That is, in my opinion, a misleading description of the effect of perfect partition, an inaccurate account of the case of *Gokal Singh* v. *Mannu Lal*, and a most extraordinary misconception of the judgments in *Jai Prasad* v. *Mahabir Rai*. The learned Judges in the latter case did not elaborate any principle stated in the former, and, so far from holding that the pre-emptive right ran with the land and that partition did not affect any agreement between the co-sharers, held, as nearly as possible, the very reverse.

In *Ramjiawan Sahu* v. *Raturaj Singh* (2) decided by Straight and Tyrrell, JJ., the question was whether under the **[19]** wajib-ul-arz of an undivided village, which gave rights of pre-emption to "co-sharers," the plaintiff as a co-sharer of one only of the two separate mahals into which the original mahal had been divided, could pre-empt property in the

(1) 11 A. 257.

(2) 9 A.W.N. (1889) 82.

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other. No new wajib-ul-arz had been framed. The learned Judges held that "the right of pre-emption was one created by agreement between the co-sharers of the village, and constituted a covenant which attached to and ran with the land. The mere fact that for purposes of revenue the village has been divided into two revenue-paying areas does not put an end to that covenant, which still attaches to all the land which formed a part of the original village unit, and will until it is abrogated. In support of this view, we may refer to I. L. R., 7 All., 772." I cannot agree either with the conception of pre-emption as a covenant running with the land, or with the conception of a perfect partition as an exclusively fiscal operation involving no material change in the pre-emptor's status as a co-sharer, or with the view that either conception is supported by *Gokal Singh* v. *Mannu Lal*. To describe pre-emption as a covenant running with the land is to misapply a technical term of English real property law. To describe perfect partition as concerned exclusively with "purposes of revenue" is to ignore half its effect. In *Abbasali* v. *Ghulam Nabi* (1) Knox, J., held in substance that the partition of a village consisting of a single mahal into two separate mahals, in one of which the plaintiff and the vendor were co-sharers, and in the other the vendee was a co-sharer, did not render the previously framed wajib-ul-arz inapplicable, and that under it the vendee was equally entitled with the plaintiff as a co-sharer of the vendor. The learned Judge did not discuss the effect of the word which he translated "shareholder," but merely observed that the case was one in which the principle which should guide the Court was that contained in *Gokal Singh* v. *Mannu Lal*, and in another case which does not seem very applicable. The circumstances of the next case, *Mata Din* v. *Mahesh Prasad* (2) were peculiar. There **[20]** was a village or mauza originally forming a single mahal, and the wajib-ul-arz gave a right of pre-emption to "hissadaran" (translated by the learned Judge as "co-sharers") not of the "mahal" but of the "mauza." There was a prefect partition of the village into three mahals, for each of which a new wajib-ul-arz was framed, and in each the pre-emption clause was copied *verbatim* from the old wajib-ul-arz. At that time one of the new mahals belonged to a single owner. Upon the sale of property in that mahal a suit for pre-emption was brought by a person who was a co-sharer in another of the new mahals. Mr. Justice Mahmood held that the plaintiff was entitled to pre-emption as a co-sharer of the mauza, notwithstanding the partition and the fact that he was not a co-sharer of the vendor in the mahal where the property was situate. Although the judgment refers to some of the previous cases, it treats the question as strictly one of the intention of the parties to the contract contained in the wajib-ul-arz. The learned Judge held that, from the use in that wajib-ul-arz of the expression "co-sharers of the mauza" as distinguished from the mahal, from its exact reproduction of the pre-emption clause of the wajib-ul-arz of the undivided village, and from the circumstance that when the new wajib-ul-arzes were framed, one of the new mahals belonged to a single owner, it was to be inferred that the parties to those instruments intended to preserve the right of pre-emption on its original footing as a right to be enjoyed by all who were formerly co-sharers of the mauza, notwithstanding the partition. It was as if each new wajib-ul-arz had said, "the right of pre-emption shall belong not only to the co-sharers of this mahal but to all persons who, prior to the

(1) 11 A.W.N. (1891) 137.

(2) 12 A.W.N. (1892) 100.

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partition, could have claimed pre-emption under the old wajib-ul-arz as co-sharers of the undivided mauza." In other words, they desired to confine the effect of the partition as nearly as possible to "fiscal purposes as to the payment of Government revenue," and to retain some distinction between the old co-parcenary body and total strangers to the village. Whether Mr. Justice Mahmood's conclusions [21] in that particular case were correct or not, I cannot doubt that his method of deciding it upon the construction of the contract contained in the wajib-ul-arz was the right one.

In *Angan Lal* v. *Hamidulnissa* (S.A. No. 1249 of 1892) the question was discussed in the judgment of Tyrrell and Blair, JJ., remitting certain issues on the 29th June 1894. The claim for pre-emption was based on the wajib-ul-arz of a mahal consisting of 12 biswas only of a mauza. In that mahal the plaintiff and the vendors were co-sharers. The wajib-ul-arz gave the right of pre-emption by contract to sharers (*sharkai*) in the mahal. There was a perfect partition by which the 12 biswas mahal was divided into four separate mahals. In one of these, in which the property in question was situate, there were several co-sharers, including the vendors, but not the plaintiff. Of another of the four, the plaintiff was the sole proprietor. No new wajib-ul-arz was framed. After the partition, the vendors sold some of the land in their new mahal to a stranger. The plaintiff sued for pre-emption on the basis of the old wajib-ul-arz. I think there can be no doubt that the suit was rightly dismissed. The plaintiff was not a *sharik* or sharer in the mahal, within the meaning of the wajib-ul-arz. The class of sharers in that mahal had ceased to exist with the mahal itself. The plaintiff was not even a *sharik* or sharer in the new mahal in which the property sold was situate. The Court distinguished *Gokal Singh* v. *Mannu Lal*, *Kuar Dat Prasad Singh* v. *Nahar Singh*, *Ramjiawan Sahu* v. *Raturaj Singh* and *Abbas Ali* v. *Ghulam Nabi*, on the grounds that in those cases the mauza and the mahal were originally conterminous; that in them the wajib-ul-arz gave rights of pre-emption not to co-sharers in the mahal but to shareholders in the mauza, and that therefore the right there survived the partition of the mahal into separate mahals for which no new wajib-ul-arzes were framed. In *Ghure* v, *Man Singh* (1), decided in 1895, the wajib-ul-arz of a village forming a single mahal gave the right of pre-emption to "*hissadaran deh*," the same expression as is used in [22] the wajib-ul-arz in the present case. There was a perfect partition of the village into three separate mahals, and for each mahal was framed a new wajib-ul-arz which gave no right of pre-emption to sharers in the other mahals. A suit for pre-emption based on the old wajib-ul-arz was brought by a co-sharer of one of the separate mahals to avoid a sale of land situate in another of them. Two questions arose. The first was whether the new wajib-ul-arz was prepared in accordance with law so as to govern the rights of the parties. The second was whether the old wajib-ul-arz was still operative, notwithstanding the partition, and whether the plaintiff was entitled to pre-emption under its provisions. Upon the first question, the Court held that the new wajib-ul-arz was a valid document, and that, as it gave the plaintiff no right of pre-emption, the suit failed. Upon the second they held that the plaintiff could not, after the partition, successfully claim pre-emption on the basis of the old wajib-ul-arz. In reference to the argument for the plaintiff based on the words

(1) 17 A. 226.

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"*hissadar deh*" Mr. Justice Knox made the following important observations :—

"We are dealing with a village which bears a Hindu name, the parties before us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining the terms in which it is recorded, we cannot forget that it was recorded at a time when the village bore its natural, and, from a Hindu standpoint, proper form of an undivided village and an undivided mahal. The term "*hissadar deh*" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were shareholders, and at a time when there existed no intention of the village brotherhood being separated or the land being broken up into distinct parcels, in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensures when perfect partition takes place."

[23] The learned Judge proceeded to distinguish *Gokal Singh* v. *Mannu Lal*, *Mata Din* v. *Mahesh Prasad*, *Kuar Dat Prasad Singh* v. *Nahar Singh* and *Shiam Sundar* v. *Amanant Begam*, with reference to the special circumstances of those cases. He concluded as follows :— "The result then is that the document upon which the respondents base their right, and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed, and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things." Mr. Justice Aikman, after holding that the new wajib-ul-arz would supply a sufficient answer to the suit, expressly stated that this would be enough to decide the case. What follows is therefore *obiter*. He proceeded to discuss the question "whether after a partition an owner of land in one mahal can assert a right of pre-emption when a sale is made of property situated in another mahal." After observing that it had never been held that a right of pre-emption disappears with an *imperfect* partition, he referred to *Motee Sah* v. *Musammat Goklee* and *Jai Ram* v. *Mâhabir Rai* in support of the view that "it is different in the case of perfect partition." He dissented from the decision in *Gokal Singh* v. *Mannu Lal* and expressed the opinion "that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other mahals, such right of pre-emption is not to be presumed from the mere fact that, when the village formed but one mahal, the co-sharers had pre-emptive rights against each other." I agree that there is no such presumption, but in deciding whether the right has been established, the terms of the wajib-ul-arz and the state of things existing when it was framed, as well as that existing at that time of partition, must, I think, be considered. However, there is nothing in Mr. Justice Aikman's **[24]** judgment to the contrary, and he expresses no disagreement with Mr. Justice Knox. The decision in that case was followed by Mr. Justice Aikman in *Abdul Aziz Khan* v. *Husen Ali* (1) and by Mr. Justice Knox

(1) 15 A.W.N. (1895) 233.

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in *Shah Bindraban Das* v. *Dani Ram* (S. A. No. 675 of 1897). The claim in the former case appears to have been based on custom. The judgment holds in substance that, after perfect partition, the benefit of a custom of pre-emption recorded in the old wajib-ul-arz as prevailing among the co-sharers of the undivided mahal could be claimed by a co sharer of one of the separate mahals in respect of property situate therein, but not in respect of property situate in another mahal of which he was not a co-sharer. The reason of this distinction must be that in the former case, but not in the latter, the claim is made by a co-sharer of the vendor. In neither case, however, is it made by a co-sharer of the mahal, to which alone the wajib ul-arz presumably referred. Whether the distinction was justified or not depends, in my opinion, upon the terms of the wajib-ul-arz. It would not, I think, be safe to assume that a custom prevailing among the co-sharers of mahal A would, after the destruction of that mahal and of the-co-parcenary body connected with it, necessarily apply to the co-sharers of mahal B or mahal C, into which A has been partitioned. In this respect Mr. Justice Aikman's decision appears to be inconsistent with that of Mr. Justice Knox in *Shah Bindraban Das* v. *Dani Ram*, which, however, also purports to follow *Ghure* v. *Man Singh*. For in the case before Mr. Justice Knox, the claim for pre-emption based on the old wajib ul-arz was made by a person who, after perfect partition, was a co-sharer of the vendor in one of the separate mahals. He claimed as coming within words which the Court of first instance translated as "co-sharers in the order of nearness, with regard to their holding shares in the village." No new wajib-ul-arz was framed. The vendees were admittedly strangers. Mr. Justice Knox confirmed the decree of the lower appellate Court dismissing the suit. His judgment treats *Ghure* v. *Man Singh* as not merely stating certain presumptions **[25]** of fact are considerations as to what is probable in given circumstances, but as giving a general answer in the negative to the question "whether a wajib-ul-arz which was prepared at a time when the village out of which two separate mahals have now been carved by perfect partition and for each of which separate mahals no wajib-ul-arz of any kind has been framed, governs the co-sharers in the two new mehals upon a question of the right of pre-emption based upon a covenant said to be contained in the old wajib-ul-arz." In *Abdul Hai* v. *Nain Singh* (1) the terms of the wajib-ul-arz do not appear from the report or from the paper-book. It appears, however, to have recorded a custom of pre-emption as prevailing in the undivided village. The village was divided by perfect partition into two mahals consisting respectively of 15 biswas and 5 biswas. No new wajib-ul-arz was framed. The whole 5 biswas mahal belonged to the defendant vendor, and he sold it to strangers. The owner of a share in the 15 biswas mahal only sued for pre-emption on the basis of the old wajib-ul-arz. The High Court on appeal dismissed the suit. The judgment of Edge, C.J., and Blair, J., refers with approval to *Ghure* v. *Man Singh* and *Angan Lal* v. *Hamid-ul-nissa*. The principle on which it is based is the improbability, having regard to the usual objects and motives of shareholders obtaining perfect partition of a mahal, that they should, after partition, intend that the other co-sharers from whom they had separated their interest should be entitled to come in and become again their co-sharers. The last reported case is *Mithu Lal* v. *Muhammad Ahmad Said Khan* (2) decided by Blair

(1) 20 A. 92.

(2) 19 A. W. N. (1899) 19.

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and Aikman, JJ. The suit was based on a pre-emption clause recording a custom of pre-emption in favour of "co-sharers in the village." The village, at the time when the wajib-ul-arz was framed, was an undivided mahal. By a perfect partition it was afterwards divided into two separate mahals of 15 and 5 biswas respectively. No new wajib-ul-arz was framed. The plaintiffs and the vendors were co-sharers in the 5 biswas mahal, in which the property was sold. The vendee **[26]** was sole proprietor of the 15 biswas mahal, and his only connection with the other was that he owned in it certain rent-free land. His main defence to the suit was that the plaintiffs had no preferential right because he was himself a "co-sharer in the village" within the old wajib-ul arz, notwithstanding the partition. The High Court held in substance (1) that the old wajib-ul-arz and the old custom still remained in force in so far as they were not inconsistent with the state of things created by the partition, (2) that as in consequence of the partition the defendant had ceased to be a "co-sharer in the village" with the vendor, and was not a co-sharer in the 5 biswas mahal, he had not equal rights with the plaintiffs, and (3) that the plaintiffs were entitled to pre-emption under the old wajib-ul-urz. So far as this decision rejected the defendant's claim to the right of pre-emption, I have no doubt that it was right. But what about the claim of the plaintiffs? The Court in decreeing the suit assumed that the plaintiffs, at all events, were entitled to pre-emption under the old wajib-ul-arz, notwithstanding the perfect partition. Apparently they assumed it because the plaintiffs were admittedly co-sharers with the vendor in the 5 biswas mahal in which the property sold was situate. In other words they took for granted that co-sharers in one of the separate mahals were "co-sharers in the village" within the meaning of the wajib-ul-arz. It is likely enough that they were right, but they do not discuss the question. All depends on what the wajib-ul-arz meant by "co-sharers in the village." If it included all persons who might thereafter be co-sharers in any part of the village, the decision was right. If it meant all persons who were co-sharers in the entire undivided village for which the wajib-ul-arz was framed, the decision was wrong, for the plaintiffs, after partition, were no more co-sharers of the village in that sense than the defendant vendee. As a matter of fact the only co-sharers in the village at the time when the wajib-ul-arz was framed were co-sharers of the undivided village.

In the present case the whole question is, in my opinion, whether a *hissadar* has transferred his share within the meaning **[27]** of the wajib-ul-arz. and whether the plaintiff is a *hissadar deh* within the fourth category of pre-emptors. Taking first the word *deh*, it is, I think, virtually equivalent to *mauza*. It means a village in the sense of a definite local area, the actual village, with the lands belonging to it: Wilson's Glossary of Judicial and Revenue Terms, p. 141, Elliott's Supplementary Glossary of Terms used in the North-Western Provinces, Vol. ii, p. 283. It does not mean a mahal, and has no necessary reference to the fiscal unit. So far I agree with the argument on behalf of the plaintiff. The next question is, what is a *hissadar* of the village? The learned pleader contended that *hissadar* did not here mean a "co-sharer" of a mahal in the sense in which that term is used in the Land Revenue Act, but merely "the holder of a share." He argued that if co-sharers, in the sense of persons owning shares in the mahal formed by the undivided village, had been intended, some such word would have been used as "*sharik-i-mahal*," the term used for

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co-sharers in the official vernacular translation of the Land Revenue Act, or else "*sharik-i-hissa.*" He laid stress on the expression "*malikan sharik khatta*" in the third category of pre-emptors mentioned in the wajib-ul-arz as indicating that, where jointness of interest was signified, the word "*sharik*" was employed. According to this argument, a *hissadar deh* merely means one who owns or holds a share within the area of the village. If that is the meaning, then, notwithstanding the partition, the plaintiff is entitled to pre-emption, for the *deh* or village still remains, and he is still a *hissadar*, or owner of a share, within its area. On the other hand, it was contended for the defendants that *hissadar* means not merely the owner of a share, but a "co-sharer," and that *hissadar deh* means a co-sharer of the entire village for which the wajib-ul-arz was framed. If that is the meaning, then, as the effect of the perfect partition was to destroy the class of *hissadaran deh* altogether, neither the plaintiff nor anyone else can now claim pre-emption as a member of it.

The result of the argument is, I think, to show that the word *hissadar* taken by itself, and without reference to any context, **[28]** is ambiguous. In Wilson's Glossary it is translated "a shareholder, a sharer, a co-parcener, one who pays his share of revenue to a zamindar or to the State." Mr. *Durga Charan* has pointed out in the written statement of one of the defendants and in the deposition of a witness instances of the description of persons as *hissadars* of the village Serai Sitam, though, since the partition, no one has been a co-sharer of the entire village. All depends, I think, upon the context. There are two main considerations which have led me to the conclusion that in this wajib-ul-arz *hissadar deh* means a co-sharer of the undivided village for which the wajib-ul-arz was framed. The first is that the word "*hissadar*" as used in the fourth category of pre-emptors must be construed in the same sense as the same word in the opening words of the clause "if any *hissadar* wishes to transfer his share (*apna hissa*)." The word "*hissadar*" is there used without the word *deh*. Considering that a wajib-ul-arz is framed under the Land Revenue Act for a mahal, and that its chief purpose is to record the usages of co-sharers of the mahal in the sense of the Act, I think here is a strong presumption that the word "*hissadar*" when used in such a document means, in the absence of other expressions implying a different meaning, a co-sharer in that sense, a person jointly and severally responsible to Government for the revenue for the time being assessed on the entire mahal for which the wajib-ul-arz was framed, and, in cases of zamindari tenure, having a joint and undivided share in the whole of that mahal. The opening words of the clause mean therefore, in my opinion, "if any co-sharer of this mahal wishes to transfer his share therein." If so, the subsequent words "*hissadaran deh*" mean "co-sharers of the undivided village," not "owners of shares in any sub-division of the village." The second consideration is this. We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom it is essential to see who are the persons among whom it has in fact habitually prevailed. It cannot be claimed by anyone **[29]** who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the wajib-ul-arz was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which the village Serai Sitam then formed and no others. There was no distinction between shareholders in the village and

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co-sharers of the entire village; there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom therefore the right belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition—persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old wajib-ul-arz would be, in my opinion, to change the custom while professing to apply it.

For these reasons I am of opinion that the sale which the suit seeks to avoid was not a transfer within the meaning of the wajib-ul-arz, that the plaintiff is not entitled to pre-emption as a *hissaddar deh*, and that his suit and this appeal must be dismissed with costs in all Courts.

KNOX, J.—I concur in all that the learned Chief Justice has written, and have nothing more to add.

BURKITT, J.—I am of the same opinion.

BANERJI, J.—I have arrived at the same couclusion as the learned Chief Justice.

A claim for pre-emption not founded on Muhammadan law must be based on custom, or contract, or both. A wajib-ul-arz in so far as it relates to pre-emption, is the record of the custom of pre-emption which prevails in the village or mahal, or of the contract by which the co-sharers have agreed to be bound; **[30]** when therefore a wajib-ul-arz is referred to as the foundation of a claim for pre-emption, the real basis of the claim is the custom or contract which is evidenced by the wajib-ul-arz. Even if the wajib-ul-arz has become inoperative as a part of the record-of-rights, it does not necessarily follow that the custom or contract embodied in it has ceased, and that a suit cannot be brought upon the basis of such custom or contract. It seems to me that the conflict of opinion which arose in the numerous cases cited to us at the hearing and considered in detail by the learned Chief Justice was to a great extent due to the fact that in many of those cases the provisions of the wajib-ul-arz were treated as representing a contract between the co-sharers, whereas in fact they were, and professed to be, the record of a custom prevailing in the particular village or mahal. It was, I suppose, in consequence of this disregard of the exact nature of the claim that it was laid down in some of those cases that after a perfect partition has been effected a co-sharer in one mahal is not entitled to pre-empt property in another mahal "unless at the time of partition there has been some specific arrangement by which reciprocal rights of pre-emption have been maintained between the co-sharers of the different mahals." In my opinion the mere fact that a perfect partition has taken place does not abrogate a custom or contract as to pre-emption which was in force before partition. If after partition a new wajib-ul-arz has been prepared recording a custom or contract different from the custom or contract embodied in the old wajib-ul-arz, the presumption will be that the custom which obtained in the village or the mahal at the time of the preparation of the old wajib-ul-arz has fallen into desuetude, and a new custom has sprung up, or that the co-sharers have set aside the old contract and entered into a new one. But where a fresh wajib-ul-arz has not been prepared

at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect and operation. As observed by the learned Chief Justice, the question in each case it that of the construction of the nature of the particular custom or [31] contract on which the claim for pre-emption is based, and whether the custom or contract can apply to the altered state of things which has come into existence since a perfect partition has been effected.

In the case before us the wajib-ul-arz which was referred to as the basis of the claim professes to be the record of a custom and not of a contract. What we have to consider is whether under that custom the plaintiff has a preferential right of pre-emption. It is admitted that the plaintiff does not belong to the first three classes of pre-emptors mentioned in the wajib-ul-arz, nor does he come under the fourth category. Since partition he has admittedly ceased to be a co-sharer of the vendor. He no doubt holds a share in the village. But, in my opinion, the true construction of the custom as recorded in the wajib-ul-arz is that it is only such a shareholder as is also a co-sharer who has the right of pre-emption as a pre-emptor of the fourth class. At the time when the wajib-ul-arz was prepared all the shareholders were also co-sharers. The custom which was embodied in the wajib-ul-arz evidently had reference to that description of shareholders. Therefore by virtue of such a custom the plaintiff, who is the holder of a share in the village, but not a co-sharer of the vendor, has no right of pre-emption and his suit has been properly dismissed. I would dismiss this appeal with costs.

AIKMAN, J.—The question raised in this appeal is whether, when no new wajib-ul-arz has been prepared on the perfect partition of a mahal, a claim for pre-emption can be maintained on the basis of the old wajib-ul-arz framed for the former mahal, which has by partition been broken up into two or more mahals. I agree with the learned Chief Justice in holding that it is incorrect to say that upon partition the former wajib-ul-arz necessarily disappears or ceases to exist. If a fresh wajib-ul-arz is prepared for each of the new mahals the old wajib-ul-arz is thereby superseded, but until this is done the old wajib-ul-arz must be considered as in force, but only so far as it is applicable to the altered state of things.

[32] The cases in this Court which held that, because, under a wajib-ul-arz in force before partition there had been a right of pre-emption amongst those who were then co-sharers of the village, the same right subsisted after partition amongst those who owned shares in the different mahals of the village, lost sight, it appears to me, of the material alteration in the circumstances brought about by the partition.

Where the wajib-ul-arz of an undivided mahal, whether reciting a custom or embodying a contract, lays down that a right of pre-emption prevails amongst the "shareholders" of the mahal, it refers to a body of men between whom there is this common bond that they each own a fractional share of an integer made up of all the shares held by each, in virtue of which ownership they incur reciprocal liabilities and are entitled to reciprocal rights. When this common bond has disappeared it cannot be assumed that the reciprocal rights and liabilities which formerly existed are still in force. Where the old wajib-ul-arz recites the existence of a custom amongst a body of men between whom a common link subsists, I do not see how, after a prefect partition, it can reasonably be held that the custom continues to prevail amongst those between whom that common link is no longer in existence. Where, however, the wajib-ul-arz embodies a contract, I concur with the learned Chief Justice in holding

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that the question whether, in the altered state of things, the contract is still in force, must depend on the language of the old wajib-ul-arz. It is quite conceivable that the old wajib-ul-arz might set forth an express agreement that no future partition would destroy existing rights of pre-emption. But where there is no such express contract, and the old wajib-ul-arz merely records a right of pre-emption as existing by way of a contract amongst those who are *hissadars* of the village, the inference is that the language of the wajib-ul-arz refers to persons who stand to one another in the mutual relation of owning shares in the same integer.

In the present case the claim of the plaintiff was based on a clause in the wajib-ul-arz which occurs in a chapter dealing with [33] the rights of co-sharers amongst themselves. According to this clause a *hissadar* could not sell his share to an outsider until he had first offered it to the other shareholders in the village (*hissadaran deh*). This was the record of a custom. From the language used. the inference I draw is that the custom was one which prevailed amongst those who each owned a fractional share or *hissa* of one undivided estate, and cannot be held to subsist amongst those between whom there is now no such common bond. To use the words of Oldfield, J. – "The condition of pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect on those shareholders and their property who separated themselves and their property by forming a separate mahal" (1). The plaintiff in this case owns no property in the mahal in which the share sold is situated, and cannot therefore be held to be standing in the relation of *hissadar* to the *hissadar* who has sold.

For these reasons I think the plaintiff's suit was properly dismissed by our brother Blair, and I would dismisss this appeal with costs.

Appeal dismissed.

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Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BHAGWANTA AND OTHERS (*Plaintiffs*) *v.* SUKHI AND OTHERS (*Defendants*).* [12th June, 1899.]

Hindu Law—Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred—Limitation—Act No. XV of 1877 (Indian Limitation Act), s. 7; sch ii, art. 120.

Held that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being [34] to contest an alienation or an adoption by the widow is allowed to become barred by limitation as against

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* Second Appeal No. 879 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 13th July 1896, confirming a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd April 1896.

(1) 7 A. 720 (730).

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him, this will not bar the similar rights of the subsequent reversioners *Beni Prasad* v. *Hardai Bibi* (1), *Ramphal Rai* v. *Tula Kuari* (2), *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (3) and *Isri Dut Koer* v. *Mussumat Hansbutti Koerain* (4) referred to. *Chhaganram Astikram* v. *Bai Motigavri* (5) and *Pershad Singh* v. *Chedee Lall* (6) dissented from.

A minor plaintiff instituting a suit which falls within art. 120 of the second schedule of the Indian Limitation Act, 1877, is not excluded from the benefit of s. 7 merely because the right of some other person through whom he does not claim to sue for similar relief has become time barred. The "right to sue" mentioned in the third column of art. 120 means the right to sue of the plaintiff or of some one through whom he claims. The "period of limitation" mentioned in s. 7 means the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. *Siddhessur Dutt* v. *Sham Chand Nundun* (7), *Mrino Moyee Debia* v. *Bhoobun Moyee Debia* (8), *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry* (9) and *Gobind Chandra Sarma Mazoomdar* v. *Anand Mohun Sarma Mazoomdar* (10) referred to.

[**Diss.**, 14 Ind. Cas. 60=173 P.W.R. 1912; **F.**, 28 M. 57=14 M.L.J. 209; 16 Ind. Cas. 839 (841)=23 M.L.J. 269 (271)=12 M.L.T. 188=(1912) M.W.N. 912 (914); 13 M.L.J. 359; **R.**, 22 A. 382; 27 A. 37 (45) (**P.C.**)=2 A.L.J. 237=1 C.L.J. 46=32 I.A. 17=8 Sar. P.C.J. 727; 32 A. 33=6 A.L.J. 931 (939)=3 Ind. Cas. 725=6 M.L.T. 348; 32 C. 62=9 C.W.N. 25; 36 C. 780 (**P.C.**)=6 A.L.J. 567=11 Bom. L.R. 833=10 C.L.J. 58=13 C.W.N. 920=3 Ind. Cas. 382=5 M.L.T 423=93 P.R. (1909); 27 M. 588; 29 M. 390 (407)=16 M.L.J. 307=1 M.L.T. 183; 31 M. 366=18 M.L.J. 209=3 M.L.T. 355; 2 C.L.J. 87=9 C.W.N 795; 12 C.W.N. 857 (859); 17 C.W.N. 605=13 M.L.T. 437=(1913) M.W.N. 470 (472); 9 Ind. Cas. 300=26 P.R. 1911=34 P.L.R. 1911=33 P.W.R. 1911; 9 Ind. Cas 957 (960)=38 P.L.R. 1911; 17 Ind. Cas. 101 (105)=8 N.L.R. 113; 8 O.C. 124 (126); 184 P.W.R. 1911 =9 Ind. Cas. 957; **D.**, 58 P.R. (1905)=59 P.L.R. (1905); 68 P.R. (1905)=2 P.L.R. (1906); 21 P.W.R. 1907.]

THIS was a suit by certain plaintiffs, who claimed, as reversioners under the Hindu law, to get rid of the effect, as against their interests, of certain alienations of property which had been of their maternal grandfather, Richpal, in his lifetime. The plaintiffs asked for a declaration, first, that an alienation made in 1876, by a Hindu widow, their maternal grandmother, Sabej Kunwar, in favour of one Musammat Hanso, was void as against the plaintiffs; secondly, that a further alienation made by Musammat Hanso in 1893 to one Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs were entitled, after the death of their mother, Musammat Mattra, to possession of the property in suit. At the time of the alienation in 1876 by Sabej Kunwar, the plaintiff's mother, Musammat Mattra, was the nearest living reversioner. She became entitled to possession of the property in 1889, when her mother, the widow Sabej Kunwar, died; she took no steps to **[35]** question the alienation made in 1876. She was made a *pro forma* defendant to the suit, and in her written statement she pleaded that she did not wish to question either the alienation of 1876 or that of 1893. The suit was brought in 1894, all the plaintiffs being then minors, represented, for the purposes of the suit, by their father, Jewa Ram, as guardian *ad litem*.

The Court of first instance (Subordinate Judge of Agra), dismissed the suit as barred by limitation, holding that limitation began to run from the date of the alienation by Sabej Kunwar in 1876, and that the case was governed either by art. 120 or by art. 125 of the second schedule to

(1) F.A. No. 35 of 1888 decided February 4th, 1893, (14 A. 67).
(2) 6 A. 116. (3) 3 I.A. 72. (4) 10 I.A. 150=10 C. 324.
(5) 14 B. 512. (6) 15 W.R. C.R. 1. (7) 23 W.R. C.R. 285.
(8) 23 W.R. C.R. 42. (9) 7 W.R. C.R. 134. (10) 2 B.L.R. A.C. 313.

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the Indian Limitation Act, 1877. The plaintiffs appealed and the lower appellate Court (District Judge of Agra) dismissed their appeal, holding the suit to be barred by either art. 120 or art. 126. The plaintiffs appealed to the High Court.

Pandit *Baldeo Ram Dave*, for the appellants.

Article 125 of the Indian Limitation Act, 1877, is not applicable to this suit. That article is applicable to a suit brought during the lifetime of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to have an alienation of land made by such female declared to be void except for her life. In the present case, the female who made the alienation was dead before the institution of the suit. It has not been brought by a person who was entitled to possession immediately after the death of that female. The appellant's mother, Musammat Mattra, is still alive, and she is the person entitled to immediate possession She is a defendant to this suit. There is no article in the Limitation Act applicable to a suit of this class. Article 126, referred to by the Court of first instance, has no bearing on the question. Article 120 of the second schedule to the Act has been held by this Court to apply to suits for declaratory decrees——*Legge* v. *Ram Baran* (1). Under it a period of six years is provided, and the time from which it **[36]** begins to run is "when the right to sue accrues." The right to impeach an alienation made by a Hindu widow having a limited interest belongs to the presumptive reversionary heir——*Rani Anund Koer* v. *The Court of Wards* (2). The present plaintiffs have no right to sue for the declaration sought by them during the lifetime of their mother, who is the presumptive reversionary heir, unless they show that their mother has refused to sue without any sufficient cause, or has precluded herself by her own act or conduct from suing, or has colluded with the widow or concurred in the act which we say is wrongful——*Rani Anund Koer* v. *The Court of Wards* (2). We allege facts to that effect in the 8th paragraph of our plaint. So long as Sabej Kunwar was alive, the transferees had a right to be in possession of the property alienated to them, and Musammat Mattra could have abstained from taking any steps to impeach the alienation. But the moment she was dead, Musammat Mattra ought not to have allowed the alienees to remain in possession of that property to the prejudice of the plaintiff's right. If the plaintiff's allegations be true, the alienees become trespassers on the death of Musammat Sabej Kunwar. It is the conduct of Musammat Mattra, on the death of Musammat Sabej Kunwar, which gave the plaintiff a right to sue. The suit is within six years of the date of Musammat Sabej Kunwar's death. There is only one case of this Court, in which Mahmood, J., has ruled that a daughter's son could, during the lifetime of his mother, maintain a suit to impeach an alienation made by his maternal grandmother without proof of collusion or other circumstances on the part of the daughter——*Balgobind* v. *Ram Kumar* (3). Oldfield, J., who was one of the Judges who decided that case, held that the suit was maintainable as one coming within the exceptional circumstances under which a daughter's son could maintain such an action. The view of Mahmood, J., has been based on the doctrines of the English law concerning life estates, whilst the estate of a Hindu widow inheriting from her **[37]** husband is not, strictly speaking, what a life

(1) 20 A. 35. (2) 8 I. A. 14=6 C. 764. (3) 6 A. 431.

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estate is under the English law——Tagore Law Lectures for 1879, pp. 239—245. The view of Mahmood, J., is in direct conflict with the ruling in *Madari* v. *Malki* (1), decided by Straight, Officiating C. J., and Brodhurst, J. Following the latter ruling, Tyrrell and Blair, JJ., have in *Ishwar Narain* v. *Janki* (2) expressly dissented from the ruling of Mr. Justice Mahmood. That ruling is also opposed to the principles laid down in *Musammat Golab Koonwer* v. *Shib Sahai* (3), *Radha Kishen* v. *Bukhtawur Lal* (4), *Bal Gobind Ram* v. *Hirusranee* (5), and *Bama Soonduree Dossee* v. *Bama Soonduree Dossee* (6). In *Kandasami* v. *Akkammal* (7) and in *Raghupati* v. *Tirumalai* (8), the Madras High Court seems to have taken the same view as Mahmood, J., has in *Bal Gobind* v. *Ram Kumar* (9). But the weight of authority appears to be in favour of the plaintiff's case.

The ruling of the Bombay High Court in *Chhaganram Astikram* v. *Bai Motigavri* (10) has no application to a case governed by the Mitakshara law. In the Bombay case, to which the Mayukha law was applicable, the daughter took a full estate, and the daughter's son inherited to his mother. Under the Mitakshara law, a daughter takes only a widow's estate in the property left by her father, and a daughter's son inherits to his maternal grandfather. The case of *Pershad Singh* v. *Chedee Lall* (11), relied on by the Court below, has been decided on a misconception of the principle that under the Mitakshara law a daughter's son does not inherit to his mother but to the maternal grandfather in respect of the property left by him. In order to substantiate the proposition that the plaintiff's suit was barred by limitation, because a right to sue for a declaration had accrued to Musammat Mattra in 1876, it must be shown that the plaintiffs derived their right to sue from or through Musammat Mattra. **[38]** [Definition of the word "plaintiff" in s. 3 of the Indian Limitation Act.]

Any act or omission on the part of Musammat Mattra cannot be prejudicial to the right of the plaintiffs by way of *res judicata* or estoppel—— *Isri Dut Koer* v. *Mussumat Hansbutti Koerain* (12). Mahmood, J., sitting with Young, J., has fully considered this question in the case of *Beni Prasad* v. *Hardai Bibi* in an unreported judgment which was delivered on a preliminary point before the appeal was referred to the Full Bench [F.A. No. 35 of 1888] (13); and has held that a suit under similar circumstances was not barred by any rule of limitation.

I further contend that as the plaintiffs were minors at the time of the institution of this suit, and as they do not derive their right to sue from, or through, any person to whom a right to sue might have accrued, the suit is not barred by limitation. The plaintiffs can claim the benefit of s. 7 of the Indian Limitation Act, 1877, even if they sue through their next friend—— *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (14).

Munshi *Gulzari Lal*, for the respondents.

Art. 125 of the Limitation Act is applicable to this suit. Although the present suit has been brought after the death of the female making

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(1) 6 A. 428. (2) 15 A. 132.
(3) N.W.P.H.C.R. (1867) 54 = 2 Agra. 54.
(4) N.W.P.H.C R. (1866) 1 = 1 Agra 1.
(5) 2 W.R.C.R. 255. (6) 10 W.R.C.R. 301. (7) 13 M. 195.
(8) 15 M. 422. (9) 6 A. 431. (10) 14 B. 512.
(11) 15 W.R.C.R. 1. (12) 10 I.A. 150 = 10 C. 324. (13) 14 A. 67.
(14) 3 I.A. 7 = 1 C. 226.

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the alienation, the prayer of the plaintiffs is that all alienations should be declared ineffectual. They could have sought for this declaration in the lifetime of Sabej Kunwar, and should have done so within six years of the alienation of 1876. Not having done so, their remedy is barred. Such a suit would lie even during the lifetime of Musammat Mattra, who has only a life estate like that of her mother, Musammat Sabej Kunwar—*Bal Gobind* v. *Ram Kumar* (1). This ruling has been followed by the Madras High Court in *Raghupati* v. *Tirumalai* (2), and to the same effect is the ruling in *Kandasami* v. *Akkammal* (3). The judgment of Mahmood, J., in *Bal Gobind* v. *Ram Kumar* (1), **[39]** sets out fully the reasons for his conclusions. Even if Musammat Mattra was entitled to sue in preference to the plaintiffs, she not having availed herself of her remedy, the plaintiff's suit would be barred on the authority of *Chhaganram Astikram* v. *Bai Motigavri* (4). That case was not decided upon any special doctrine of the Hindu law under the Mayukha, but was decided upon the authority of the case of *Pershad Singh* v. *Chedee Lall* (5), which has been relied on by the plaintiff. Under these circumstances the plaintiff's suit is barred by limitation. As to the application of s. 7 of the Limitation Act, I say that that section does not apply if the suit is by a guardian. The ruling of the Privy Council was decided under the old Limitation Act, which has been repealed. The word "plaintiff" has not been used in s. 7 of the Act or in art. 120 of the schedule. The definition of that word in s. 3 has no application.

[The case was again put up at a subsequent date for further argument with reference to the principle enunciated in the case of *Siddhessur Dutt* v. *Sham Chand Nundun* (6)].

On this point Pandit *Baldeo Ram Dave*, for the appellants—

In the case of *Siddhessur Dutt* v. *Sham Chand Nundun* (6), the suit was one to set aside an adoption and was governed by art. 129 of the Indian Limitation Act of 1871. Under that article, which has now been replaced by art. 118 of the present Act, the period of limitation began to run from "the date of the adoption, or (at the option of the plaintiff), the death of the adoptive father." There a particular date was fixed and the period of limitation began to run from that date. No subsequent disability or inability to sue could stop it. But the article applicable to the present suit is art. 120 of the Limitation Act of 1877, which provides 6 years from the date "when the right to sue accrues," that is, when the right to sue accrues to the "plaintiff" as defined in s. 3 of the Act. As the plaintiffs in this case do not derive their right to sue from or through any person, but they sue **[40]** in their own right, no right to sue could accrue to them before their birth. No cause of action can exist "unless there be also a person in existence capable of suing"—*Murray* v. *The East India Company* (7). As the right to sue did not accrue to the plaintiffs before their birth, no period of limitation could begin to run prior to their birth. As the plaintiffs were minors at the time of the institution of this suit, they could avail themselves of the provisions of s. 7 of the Indian Limitation Act, 1877, and present suit was not barred by limitation.

Munshi *Gulzari Lal contra.*

I rely on the terms of s. 7 of the Limitation Act, according to which the plaintiff must be in existence at the time from which the

(1) 6 A. 431. (2) 15 M. 422. (3) 13 M. 195.
(4) 14 B. 512. (5) 15 W.R.C.R. 1. (6) 23 W.R.C.R. 235.
(7) (1821) 5 Barn. and Ald. 204 = 24 R.R. 325.

period of limitation is to begin, to enable him to avail himself of the provisions of that section. In this suit the plaintiffs were not in existence. In support of this I also rely upon *Siddhessur Dutt* v. *Sham Chand Nundun* (1), *Mrino Moyee Debia* v. *Bhoobun Moyee Debia* (2), *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry* (3) and *Gobind Chandra Sarma Mazoomdar* v. *Anand Mohan Sarma Mazoomdar* (4).

These authorities have not been overruled by any subsequent decisions. The change in the terms of s. 7 of the present Act does not alter the law. We have now the words "the right to sue" in art. 120, which is applicable to this suit, instead of in s. 7 of the Act.

JUDGMENT.

STRACHEY, C. J.—The only question which we have to consider is whether the Court below has rightly dismissed this suit as barred by limitation. The suit was brought for a declaration, first, that an alienation made in 1876 by a Hindu widow, the plaintiffs' maternal grandmother Sabej Kunwar, in favour of Musammat Hanso was void as against the plaintiffs; secondly, that a further alienation made by Hanso in 1893 to Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs [41] are entitled after the death of their mother Musammat Mattra to possession of the property in suit. At the time of the alienation of 1876 by Sabej Kunwar, the plaintiff's mother Musammat Mattra was the nearest living reversioner. She became entitled to possession of the property in 1889, when her mother, the widow Sabej Kunwar, died. She took no steps to question the alienation made in 1876. She has been made a *pro forma* defendant to this suit, and in her written statement she pleads that she does not wish to question either the alienation of 1876 or that of 1893.

Several questions have been discussed, which, in the view we now take of the case, it is not necessary to consider further, such, for instance, as whether the plaintiffs could during the life-time of Sabej Kunwar have sued for a declaration in respect of the alienation of 1876, their mother Musammat Mattra being then the nearest reversioner, though having only an estate similar in nature and extent to that of the widow, and whether on the death of Sabej Kunwar in 1889, or on the further transfer made by Hanso to Kirpa Ram in 1893, any fresh cause of action for a declaratory suit accrued to the plaintiffs. As I have said, the only question which it is necessary to consider is whether this suit is barred by limitation.

Admittedly during the life-time of Musammat Mattra all that the plaintiffs can claim is declaratory relief in respect of these alienations. It is clear that the suit does not fall within art. 125 of the second schedule of the Limitation Act, which refers only to suits brought during the life-time of the widow whose alienation is impeached. That article could not apply to the suit as regards the transfer made by Sabej Kunwar, who died in 1889. The only article applicable to the suit is art. 120 which prescribes a period of six years from the time when the right to sue accrues. A right to sue for a declaration impugning the alienation of 1876, accrued to Musammat Mattra at the date of that alienation, and, having regard to art. 125, became barred in the year 1888, in the absence of any special circumstance extending the limitation period. The right of the present plaintiffs, the sons of Musammat

(1) 23 W.R.C.R. 285.
(2) 23 W.R.C.R. 42.
(3) 7 W.R.C.R. 134.
(4) 2 B.L.R. A.C. 313.

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[42] Mattra, to impugn that alienation accrued on one view of the law at their birth, and on another view of the law when, by the death of Sabej Kunwar in 1889, the first occupied the position of next reversioners to the estate. It is, however, admitted that all the present plaintiffs were minors at the date of the institution of the suit which they brought in February 1894. They claim the benefit of s. 7 of the Limitation Act, which has been held by the Privy Council in *Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (1), to apply not only after the disability of minority has ceased, but, during its continuance, to suits brought on behalf of the minor by his next friend; so that in any view it would appear that, having regard to s. 7, the suit cannot be defeated on the ground of limitation.

It has, however, been argued that s. 7 pre-supposes a right to sue in existence at the time of the institution of the suit, and that the fact that a suit by Musammat Mattra was long ago time-barred would operate as a bar to the plaintiffs, even though they are minors and notwithstanding s. 7. In support of that contention the case of *Chhaganram Astikram* v. *Bai Motigavri* (2), has been cited. There the mother of the plaintiffs was originally the nearest reversioner. There was a sale of the property in suit in execution of a decree against the widow for a debt due by her husband, and in consequence the widow was dispossessed in 1869. The nearest reversioner, the plaintiff's mother, died in 1879. In 1883, the plaintiffs sued as reversioners, the widow being still alive, for a declaration that they were not bound by the sale, that the decree in execution of which the property was sold was collusive and fraudulent, and that they were entitled to the property on the widow's death. One of the plaintiffs was a minor up to the year 1881. The other was still a minor in 1883, when the suit was brought. It was held that all right to sue for a declaration in respect of the sale and dispossession of the widow was barred in 1875, that is, when both the plaintiffs were minors, under art. 120 of the second schedule of the Limitation [43] Act. The ground of the decision is thus stated at p. 515 of the report :—" Cause of action having, therefore, been given to the plaintiffs' mother both by the sale and dispossession, no new cause of action can be held to have remained to the plaintiffs on their mother's death. It could not have been the intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the right, to give successive rights to a series of successive reversioner to harass the alienees of an estate with repeated suits in respect of the same alienation. It has been held that when the widow dies, a new right of action (for possession) will be given to the reversioner then living, but, till then, at any rate, any right to seek a declaration possessed by any reversioner whose title to sue had accrued after the alienation must be regarded as derived from the person who was the heir-presumptive at the time of the alienation." Now, it is quite clear that such a reversioner does not in fact derive his title from the person who was the heir-presumptive at the time of the alienation. The judgment seems to me in effect to hold that although one reversioner does not derive his title from another and nearer reversioner, he must be deemed to do so in order to avoid the consequence of the alienees of the estate being harassed by a multiplicity of suits. The reversioner derives his title, not from any other reversioner but from the last full owner of the estate, and I can see no justification for introducing

(1) 3 I.A. 7=1 C. 226.
(2) 14 B. 512.

a fiction to the contrary effect merely to avoid a result which the Court may consider inexpedient. That judgment, having regard to the passage which I have just read, does not depend, as was suggested to us in argument, upon any special view entertained in Bombay as to the position in Hindu law of a daughter as being a full owner of the estate through whom the plaintiffs, in that case her sons, might have been held to claim. It follows a judgment of the Calcutta High Court in *Pershad Singh* v. *Chedee Lall* (1). In that case a Hindu widow was sued for acts of waste and alienation alleged to have taken place during the [44] lives of the mothers of the plaintiffs who were, when those acts were committed, the next heirs to the property. "At the time when the alienation complained of occurred, the mothers of the plaintiffs were alive and were then the next heirs entitled to this property, and they might have brought the suit which the plaintiffs have now brought, but they did not do so. They allowed more than twelve years to elapse, and this cause of action is not revived in favour of the plaintiffs who have since been born and have now arrived at majority." That is to say, the plaintiffs' right of suit was held barred by the omission of their mothers to sue, through whom they did not claim, and it was assumed that the cause of action accruing to the plaintiffs' mothers and the cause of action on which the plaintiffs themselves came into Court were one and the same, so that what barred the mothers would equally bar the sons. We have very carefully considered these two cases. It appears to me that they are contrary to well recognized principles, and that we ought not to follow them. If the nearest reversioner could be held, as the Hindu widow has been held, to represent fully the whole estate, it would no doubt follow that the limitation which would bar that reversioner would bar other reversioners, just as a decree passed against the nearest reversioner would, in that case, operate as *res judicata* against the more remote. But so far as I know, that has never been held to be the relation in which one reversioner stands to another, and we are not, I think, at liberty to act on an incorrect view of that relation in order to achieve the desirable result of preventing multiplicity of suits. A similar question has been considered with greatfulness and care by Mr. Justice Mahmood in an unreported case—*Beni Prasad* v. *Hardai Bibi*.* That case has recently been decided by the Privy Council in connection with the validity in Hindu law of the adoption of an only son; but the question of limitation was apparently not raised by the defendants before the Privy Council; it was disposed of by Mr. Justice Mahmood and Mr. Justice Young as a preliminary point in the appeal before them. [45] In that case there was an adoption by a Hindu widow in 1858. At that time the nearest reversioner was one Kedar Nath. He died in 1881, a declaratory suit to impugn the adoption being then barred so far as he was concerned by art. 118 of the Limitation Act. The plaintiff was the son of Kedar Nath. He was born in 1852, but until he became, on Kedar Nath's death in 1881, the nearest reversioner, he could not have brought a declaratory suit to impugn the adoption. He brought such a suit in 1886, it was found, within six years from the date on which he acquired knowledge of the adoption. So far it was clear that the suit was within limitation. But it was argued that as a suit by Kedar Nath when he was the next reversioner became barred by limitation long before his death in 1881, on which the plaintiff acquired his right to sue, the plaintiff's suit was also barred. Mr. Justice Mahmood held, with the concur-

(1) 15 W.R.C.R. 1.

* F.A. No. 35 of 1888, decided 4th February 1892 (14 A. 67).

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rence of Mr. Justice Young, first, that one reversioner cannot be held to claim through or to derive his title from another, even if that other happens to be his father, but derives his title from the last full owner; secondly, that the limitation which barred a suit by the nearest reversioner for the time being to contest an alienation or an adoption by a Hindu widow, would not bar a similar suit brought by another person after he became the nearest reversioner. At p. 160 of the paper book in that case Mr. Justice Mahmood thus sums up his elaborate consideration of the question :—"I think it is quite clear from what I have said that there is no authority, and there can be no reason in juristic principle for maintaining the proposition that the reversionary right under the Hindu law is a kind of heritable estate which descends from the father to the son, maintaining a kind of privity of blood for purposes of estoppel, the plea of *res judicata*, or the bar by limitation." Again at p. 161, after referring to the ruling of the Full Bench in *Ramphal Rai* v. *Tula Kuari* (1), he said :—"Applying the principle of that case together with that I have said as to the nature of reversionary right under the Hindu law, I hold that the circumstance **[46]** that the plaintiff's father Kedar Nath, whilst being the nearest reversioner, had allowed the period of limitation for such a suit to elapse during his life-time, does not operate as barring the plaintiff's present suit by limitation." In support of his conclusion Mr. Justice Mahmood refers by way of analogy to the judgment of the Privy Council in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (2), where their Lordships expressed a doubt as to whether a decree in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding upon any reversioner except the plaintiff, and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later Privy Council case not referred to by Mr. Justice Mahmood, *Isri Dut Koer* v. *Mussummat Hansbutti Koerain* (3), their Lordships (at p. 157 of the report) indicate strongly that such a decision would not be binding as *res judicata* in the case of a new reversioner.

It was further argued that, having regard to the terms of s. 7 of the Limitation Act, a plaintiff, to be entitled to the benefit of that section, must have been in existence and under disability at the time from which the period of limitation commences, and that therefore a minor cannot avail himself of the section in respect of a right of suit which came into existence before his birth. That contention in effect seeks to apply to the case the principle of s. 9, that "when once time has begun to run, no subsequent disability or inability to sue stops it." In support of that contention the following cases were cited :—*Siddhessur Dutt* v. *Sham Chand Nundun* (4), *Mrino Moyee Debia* v. *Bhoobun Moyee Debia* (5), *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry* (6) and *Gobind Chandra Sarma Mazoomdar* v. *Anand Mohan Sarma Mazoomdar* (7). None of those cases were decided with reference to the present Limitation Act, and in none of them was the suit of the exact description of **[47]** that now before us. None of them, so far as I am aware, have been applied to suits brought since Act No. XV of 1877 came into force for a declaration impugning the validity of an alienation made by a Hindu widow. They are cases of suits to set aside an adoption

(1) 6 A. 116.
(2) 3 I.A. 72.
(3) 10 I.A. 150.
(4) 23 W.R.C.R. 285.
(5) 23 W.R.C.R. 42.
(6) 7 W.R C.R. 134.
(7) 2 B.L.R. A.C. 313.

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falling under art. 129 of Act IX of 1871, which article has been replaced by the totally different provisions of art. 118 of the present Act. Instead of straining the language of these decisions to meet a case of this kind, it appears to me to be safer to look to the precise terms of the provisions applicable to this present case, *i.e.*, art. 120 of the second schedule and s. 7. As regards art. 120, when the Legislature said that a suit may be brought six years from the time when the right to sue accrues, I think it clearly meant the right to sue of the plaintiff himself or some one through whom he claims, not a right of somebody else to sue through whom the plaintiff does not claim. The Legislature cannot have meant a right of anybody to sue, a right at large of some person wholly unconnected with the plaintiff. Similarly if s. 7 is read giving the terms used their ordinary and natural signification. I think the expression "the period of limitation" means the period of limitation for the plaintiff's suit, the period of limitation for the suit which the person under disability or some one through whom he claims is entitled to institute, nor the period of limitation for a similar suit which some other person may have been entitled to institute. In my opinion nothing has occurred to deprive the plaintiffs, who are still minors, of the benefit of s. 7 by extinguishing or barring their right to sue for a declaration in respect of the alienations of 1876 and 1893. I am therefore of opinion that the Court below ought not to have dismissed the suit as barred by limitation, but should have disposed of it on the merits. I think that the proper course is to allow this appeal, set aside the decree of the Court below, and remand the case to the Court of first instance for disposal on the merits. The plaintiffs are entitled to their costs of this appeal. The other costs will abide the result.

[48] KNOX, J.—I also agree that the plea of limitation should not have been allowed, and concur in the order proposed by the learned Chief Justice.

BLAIR, J.—I concur in the order proposed by the learned Chief Justice and the reasons by which that order is supported.

BANERJI, J.—I have arrived at the same conclusion as the learned Chief Justice. The lower appellate Court dismissed the suit as barred by limitation under art. 125 of the second schedule of the Indian Limitation Act, 1877. As the suit was not one to set aside an alienation during the lifetime of the Hindu female who made the alienation, that article clearly did not apply. There being no other provision of the Limitation Act applicable to a suit of the kind brought by the plaintiffs, it was governed by art. 120, which prescribes a limitation of six years, calculated from the date on which the right to sue accrued. I am of opinion that the right therein referred to is clearly the right of the plaintiff as defined in s. 3 of the Act, and that the article does not refer to the right of a person other than the plaintiff. In the present case the right of the plaintiffs to question the alienation made by Sabej Kunwar could arise at the earliest on their birth. During the whole of the period subsequent to their birth they have been under a disability, and consequently they are entitled to the privilege which is accorded to plaintiffs of that description by s. 7 of the Act. The rulings of the Calcutta High Court on which the learned vakil for the respondents has relied, and which are referred to in detail in the judgment of the learned Chief Justice, had reference to suits of a particular description and were based on the peculiar phraseology of the Limitation Act applicable to

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those suits. I am unable to hold that by reason of their not being in existence at the date of the alienation in question, the plaintiffs are not entitled to bring their suit at any time during the period of their minority, after the accrual of their right of suit. As regards the only other contention which was raised in this case, namely, whether the fact of the omission of the plaintiff's [49] mother to question the alienation made by Sabej Kunwar barred the plaintiffs from maintaining the present suit, and the ruling by which that contention was sought to be supported, it is sufficient to say that those rulings evidently proceed upon the assumption that one reversioner derives title from another. I am unable to hold that that is a true proposition under the Hindu law. There is no privity of estate between one reversioner and another *qua* reversioners ; therefore the act or omission of one reversioner cannot bind another, on the general principle that no one can be bound by the act or omission of a person through whom he does not derive title. For these reasons I agree in the order proposed by the learned Chief Justice.

BURKITT, J.—I have arrived at the same conclusion. In my opinion no cause of action for the present suit accrued before these plaintiffs' birth, and therefore it cannot possibly be barred by any limitation.

AIKMAN, J.—I concur in the judgments of the learned Chief Justice and my brother Banerji, and in the order proposed.

Appeal decreed and cause remanded.

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PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

[*On Appeal from the High Court for the North-Western Provinces.*]

IN THE MATTER OF RAJENDRO NATH MUKERJI.

[27th April and 21st June, 1899.]

Para 8 *of the Letters Patent*, 1866—*Removal of a vakil from the roll for reasonable cause—A conviction under s.* 471, *Indian Penal Code.*

A vakil of the High Court was convicted, under s. 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged. This was affirmed on appeal, when the punishment to which he had been sentenced was reduced to two years.

The High Court, while not allowing the propriety of the conviction and sentence to be questioned, had considered whether his culpability was such as to disqualify him for his profession, and had decided in the affirmative, removing him from the roll, under para 8 of the Letters Patent, 1866.

Held, that, in the present case, the conviction, followed by the sentence, was sufficient, without further inquiry, to justify the High Court in making that order. The appellant could not be allowed to have an indirect appeal [50] against the judgment of the Sessions Judge confirmed by the High Court. The judgment of Lord Mansfield in *ex parte Brounsall* (1) referred to as well explaining the disqualification of a member of the legal profession that attends such a conviction and sentence.

In re Weare (2), where the Court of Appeal looked to see what was the nature of the offence and would not, as a matter of course, strike a solicitor off the roll because he had been convicted, distinguished from the present case.

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(1) 2 Cowper's Rep. 829.

(2) (1893) L.R. 2 Q.B.D. 439.

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In re Durga Charan (1), dealt with under s. 12 of Act XVIII of 1879, referred to as a case where the nature of the offence admitted of further inquiry and also distinguished.

In regard to the finality of the judgment of the High Court in deciding the appeal from the conviction and sentence, *In re the petition of Macrea* (2) was referred to.

[R., 29 A. 95 (P.C.) = 4 A.L.J. 34 = 9 Bom. L.R. 9 = 5 C.L.J. 130 = 11 C.W.N. 273 = 17 M.L.J. 74 = 2 M.L.T. 1; 32 B. 106 = 10 Bom. L.R. 21 = 3 M.L.T 131; 13 Cr. L.J. 800 (802) = 17 Ind. Cas. 544 (546) = 23 M.L.J. 447 = 12 M.L.T. 615 = 1912 M.W.N. 1029 (1032); 11 Cr. L.J. 503 = 14 C.W.N. 1073 = 7 Ind. Cas. 622 (623); 11 Cr. L.J. 615 (619) = 8 Ind. Cas. 282 (286) = 6 N.L.R 129; D., 8 A.L.J. 389 = 9 Ind. Cas. 1013 (1015).]

APPEAL from an order (4th January 1896) of the High Court (3) in the matter of a vakil of the Court.

The appellant was enrolled as a vakil on the 8th April 1885, and practised till 1895. On the 9th August 1895, he was convicted at the Sessions, at Allahabad, of an offence under s. 471 of the Indian Penal Code, and was sentenced to a term of rigorous imprisonment for three years. On the 1st November 1895, his appeal was dismissed by the High Court with a reduction of the sentence to two years. The ground of his conviction was the making use of an official copy, filed by him in the High Court, for the purpose of presenting an appeal from a decree of the Saharanpur District Court, in which copy, as he knew, the date had been fraudulently altered, to make it appear that the appeal was not time-barred, as in fact it was.

A question now raised on this appeal was whether the conviction and the sentence of the Sessions Court, affirmed by the Court of Criminal appeal, sufficiently established the unfitness of a vakil to belong to the legal profession, forming a reasonable cause for his exclusion under para. 8 of the Letters Patent, or there should be further consideration of the degree of his culpability as affecting the justice of his removal or suspension from practice.

[51] The conviction and sentence had been brought to the notice of the High Court by the Registrar on the 26th November 1895. The proceedings thereupon, under the above para. 8, the hearing by the Chief Justice and five Judges, and their judgment, are reported in Volume 18, p. 174, of the Indian Law Reports, Allahabad series.

The High Court decided that the propriety in law, or in fact, of the conviction, maintained by the Court of appeal, could not be brought into question. That was final. They, however, considered it incumbent on them to consider whether there existed reasonable cause or not for removing the vakil from practice in the fact of the conviction itself. Their opinion was that the prisoner's Counsel was not precluded from showing, if he could, that the conduct of the vakil was not such as to render him unfit to be retained on the roll, and that the case presented was that the Court should consider the degree of culpability involved in the act which constituted the offence in regard to his removal, or suspension, from practice. Their conclusion was that he had proved himself unfit to remain a member of an honorable profession, and that he must be excluded from it.

The appellant obtained a certificate for appeal under s. 595, Civil Procedure Code. On this appeal,

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(1) 7 A. 290. (2) 20 I.A. 90 = 15 A. 310. (3) 18 A. 174.

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Mr. *J. H. A. Branson*, for the appellant, referred to *In re Weare* (1), where the Court had held that it had a discretion to remove a solicitor or not to do so after a conviction. Also to *In re a solicitor, ex parte the Incorporated Law Society* (2), where the fact of the conviction of a practitioner was not taken to add necessarily to the gravity of his offence in regard to the question of his remaining on the roll. *In re Hill* (3) there referred to. *In re Durga Charan*, and s. 12 of Act XVIII of 1879 (4), as reported contained the expression of a former Chief Justice that the pleader in that case could "go behind the [52] order" of the Criminal Court. *In re Dillet* (5) was also referred to. Afterwards on June 17th, their Lordships' judgment was delivered by SIR RICHARD COUCH :—

JUDGMENT.

This is an appeal against an order of the High Court of Judicature at Allahabad made on the 4th of January 1896, whereby it was ordered that the appellant's name should be struck off the roll of vakils entitled to practice before the said Court and his certificate should be cancelled. On the 9th of August 1895, the appellant was found guilty by the Sessions Judge of Allahabad concurring with the assessors under s. 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged, and sentenced to be rigorously imprisoned for three years. He appealed to the High Court by which on the 21st November 1895, the conviction was affirmed and the sentence altered to two years' rigorous imprisonment. On the 27th November 1895, the High Court ordered notice to be given to the appellant to show cause why he should not be removed from the roll of vakils and his certificate be cancelled in consequence of the offence of which he had been convicted. On the 3rd of January 1896, the case came before the Chief Justice and five Judges of the High Court and it was held that the propriety in law or in fact of the conviction could not be questioned, but the Counsel for the appellant was not precluded from showing, if he could, that the conduct of his client in the matter was not such as to render him an unfit person to be retained on the roll of the vakils of the Court. On the next day the same Judges in their judgment after stating the circumstances connected with the offence said that the appellant had attempted to deceive the Court by representing by means of a forged endorsement on a copy of a decree that an appeal was within time when he knew or must have known that it was time-barred ; that this offence was not committed by an ignorant man or by a new practitioner unaccustomed to the examination of documents, nor in the hurry of the moment and without due consideration, and [53] made the order now appealed against. The printed case in this appeal for the appellant consists of a statement of the facts previous to the using by him of the forged document, the evidence of witnesses examined at the trial, and the judgment of the High Court on the 21st November 1895. The reasons given for the appeal are that the High Court was wrong in law in not allowing the propriety of the conviction to be questioned, that the conviction was not justified either in law or in fact, that the appellant did not fraudulently or dishonestly use the copy of the decree, that no reasonable cause had been shown to justify his removal from the roll of vakils, and the evidence given on his trial did not prove any

(1) (1893) L.R. 2 Q.B.D. 439.
(2) 61 L.T.R. Q.B.D. 842.
(3) (1869) 18 L.T.R. 564 = 3 Q.B.D. 543.
(4) 7 A. 290.
(5) (1887) L R. 12 App. Cas. 459.

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act or practice on his part justifying the order for it. It is plain that the object of the present appeal is to have the judgment of the Sessions Judge and of the High Court on the appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect the appellant would indirectly have an appeal against the conviction when if he had petitioned for leave to appeal against it the leave would certainly have been refused. *Ex parte Macrea* (1). Mr. Branson, who appeared for the appellant, admitted that if this review of the conviction was not allowed, there were no extenuating circumstances that he could rely upon against the order. He referred to *In re Weare* (2). In that case a solicitor had been convicted by two justices of Bristol of being a party to the continued use of premises as a brothel and sentenced to a term of imprisonment, which sentence was on appeal to the quarter sessions, set aside, and a fine of 20*l.* substituted. An application was made by the Incorporated Law Society to strike his name off the roll, which was ordered by the Divisional Court, and he appealed from that order to the Court of Appeal. The Court looked at the evidence given at the trial to see what was the nature of the offence, holding that it had a discretion and would not as a matter of course strike him off the roll because he had been convicted. This is a very different case from the present **[54]** one. The judgment of Lord Mansfield in *In re Brounsall* (3) quoted by Lord Esher in his judgment is more appropriate to the present case. That was an application to the Court to strike an attorney off the roll, he having been convicted of stealing a guinea, for which offence he was sentenced to be branded in the hand and to be confined in the House of Correction for nine months. Lord Mansfield said: "This application "is not in the nature of a second trial or a new punishment. But the "question is whether after the conduct of this man" (*i.e.*, in stealing the guinea—it does not say when, where or how—) "it is proper that he "should continue a member of a profession which should stand free from "all suspicion..... and it is on this principle that he is an unfit person "to practise as an attorney. It is not by way of punishment, but the "Court in such cases exercise their discretion, whether a man whom they "have formerly admitted, is a proper person to be continued on the roll "or not. Having been convicted of felony we think the defendant is not "a fit person to be an attorney." Lord Esher in Weare's case adds: "There it seems to me is the whole law on the matter laid down as "distinctly as can be, and in a way the propriety of which nobody, as it "appears to me, can doubt." The case in 61 Law Times 842 also referred to by Mr. Branson is only an authority that the Court has a discretion. The case in 7 All. 290 was under s. 12 of Act XVIII of 1879, which gives power to the High Court to suspend or dismiss any pleader holding a certificate who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader. It does not appear in the report whether the Court considered that the conviction of the pleader of cheating was wrong, or that in the exercise of its discretion he should not be suspended or dismissed. It was a case where the nature of the offence might reasonably be inquired into. Their Lordships do not agree with the Chief Justice where he says that the pleader's Counsel was entitled to go behind the conviction in order to show that he had committed no offence at **[55]** law. In the present case the conviction of

(1) 20 I.A. 90. (2) L.R. (1893) 2 Q.B.D. 439. (3) 2 Cowper's Reports 829.

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forgery, followed by a sentence of two years' rigorous imprisonment, is sufficient without further inquiry to justify the Court in removing the appellant from the roll of vakils and cancelling his certificate. Their Lordships will therefore humbly advise Her Majesty to affirm the High Court's order and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Barrow, Rogers* and *Nevill.*

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22 A. 55 = 19 A.W.N. (1899) 172.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice. and Mr. Justice Knox.

BASDEO (*Defendant*) *v.* JOHN SMIDT AND OTHERS (*Plaintiffs*).*

[3rd July, 1899.]

Civil Procedure Code, ss. 51, 578—Plaint not signed by plaintiff or his authorized agent—Effect of such want of signature—Plaint not necessarily void—Breach of contract—Measure of damages.

Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by s. 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and, having regard to s. 578 of the Code of Civil Procedure, is not a ground for interference in appeal. *Rajit Ram* v. *Katesar Nath* (1) and *Mohini Mohun Das* v. *Bungsi Budden Saha Das* (2) referred to. *Marghub Ahmad* v. *Nihal Ahmad* (3) overruled. *Mahabir Prasad* v. *Shah Wahid Alam* (4) distinguished. *Katesar Nath* v. *Aggyan* (5) and *Badri Prasad* v. *Bhagwati Dhar* (6) discussed.

The plaintiffs sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held*, that the proper of damages was the difference between the contract price [56] of the goods which the defendant had refused to accept, and the price realized by the plaintiffs on the re-sale. *Moll Schutte & Co.* v. *Luchmi Chand* (7) followed. *Yule & Co.* v. *Mahomed Hossain* (8) dissented from.

[F., 28 A. 244 = A.W.N. (1905) 263 ; 5 C.W.N. 91 (98); 4 L.B.R. 284 ; 5 O.C. 365 (358); R., 25 A. 635 (637) = A.W.N. (1903) 189 ; 34 A. 348 = 9 A.L.J. 294 = 14 Ind. Cas. 507 ; 10 Ind. Cas. 731 (732) = 7 N.L.R. 33 ; 11 Ind. Cas. 842 (843) = 254 P.L.R. 1911 = 165 P.W.R. 1911 ; 15 Ind. Cas. 533 (584).]

THIS was a suit to recover damages alleged to have been incurred by the plaintiffs by reason of the defandant's refusal to take delivery of and to pay for certain goods which he had contracted to purchase from the plaintiffs. The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiffs a decree. The defendant appealed, but his appeal was dismissed by the lower appellate Court (District Judge of Cawnpore). The defendant appealed to the High Court, and there a new point was raised, which had not been taken in either of the Courts below, namely,

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* Second appeal No. 474 of 1897, from a decree of J. E. Gill Esq , District Judge of Cawnpur dated the 29th March 1897, confirming a decree of Rai Kishen Lal, Subordinate Judge of Cawnpur, dated the 5th October 1896.

(1) 18 A. 396. (2) 17 C. 580 (3) 19 A.W.N. (1899) 55.
(4) 11 A.W.N. (1891) 152. (5) 14 A.W.N. (1894) 95. (6) 16 A. 240.
(7) 25 C. 505. (8) 24 C. 124.

that " the suit of the plaintiffs is defective in point of law and is wrongly framed and should have been dismissed." This ground of appeal was explained at the hearing to convey an objection to the form of the plaint, the contention being that inasmuch as the person who had signed the plaint on behalf of the plaintiffs was not duly authorized so to sign on their behalf, the plaint was in effect unsigned, and there had never been before the Court any suit of which cognizance could legally be taken. There was on the record no power of attorney authorizing the signature of the plaint and nothing otherwise to show that the person who signed it was authorized to sign within the meaning of s. 51 of the Code of Civil Procedure.

Mr. *R. Malcomson* (with whom Pandit *Sundar Lal*), for the appellant.

The suit ought to have been dismissed on the ground that the plaint was not signed by the plaintiffs or by anyone duly authorized by them in that behalf. No Civil Court can take cognizance of a suit without having before it in the first instance a properly constituted plaint, that is to say, a plaint which complies with the requirements of ss. 49, 50, 51, and 52 of the Code of Civil Procedure. In this case the plaint was signed on behalf **[57]** of the plaintiffs by Mr. C G. Sanders, but Mr. Sanders was not authorized to sign plaints, or this particular plaint, on behalf of the firm. The plaint must therefore be regarded as unsigned. This being so, the so-called plaint was, within the rulings of this Court. no more than a " piece of waste paper"—*Mahabir Prasad* v. *Shah Wahid Alam* (1), *Katesar Nath* v. *Aggyan* (2), *Marghub Ahmad* v. *Nihal Ahmad* (3).

In view of the rule laid down in the last mentioned case, the Court has no power to amend an unsigned plaint or to allow amendment thereof. The defect is much more than a mere irregularity which may be cured by amendment : it is an absolute bar to the entertainment of the suit. S. 578 of the Code of Civil Procedure could not be applied, inasmuch as there was here no suit before the Court of which cognizance could be taken or in the course of which any error, defect or irregularity could possibly be committed. I would adopt the reasoning set forth in the judgments in *Katesar Nath* v. *Aggyan* and *Marghub Ahmad* v. *Nihal Ahmad*.

Babu *Durga Charan Banerji*, with the Hon'ble Mr. *Conlan* and Munshi *Ram Prasad*, for the respondents.

I contend that the provision contained in s. 51 of the Code of Civil Procedure as to signature and verification is a rule of Procedure merely and any defect in signature does not affect the merits of the case. In order to show that the omission to sign in compliance with s. 51 will not lead to the dismissal of the suit, it is necessary to show that the plaint was not the plaintiff's plaint. In this case there is no room for such contention upon the admitted facts. If the defect had been pointed out, it could and would have been remedied. The defect is certainly covered by s. 578 of the Code. Moreover, the defendant by his pleadings and conduct must be held to have waived the irregularity. There was a valid plaint as required by law, and any defect in the prescribed formality as to signature could be remedied **[58]** as well as waived. The plaint without the signature is not necessarily a piece of waste paper as contended for on

(1) 11 A.W.N. (1891) 152.
(2) 14 A.W.N. (1894) 95.
(3) 19 A.W.N. (1899) 55.

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22 A. 55 = 19 A.W.N. (1899) 172.

the other side. I rely on *Rajit Ram* v. *Katesar Nath* (1) and *Fateh Chand* v. *Mansab Rai* (2). The plaintiff, although he may not have signed the plaint, is none the less plaintiff in the suit, and it cannot be contended upon the admitted facts of this case that he has in any way or at any stage repudiated the plaint as his.

JUDGMENT.

STRACHEY, C. J.—There are in substance two objections taken on behalf of the appellant. The first objection is not set forth in the memorandum of appeal, but upon an application made to us under s. 542 of the Code of Civil Procedure, we allowed the learned counsel for the appellant to argue in support of it. That objection is that the plaint was not signed as it should have been in accordance with s. 51 of the Code, and that consequently all the proceedings in the suit have been bad and void *ab initio*. Now, with regard to that objection, the plaint purports to be signed on behalf of the plaintiff by an advocate of this Court, who, as the Munsarim's note shows, himself filed the plaint, and also by a gentleman named C. G. Sanders who purports to sign as "agent" for the plaintiffs, who are a firm of foreign merchants, residing out of, but trading within, British India. There is no finding which would justify us in holding that Mr. Sanders was a recognised agent of the plaintiffs within the meaning of s. 37 of the Code, so that the point considered in *Maharanee Surnomoye* v. *Poolin Behary Mundul* (3) and *Roy Dhunput Singh* v. *Jhoomuk Khawas* (4) does not arise. There is on the record no power of attorney authorizing Mr. Sanders to sign the plaint on behalf of the plaintiffs, and there is nothing which otherwise shows that he was so authorized within the meaning of s. 51. The most probable reason why there is nothing of the kind on the record is that, until the point was raised for the first time in second appeal, the defendant appears **[59]** never to have thought of suggesting that Mr. Sanders was not authorized to sign the plaint, or that there was any sort of defect or irregularity in the institution of the suit. There is no such suggestion in the defendant's written statement, in the issues, the judgments of the Courts below, the defendant's memorandum of appeal in the lower appellate Court, or his memorandum of appeal to this Court. Now, in the first place, as I have said already, the plaint is signed and was filed by an advocate of this Court, who thus claimed to represent the plaintiffs named in the plaint. The decrees of both the Courts below show that throughout the trial of the suit in both Courts the same advocate appeared and conducted the case as representing the plaintiffs. There is no plea, no suggestion, still less any finding, that that advocate did not possess in fact the authority to represent the plaintiffs named in the plaint which he claimed throughout to possess. On the contrary it is clear that the suit was throughout contested entirely on the merits, and on the assumption of everybody that it was properly brought by the right parties. Under s. 39 of the Code an advocate of this Court does not depend for his authority to represent a party upon any document empowering him to act. It appears to me that in the total absence of any finding, evidence or suggestion to the contrary, it must be presumed that the plaintiffs named in the plaint were throughout represented in the suit by the counsel who claimed to represent them, and that the

(1) 18 A. 396.
(2) 18 A.W.N. (1898) 110.
(3) 3 C.L.R. 15.
(4) 3 C.L.R. 579.

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suit was therefore instituted and conducted throughout with the knowledge and authority of those plaintiffs. Bearing this in mind, I have come to the conclusion first, that the defect in the plaint arising from non-compliance with s. 51 has been waived by the defendant, and that, therefore the suit cannot on that ground be now dismissed. Secondly, that the defect falls within s. 578 of the Code, which prohibits our interference with the decrees below on the ground of any error, defect, or irregularity which affects neither the merits of the case nor the jurisdiction of the Court. If it were necessary, I should be prepared to hold, having regard **[60]** to the judgment of this Court in *Rajit Ram* v. *Katesar Nath* (1), that we are, even at this stage, competent under s. 53 (*c*) of the Code to direct that the plaint be amended by the addition of the signature of the plaintiffs or of any person duly authorized by them in that behalf. But for the reasons which I have indicated, I am of opinion that any such amendment is unnecessary. The argument on behalf of the appellant is shortly this, that where a plaint is not signed in accordance with s. 51, not merely is there "an error, defect or irregularity," but there is no suit: the plaint is "waste paper," and the Court has no suit before it which it can legally decree. From this argument I entirely dissent. S. 48 of the Code shows that a suit is instituted by presenting a plaint to the Court or to the proper officer. The Code contains no definition of a plaint, but s. 50 shows what a plaint substantially is, and states the various particulars which it must contain. It says nothing about signature, and in no way suggests that what it describes as a plaint is not a plaint if it is unsigned or if the signature is in any way defective. S. 51 deals with the signature and verification of the plaint. It places the signature and the verification on exactly the same footing. In that connection I observe that at page 400 of the report in *Rajit Ram* v. *Katesar Nath*, the Full Bench of this Court observed:—"It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court." There is nothing whatever in s. 51 to suggest that, if its terms are not complied with, the defect stands on any different footing from the other defects mentioned in s. 53 (*b*), or involves any other consequence than rejection of the plaint if not amended in accordance with an order for amendment, or that the defect cannot be waived like other initial irregularities, or that the plaint by reason of the defect is necessarily "waste paper," or that there is no suit legally before the Court. The object of the verification of the plaint **[61]** is to fix upon the plaintiff the responsibility for the statements which it contains, and to afford a guarantee of his good faith. The object of the signature to the plaint is to prevent, as far as possible, disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. I do not underrate the importance of this: but there may be other ways of establishing the plaintiff's responsibility besides signature; and the fact that the Code contains no provision requiring an appellant to sign his memorandum of appeal supports this view. In a work by a learned American author, Mr. Vanfleet, "*The Law of Collateral Attack on Judicial Proceedings*," there is stated what, I think, is the true principle as to verification, and the whole context shows that the principle is equally applicable to signature, which s. 51 places on the same footing. At page 235 he says:—"The statutes require many kinds of petitions to be verified. This

(1) 18 A. 396.

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includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty, and, in some states, the complaint or petition in all cases. Such verification adds no allegation to the pleading and tenders no issue. Its only object is to show the good faith of the petitioner. In other words, if he will not swear that he believes his cause to be just, the law does not care to bother with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course, mere defects in it cannot."

Section 53 (*b*) (*i*) clearly shows that there may be a plaint within the meaning of the Code, although the plaint is not signed and verified as required by s. 51. If such a plaint were "waste paper" or not a plaint at all within the meaning of the Code the section would not have called it a plaint and would not have provided for its amendment. It is only upon the plaintiff's failure to comply within the time fixed by the Court, with the order allowing the amendment, that such a plaint has to be **[62]** rejected under s. 54 (*d*). The doctrine that the plaint is waste paper because it is not duly signed in accordance with s. 51 of the Code, and that there is consequently no legal suit before the Court, is opposed to the judgments of this Court in three connected unreported cases, First Appeals Nos. 170, 126 and 29 of 1895, in which the plaint was, at the stage of first appeal, returned for amendment under s. 53, on the ground that the person who had signed it was not duly authorized in that behalf by his power of attorney. In these cases the objection was taken by the defendant in his memorandum of appeal; and, in two at least out of the three, was specifically pleaded by him and put in issue in the Court below. The doctrine that a plaint not duly signed is necessarily waste paper also appears to me to be opposed to the judgment of the Privy Council in *Mohini Mohan Das* v. *Bangsi Baddan Saha Das* (1). In that case there were three plaintiffs named in the plaint as joint creditors. Only one of them signed and verified the plaint. Sometime after the plaint was filed, the Court made an order adding another of the joint creditors as a plaintiff, evidently on the view that he was not one already. The suit was dismissed on the ground that it must be regarded as instituted on the date of the order, and that, so regarded, it was barred by limitation. On appeal the Privy Council set aside the dismissal, holding that all the creditors became plaintiffs when the plaint was filed, that the order was "merely waste paper," and that the suit was not barred. Their Lordships observed:—"On the face of the plaints the three joint creditors are named as co-plaintiffs. The names of Gobind Rai and Khettar Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint." Observe, they do not say that a person named as a co-plaintiff need not sign and verify the plaint. They could not have said so, for s. 51 makes no distinction between a co-plaintiff and a **[63]** single plaintiff. What they say is, that it does not follow from his omitting to sign and verify the plaint that he is not to be treated as a plaintiff. They further indicate the considerations which, in that case, prevented such a consequence from following. The persons in question were named

(1) 17 C. 580.

as co-plaintiffs on the face of the plaint; their names had not been struck out; they had not attempted to repudiate the suit. In other words, there was no reason to doubt that the suit was really theirs, and, that being so, their omission to sign the plaint would not justify the Court in treating them as not plaintiffs. Nothing in the judgment turns upon their being joint creditors with the plaintiff who had signed, or upon any supposed authority in him to sign on their behalf. Several cases have been cited in support of the argument I am considering. The first was *Mahabir Prasad* v. *Shah Wahid Alam* (1). That case is, I think, clearly distinguishable. The evidence there showed that the so-called plaintiff knew nothing whatever about the suit and was not a party to its institution. The second case was *Katesar Nath* v. *Aggyan* (2). It does not appear to me quite clear from the report whether the learned Judge held that there was no legal plaint and no legally instituted suit merely because the plaint was not signed in accordance with s. 51, or whether he so held on the ground that there was no valid authority given by the plaintiff for the institution of the suit. My doubt arises from the learned Judge's allusion to the case of *Badri Prasad* v. *Bhagwati Dhar* (3), which has nothing to do with the signing of the plaint, but relates only to the conditions under which a suit or appeal may be filed under a vakalatnamah. The case of *Katesar Nath* v. *Aggyan* was a decision of a single Judge of this Court, and if it means that, in all circumstances whatever, whether the plaintiff knew of and authorized the suit or not, whether the defendant waived the defect or not, and notwithstanding s. 578 of the Code, an unsigned plaint is necessarily waste paper, **[64]** and a Court of appeal is at liberty to treat the suit as no suit at all, then, with the greatest respect for the learned Judge, I cannot agree with him. The last case on the point to which I need refer is the case of *Marghub Ahmad* v. *Nihal Ahmad* (4). In that case not only did the defendant make no objection that the plaint was not duly signed, but he expressly stated that he desired the suit to be disposed of on the merits. In that suit also, so far as one can gather from the report, although the plaintiff had not signed the plaint, there seems to have been no doubt at all that the suit was instituted with his knowledge and authority, but it was held that, notwithstanding these facts, neither the Court below nor this Court had power to allow any amendment, and that the plaint must be rejected. All I can say as to that case, in which no doubt it was held that the plaint in such cases was "a piece of waste paper," and that there was no suit before the Court, is that it appears to me to be wholly at variance with the three unreported decisions which I have mentioned, that in this conflict of authority it is open to me to adopt the view which I think right, and that I unhesitatingly prefer that taken in the unreported cases. In my opinion, to dismiss a suit at the stage of second appeal upon a point of this kind never raised before by the defendant, would be to sacrifice the substantial merits and justice of the case for the sake of technicality, to an extent to which I could never agree. Although I do not say that an objection founded on s. 51 is always and necessarily one of pure form, I think that it is so here, and that this objection therefore to the decrees of the Courts below must be over-ruled.

The only other objection which has been pressed is that the Courts below have applied a wrong principle as the to measure of damages. The damages claimed are the difference between the contract price of the goods

(1) 11 A.W.N. (1891) 152. (2) 14 A.W.N. (1894) 95. (3) 16 A. 240. (4) 19 A.W.N. (1899) 55.

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which the defendant refused to accept and the price realized by the plaintiffs on the re-sale. That claim is in accordance with the clause in the indent contract, which is admittedly indistinguishable from the clause under [65] consideration by the Full Bench of the Calcutta High Court in *Moll Schutte and Co. v. Luchmi Chand* (1). That case is exactly in point, and the only question is, whether we ought to follow it or the previous decision of the same Court in *Yule and Co.* v. *Mahomed Hossain* (2). For my part I have no hesitation in agreeing with the decision in the later case, and I adopt all that was said by the Chief Justice in delivering the judgment of the Full Bench. In this case, as in that, s. 107 of the Contract Act has no application. I think that the Courts below have taken the right view of the measure of damages, and that this appeal should be dismissed with costs.

KNOX, J.—I too am of the same opinion, namely, that although the plaint in the case in which this appeal arises was not signed by the plaintiffs as required by s. 51 of the Code of Civil Procedure, the circumstances of the case raise a proper presumption that the plaintiffs have been privy to the suit throughout.

As the learned Chief Justice has pointed out the plaintiffs were represented by an advocate of this Court. The appearance in and prosecution of the suit by such advocate can be and must be taken to be an appearance by the plaintiffs themselves, especially as it was never suggested until the case came before the Court in Second Appeal that there could be any doubt upon the matter at all.

In First Appeal No. 170 of 1895, decided on the 22nd July, 1898, a decision of which I was one of the Judges, and which moreover is a stronger case, inasmuch as it was a case in which the plaintiffs were not represented in the Court of first instance by an advocate, my brother Banerji and myself were prepared to hold that the plaint might even in the appellate stage be amended and rectified. *Marghub Ahmad* v. *Nihal Ahmad* (3), is an authority at variance with this; but I have heard nothing which leads me to differ from the view which I took in F. A. No. 170 of 1895. In that case, the absence of the signature of the [66] plaintiffs was held not to be a defect which affected the merits of the case or the jurisdiction of the Court; in my opinion no ground has been made out, so far as this appeal is concerned, for interference with the decrees of the Courts below.

The only other question raised before us, namely, as to damages, was fully considered in the case of *Moll Schutte and Co.* v. *Luchmi Chand* (1), and I agree with the way in which it was then decided.

Appeal dismissed.

(1) 25 C. 505. (2) 24 C. 124. (3) 19 A.W.N. (1899) 55.

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FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

LALTA PRASAD (*Applicant*) *v.* NAND KISHORE AND OTHERS (*Opposite parties*).* [3rd July, 1899.]

Civil Procedure Code, ss. 102, 103, 157—*Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance"*.

In construing an order alleged by one side and denied by the other to be an order under s. 102 of the Code of Civil Procedure, the order will be considered as an order under s. 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear.

Where, his suit having been dismissed for default of appearance under s. 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under s. 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an "appearance" within the meaning of s. 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply [67] for an adjournment. *Shankar Dat Dube* v. *Radha Krishna* (1) and *Soonderlal* v. *Goorprasad* (2) approved. *Mahomed Azeem-ool-lah* v. *Ali Buksh* (3) *Kashi Prashad* v. *Debi Das* (4) and *Kanhi Lal* v. *Naubat Rai* (5) referred to.

[F., 34 A. 123 (126) = 8 A.L.J. 1265 (1268) = 12 Ind. Cas. 603 (604); R., 34 C. 403 = 5 C.L.J. 247 = 11 C.W.N. 329 = 2 M.L.T. 123; 33 M. 241 = 5 Ind. Cas. 23 = 19 M.L.J. 760 (762) = 7 M.L.T. 369; 8 C.W.N. 621 (623); 6 Ind. Cas. 851 (855) = 3 S.L.R. 203 (217); 18 M.L.J. 51 = 3 M.L.T. 225; 1 S.L.R. 115; 1 S.L.R. 224 (225).]

THIS was an appeal under s. 588 (8) of the Code of Civil Procedure from an order rejecting an application made under s. 103 of the Code by a plaintiff whose suit had been dismissed. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that

* First Appeal, No. 22 of 1899, from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 23rd January 1899.

(1) 20 A. 195. (2) 23 B. 414. (3) 5 N.W.P.H.C.R. (1873) 74.
(4) 7 N.W.P.H.C.R. (1875) 77. (5) 3 A. 519.

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they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court rejected the application for an adjournment and proceeded to pass the following order dismissing the suit:—"Up to the present this case has been adjourned four times since June 1898, on applications made by the plaintiff. Finally proclamations and warrants were issued for some of the plaintiff's witnesses, who have with difficulty been got to attend to-day; but the plaintiff has been called, and he himself is not present, and his pleaders being unable to proceed with the case, have made this application for adjournment. In the [68] application no reasonable cause is given for adjournment. Sickness, or a friend being at the point of death, is not a proper ground for non-prosecution, especially when no certificate of sickness has been produced. It appears that for some reason there is intentional inaction on the part of the plaintiff. Under these circumstances the case cannot remain pending. The Court cannot waste its time over the business of such a negligent party. It is therefore ordered that the claim of the plaintiff be dismissed for default of appearance and for want of prosecution, with costs; the costs of the defendant to be borne by the plaintiff."

On the 22nd of December 1898 the plaintiff applied for restoration of the suit to its original number, urging that there was in fact sufficient and reasonable cause for his not having prosecuted the suit on the 25th of November.

The defendants filed a counter application pleading (1) that the case had not been dismissed in default of prosecution, (2) that the case had not been decided *ex parte* (3) that the petitioner ought to have filed an appeal against the order of the Subordinate Judge, and (4) that no good reason for the petitioner's absence on the 25th November had been, or could be, shown.

The Subordinate Judge disallowed the plaintiff's application on the ground that the order dismissing the suit was not in effect an order under s. 102 of the Code, that it was a dismissal for want of proof, and therefore the plaintiff's remedy was by appeal against the decree and not by application under s. 103.

Against this dismissal the plaintiff appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

The order of the 25th November 1898 as rightly understood was an order under s. 102 read with s. 157 of the Code of Civil Procedure. It clearly says that the suit was dismissed "for default of appearance and want of prosecution" the evidence upon the record was not taken into consideration and the suit was not decided upon the merits. The Court in dealing with the [69] subsequent application under s. 103 of the Code was not competent to go behind the order passed under s. 102 and say that it was a wrong order and therefore an application under s. 103 would not lie. The Court had only to interpret that order and to see whether it was really an order passed under s. 102 and then to deal with the application under s. 103 on the merits. I submit that the order of the 25th November was in substance and effect an order under s. 102. The circumstances under which it was passed were exactly those under which an order under s. 102 of the Code would be legally justified. The pleaders who presented the application for adjournment on that date on behalf of the plaintiff-appellant were not instructed to go on with the suit in case the application was refused. The following cases were referred to:—

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Fazal Ahmad v. *Bahadur Singh* (1), *Hira Dai* v. *Hira Lal* (2), *Ramtahal Ram* v. *Rameshar Ram* (3), *Shankar Dat Dube* v. *Radha Krishna* (4), *Bhimacharya* v. *Fakirappa* (5), *Administrator-General of Bengal* v. *Lala Dayaram Das* (6), *Zeinúlabdin Khan* v. *Ahmed Raza Khan* (7), *Jonardan Dobey* v *Ramdhone Singh* (8), *Bhagwan Dai* v. *Hira* (9), *Shrimant Sagajirao* v. *S. Smith* (10), *Soonderlal* v. *Goorprasad* (11). The cases in I.L.R. 20 Allahabad and 23 Bombay are exactly in point. There seems to be no conflict of authority upon the point that an uninstructed pleader or counsel cannot represent a party in a Court of justice.

Pandit *Sundar Lal*, for the respondents.

Under s. 157 of the Code of Civil Procedure if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit in one of the modes provided in chapter VII of the Code, or make such order as it thinks fit. The 25th November 1898 was the **[70]** date of adourned hearing of the case. Documentary evidence had already been filed. The Court could either dismiss the suit under s. 102 of the Code, if the plaintiff did not appear, or dispose of the case on the merits on the evidence on the record. In the latter case the plaintiff's remedy is by way of appeal under s. 540 of the Code, and not under s. 103 of the Code. The plaintiff's pleader was present before the Court. Whether his presence was appearance under s. 102 of the Code or not depended upon the instructions he had received—*Soonderlal* v. *Goorprasad* (11) There is nothing on the record to show that he had no instructions to appear. The order of the 25th of November 1898, read with the order under appeal, shows that the Court did not dispose of the suit under chapter VII of the Code, but on the merits. Therefore no application can be made under s. 103 of the Code. There must be an order under s. 102 of the Code, before an application under s. 103 can be made—*Mahomed Azeemool-lah* v. *Ali Buksh* (12) and *Kashi Parshad* v. *Debi Das* (13). The case of *Kanahi Lal* v. *Naubat Rai* (14) also supports this contention.

Munshi *Gulzari Lal* in reply.—The rulings relied upon by the other side do not really decide the point arising in this case. Some of them are clearly distinguishable and the others, I contend, were not rightly decided. The opening words of s. 103 make it abundantly clear that a Court in dealing with an application under that section should not reconsider its order under s. 102 of the Code.

JUDGMENT.

STRACHEY, C. J.—This is an appeal under s. 588 (8) of the Code of Civil Procedure from an order rejecting an application by a plaintiff under s. 103. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, **[71]** two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose

(1) 13 A.W.N. (1893) 25. (2) 7 A. 538. (3) 8 A. 140.
(4) 20 A. 195. (5) 4 B.H.C.R. A.C.J. 206. (6) 6 B. L. R. 688.
(7) 5 I. A. 233. (8) 23 C. 738. (9) 19 A. 355.
(10) 20 B. 736. (11) 23 B. 414.
(12) 5 N.W.P.H.C.R (1873) 74. (13) 7 N. W. P. H. C. R. (1875) 77.
(14) 3 A. 519.

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of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November, 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court made an order rejecting the application for adjournment and also dismissing the suit. The earlier part of that order referred to the number of adjournments already granted, and then continued :—"The plaintiff was called and he himself is not present, and his pleaders, being unable to proceed with the case, have made this application for adjournment. In the application no reasonable cause is given for adjournment." The order went on to criticise the reasons put forward in the application, and to say that the plaintiff seemed to be "intentionally negligent." The order concludes with these words :—"Therefore it is ordered that the claim be dismissed for default of appearance and for want of prosecution, with costs." It will be observed that the order makes no reference to the evidence, oral and documentary, which had already been taken in the case. We construe that order as an order passed under the earlier portion of s. 157 of the Code. In other words, the Court, in our opinion regarded the case as one in which the plaintiff had failed to appear at the adjourned hearing, and proceeded to dispose of the suit in one of the modes directed in that behalf by Chapter VII, that is, under s. 102 of that chapter. We have arrived at this construction by a consideration of the terms of the order as a whole, and more especially with regard **[72]** to three points. The first is the expression *baghair haziri*, or "default of appearance." That is the expression which a Court ordinarily uses when dismissing a suit for default of the plaintiff's appearance. The second point is that if the suit had been dismissed otherwise than under s. 102, one would have expected the order to have at least referred to the evidence previously adduced by the plaintiff. The third point is that in awarding costs to the defendant the Court awarded half the pleader's fees only, and in doing so obviously acted with reference to Rule 458 of the Rules of the 4th April 1894, which is applicable only to cases in which one of the parties does not appear, and which is not applicable where both parties appear and the case is decided after contest. We also construe that order as meaning that the pleaders for the plaintiff, though present and applying for an adjournment, were not duly instructed for the purpose of proceeding with the suit, or instructed otherwise than for the purposes of the application. The order refers to those pleaders as unable to proceed with the case, that is unable in consequence of the plaintiff's absence; and when, notwithstanding the presence of the pleaders, it describes the suit as dismissed for default of appearance, we think that the Court was presumably referring to those cases in which it has been held that the mere physical presence of a pleader not instructed except for the purpose of applying for adjournment, is not an appearance in the suit in the sense of Chapter VII of the Code.

That being our construction of the order, what next happened was that on the 22nd of December 1898 the plaintiff made an application under s. 103 of the Code for an order to set the dismissal aside. The Court

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rejected that application on the ground that the dismissal of the suit could not be treated as a dismissal for want of appearance of the plaintiff under s. 157 read with s. 102, but must be treated as a dismissal on the merits, and for want of proof, having regard to the fact that evidence had been taken and was on the record. The Court observed that the contention of the pleaders, that on the 25th [73] of November they had had no instructions, could not be maintained. It, however, did not go into any evidence as to the nature or extent of the pleader's instructions, no doubt because, in the view which it took of that case, that question was not material. The Court held that as the suit had not been dismissed for default of appearance, the application under s. 103 could not be maintained. It therefore dismissed the application, and the plaintiff now appeals to us from that decision.

The contention of the plaintiff in this appeal is that the suit was in fact dismissed under s. 157 read with s. 102, and that his application under s. 103 ought therefore to have been determined as such an application properly made, and on the merits. He contends that as he was not present on the 25th of November, and as his pleaders, though present, were not duly instructed in the suit, there was a dismissal of the suit for default of appearance under s. 102. In support of that contention he relies on, amongst other authorities, the decision of this Court in *Shankar Dat Dube* v. *Radha Krishna* (1) and of the High Court of Bombay in *Soondelal* v. *Goorprasad* (2).

The defendants support the decision of the Court below. They contend on two grounds that s. 102, and therefore s. 103, is not applicable to the case. The first ground is, that the order of dismissal does not purport to be passed under s. 102, and on its true construction is not an order under that section. The second ground is that, even if the Court purported to act under s. 102, or intended so to act, it could not legally dismiss the suit under s. 102, because there was in law an appearance of the plaintiff within the meaning of s. 102. It was further argued that the order dismissing the suit, as it could not be considered a legal order under s. 102, must be treated as an order dismissing the suit in the ordinary way on the merits, or at all events not for want of appearance, and that the plaintiff's remedy was not by way of application under s. 103, but by way of appeal. In support of this contention the learned advocate for the [74] defendants cited, amongst others, the cases of *Mahomed Azeemoollah* v. *Ali Buksh* (3), *Kashi Parshad* v. *Debi Das* (4) and *Kanahi Lal* v. *Naubat Rai* (5).

The reply of the plaintiff to this contention is, first, that the order on its true construction is an order of dismissal under s. 102; and secondly, that a defendant cannot, in reply to an application under s. 103, be heard to say that an order purporting to be passed under s. 102, was one which the Court had no power to make under that section, or to contend for any reason that, contrary to the meaning and effect of that order, the plaintiff had actually appeared when his suit was dismissed for non-appearance.

Now in the first place, as I have already stated, we construe the order of the 25th of November 1898, as an order by which the Court intended to act and believed itself to be acting under s. 157 read with s. 102. It is not necessary to repeat the reasons which I have already given

(1) 20 A. 195. (2) 23 B. 414. (3) 5 N.W.P.H. C. R. (1873), 74.
(4) 7 N. W. P. H. C. R. (1875) 77. (5) 3 A. 519.

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for that construction. In the second place, what is the meaning of the opening words of s. 103 of the Code "when a suit is wholly or partially dismissed under s. 102?" Is it a dismissal under s. 102 merely if the order says that it is passed under s. 102? Or is it only a dismissal under s. 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed under s. 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action, is that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be **[75]** read and construed as a whole. But, although the Court may describe an order of dismissal, as being made under s. 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if s. 102 is not named, and even if some other section, whether s. 158 or any other, is named, still it may be that that is a mere misdescription, and that nevertheless the real reason for the dismissal is that in the Court's view the defendant appears and the plaintiff does not appear. In such a case, nothwithstanding the misdescription, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff and therefore a dismissal under s. 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered under s. 102, it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed under s. 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court's reason for the dismissal is its view that the plaintiff has not appeared.

If that is the correct view of the meaning of the opening words of s. 103, referring to a suit being dismissed under s. 102, it follows that a plea by the defendant, in answer to the plaintiff's application under s. 103, that the order under s. 102 was illegally made, is irrelevant. S. 103 allows the plaintiff to apply for an order to set the dismissal aside, where the suit has been in fact wholly or partially dismissed under s. 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore the defendant cannot contest the **[76]** application *in limine* as one which cannot be entertained at all under s. 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law. But what can the defendant do? He is entitled to meet in any way that is relevant the plaintiff's allegation, which is the only ground on which such an application can succeed, that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing. In order to succeed the plaintiff must prove that he was [so prevented from appearing. The

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defendant may prove that the plaintiff was not prevented from appearing. Those terms would undoubtedly cover a contention by the defendant that the plaintiff was not prevented from appearing because, in fact, he did appear, so that the contention that there was such an appearance in fact and in law, though it cannot be used as a bar to the application under s. 103 *in limine* would still be material on the merits of the application and as a ground for dismissing it under the section.

Now in the present case the plaintiff did not appear in person. If he appeared at all, it was by his pleaders. If his pleaders were not duly instructed and able to answer all material questions relating to the suit, if they were instructed only to apply for an adjournment, then Pandit *Sundar Lal* concedes that according to the authorities, and particularly according to *Shankar Dat Dube* v. *Radha Krishna* and *Soonderlal* v. *Goorprasad*, with which we agree, the plaintiff did not appear at all. Therefore, all depends on two questions : first, were the pleaders duly instructed in the sense of these authorities ? and, secondly, if they were not, and if consequently there was no appearance by the plaintiff on the 25th of November 1898, was he prevented by any sufficient cause from appearing ?

These questions have not been considered by the Court below. It did not consider them because of the erroneous view which it formed of the nature of the order of dismissal. It should have treated that order as a dismissal of the suit under s. 102, and **[77]** disposed of the application solely with reference to the circumstances contemplated by s. 103. The order must be set aside as in effect passed on a preliminary point, and the case must go back to the Court for the application under s. 103 to be disposed of on the merits. In this judgment I have not thought it necessary to discuss in detail the various cases that have been cited. If any of them, being decisions of this Court, and especially the cases reported in 5 N.W.P.H.C. Rep., 1873, p. 74, 7 N.W.P.H.C. Rep., 1875, p. 77, and I.L.R., 3 All., 519, contain anything inconsistent with the views expressed in this judgment, they must be considered overruled to that extent. The appellant will have his costs of this appeal. The other costs will abide the result.

KNOX, J.—I fully agree with the order proposed and with the reasons given for the same.

BANERJI, J.—I am of the same opinion, but desire to make a few observations. Two points have been conceded, and in my opinion rightly conceded, by the learned advocate for the respondents. The first is that if the dismissal of the plaintiff's claim was in fact and in law a dismissal under the first part of s. 157 of the Code of Civil Procedure, that is, a dismissal under s. 102, on the ground of the plaintiff's failure to appear at the adjourned hearing of the suit, the plaintiff has a remedy under s. 103. The second point is, that the mere presence of a pleader at the hearing is not an appearance within the meaning of the Code unless the pleader was duly instructed and able to answer material questions relating to the suit. On both these points the course of rulings in this Court in recent years, and in the other High Courts is to the effect that in the former case an application can be made under s 103, and in the latter, that the party represented by a pleader without instructions must be deemed not to have appeared. There is no reason to depart from this consensus of rulings. The learned advocate for the respondents contends that whenever an application is made under s. 103, the first question to be determined is, whether the order which is sought to be **[78]** set

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aside could legally have been made under s. 102. With this contention, and the rulings which support it, I am unable to agree. What the Court has to determine is, whether the order of dismissal was, in fact, made under s. 102; that is, whether it was made on the ground that the plaintiff did not appear and the defendant did appear, not whether that order was rightly or legally made. When a Court has dismissed a suit on the ground that the defendant has appeared, and the plaintiff has not appeared, that is a dismissal under s. 102, and an application can be made under s. 103 to set aside such a dismissal. The plaintiff's success upon that application depends on his ability to prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant may, for the purpose of showing that no such cause existed, prove that, in fact, the plaintiff had appeared, and that he was not prevented by any sufficient reason from appearing at the hearing: but that is a question which must be determined for the purpose of considering whether the plaintiff has been able to substantiate his application under s. 103 to set aside the dismissal. In this case, as has been shown in the judgment of the learned Chief Justice, the Court did, in fact, dismiss the suit on the ground that there was no appearance on behalf of the plaintiff. That being so, the plaintiff was entitled to apply under s. 103 for the setting aside of that dismissal, and the Court below was wrong in refusing to entertain the application. I agree with the order proposed by the learned Chief Justice.

AIKMAN, J.—I also am of the same opinion. The learned Subordinate Judge says that the order of dismissal which was passed on the 25th November, 1898, amounted to a dismissal for want of proof. I am clear that this is a mistake. It would have been open to the Subordinate Judge in the present case to say that the evidence on the record was insufficient to prove the plaintiff's case, and that therefore the suit was dismissed. Had he said so, that would have been a decree against which the plaintiff's remedy would have been by way of appeal. But what he did say, **[79]** was that the suit was dismissed for default of appearance. That is clearly an order passed under the first part of s. 157 read with s. 102 of the Code, and the plaintiff adopted the proper course by applying under s. 103 for an order to set the dismissal aside. The argument that because the Court may have been mistaken in thinking that there was no appearance by the plaintiff, the order must be taken to have been one not passed under s. 102 is, in my opinion, utterly fallacious, and I would dissent from anything there may be in the judgments cited which would support such reasoning. I concur in the order proposed.

Appeal decreed and cause remanded.

22 A. 79=19 A.W.N. (1899) 181.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

DHAN KUNWAR AND ANOTHER (*Opposite-parties*) *v.* MAHTAB SINGH AND OTHERS (*Objectors*).* [6th July, 1899.]

Civil Procedure Code, s. 244—*Execution of decree—Sale in execution—Decree satisfied—Amendment of decree in favour of judgment-debtors—Application by judgment-debtors to recover surplus from decree-holders.*

Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwads amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was *held* that it was competent to the judgment-debtors by application under s. 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

[F., 25 A. 441; R., 24 A. 291 (294)=22 A.W.N. (1902), 67; 29 A. 348 (350)=4 A.L.J. 188=27 A W.N. (1907) 90.]

THIS was an appeal under s. 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment, which was as follows:—

"This appeal relates to a decree bearing date the 25th July 1895. Of that decree the ancestors of the present respondents [80] were decree-holders, and the ancestors of the present appellants were the judgment-debtors against whom the decree ran. The decree was a decree for sale passed under s. 88 of Act No. IV of 1882. The order absolute for sale had followed in due course, the property was sold, and the proceeds of the sale dealt with as provided by s. 88. The amount due had been paid to the plaintiffs, when the judgment-debtors discovered that there was an error in the decree, applied for amendment and got the decree amended. The result of the amendment was the discovery that a sum of Rs. 500-11-4 had been paid to the plaintiffs in excess of what was due to them under the decree as now amended. The judgment-debtors then applied under s. 244 of the Code of Civil Procedure to recover this sum in the execution department. Their application has been dismissed on the ground that the loss is due to the negligence of the appellants."

The single Judge thereafter proceeded to dismiss the appeal before him. The appellants appealed under s. 10 of the Letters Patent.

Mr. *D. N. Banerji* and Babu *Satish Chandar Banerji*, for the appellants.

Pandit *Moti Lal Nehru*, for the respondents.

JUDGMENT.

STRACHEY, C. J. (BANERJI, J., concurring).—We are of opinion that this appeal must be dismissed. At the same time we are unable to concur in the view of the law on which the learned Judge has dismissed the appeal to this Court. The learned Judge's view was this. He considered that where there had been a sale in execution of a decree, and by that sale the decree as passed was fully discharged, but the judgment-debtor afterwards obtained an amendment of the decree, and the

* Appeal No. 11 of 1899, under s. 10 of the Letters Patent.

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decree as amended showed that the decree-holder had realized at the sale more than he was entitled to, the judgment-debtor had no right under s. 244 of the Code of Civil Procedure to apply to recover the excess realized. We cannot agree with that view at all. It appears to us that the question whether the decree-holder had realized more than he was entitled to under the decree as it finally stood, was undoubtedly [81] a question relating to the execution, discharge or satisfaction of the decree, and that therefore under s. 244 the judgment-debtor was entitled to apply for the recovery of what the decree-holder had taken in excess. The learned Judge says:—"As soon as the decree ceased to subsist s. 244 had no application." It would, we think, be impossible to maintain that after the sale in execution, the decree ceased to subsist in the sense that no amendment of it could be made, and if so the answer is that as soon as the decree was amended, and the amendment showed that the decree-holder had realized too much, the application of s. 244 was revived. So long as there is no question which can be raised under s. 244, that section, of course, could have no application; but as soon as any such question arises the section again becomes applicable. Take the converse case. Suppose that after the execution sale it appeared that the decree awarded less to the decree-holder than he was entitled to according to the judgment. Surely he could apply, notwithstanding the sale, for an amendment of the decree so as to entitle him to recover in execution the full amount decided in the judgment to be due to him, and, if the amendment were made, surely he could then execute his decree for the balance due, and any application for such execution would be made under s. 244. If so, the judgment-debtor, in the converse case of too much having been realized, can equally apply for amendment and afterwards recover the excess under s. 244. According to the principle laid down by the learned Judge, neither the judgment-debtor nor the decree-holder would have any remedy under ss. 206 and 244, and a separate suit would be necessary, if it were discovered that too much or too little had been realized at the sale in consequence of a clerical or arithmetical error in the decree. Section 244 was intended to make a separate suit unnecessary in such cases.

On other grounds, however, we think that the appeal must fail. The whole question is whether the decree-holders in fact realized Rs. 500 odd in excess of what they were entitled to. That is a question of the construction of the decree for sale under s. [82] 88 of the Transfer of Property Act. That decree provides for future interest. It does not expressly state that the future interest is payable until realization, but it does not state that it is to stop at any earlier date. Therefore, unless there is anything to preclude us from so doing, we must construe the decree according to the recent Full Bench ruling in *Bakar Sajjad* v. *Udit Narain Singh* (1) as a decree in accordance with s. 88, that is, as a decree awarding interest until the date of realization. On that view of the decree the decree-holders have not realized too much, and this application of the judgment-debtors must fail. Then is there anything which does preclude us from applying the principle laid down by the Full Bench? The only thing which, it is suggested, precludes us is an order passed on the 4th of December, 1897, on the judgment-debtor's application, by which the Court amended, not the decree under s. 88, but the order absolute for sale under s. 89. Of course, the decree to be executed was the decree under s. 88, and

(1) 21 A. 361.

no alteration of the order absolute could affect the rights of the decree-holders under that unamended decree. But it is said that the amending order placed a construction on the decree under s. 88 to the effect that interest beyond six months from the date of the decree should not be allowed. It is suggested that we are bound to construe the decree under s. 88 according to that construction and not on the construction which would be right according to the Full Bench decision. We do not think that the order of December, 1897, has any such effect. It was not an order passed in execution proceedings, nor an interlocutory order which could have an effect analogous to that of *res judicata* in accordance with the well-known rulings of the Privy Council. At the time when it was made, execution proceedings had been completed by the sale. It was not until some time later that proceedings in execution were resumed by the present application under s. 244. We do not think that the principle of the Privy Council rulings can be held to cover an **[83]** order of this kind. It is difficult, indeed, to say under what provision of the law the order was made. It cannot be regarded as an order under s. 206 of the Code, because the Court did not profess to act on any ground stated in that section. Nor can it be regarded as an order of review. We think that the principle laid down in the Full Bench case must be applied; that the decree-holders did not realize anything in excess of what was due to them under the decree, and that this appeal of the judgment-debtors must be dismissed with costs.

Appeal dismissed.

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22 A. 83 = 19 A.W.N. (1899) 189.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

ZUBEDA BIBI (*Defendant*) *v.* SHEO CHARAN (*Plaintiff*).*
[12th July, 1899.]

Act No. XII of 1881 *(N. W. P. Rent Act), s. 36—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.*

Held, that the mere fact of a plaintiff in a suit for ejectment in a Civil Court, having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser.

[F., 22 A. 93; 35 A. 14 (17) = 10 A.L.J. 408 = 17 Ind. Cas. 376 (377); R., 10 A.L.J. 85 (86) = 15 Ind. Cas. 303.]

THE plaintiff in this case was the purchaser of the rights of the mortgagor in certain property which was the subject of a usufructuary mortgage. The defendant, Zubeda Bibi, was the representative in interest of the mortgagees. The plaintiff redeemed the mortgage by deposit of the whole mortgage-money in Court, and obtained possession of the mortgaged property with the exception of four plots of land on which the mortgagee during the continuance of the mortgage had planted trees. The plaintiff accordingly brought the present suit for the recovery of these four plots.

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* Second Appeal, No. 196 of 1899; from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st December, 1898, confirming a decree of Mr. H. David, Munsif of Basti, dated the 6th November, 1897.

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The Court of first instance (Munsif of Basti) decreed the plaintiff's claim. The defendant appealed and urged, *inter alia*, that the suit was not cognizable by a Civil Court because on a former occasion the plaintiff had sought to eject the defendant as [84] a tenant by proceedings under the North-Western Provinces Rent Act, 1881. This was so; but in those proceedings the Board of Revenue had found that the relation of landholder and tenant did not subsist between the parties, and had directed the plaintiff to seek his remedy in a Civil Court. The lower appellate Court (Subordinate Judge of Gorakhpur) dismissed the appeal confirming the decree of the Court of first instance.

The defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondent.

JUDGMENT.

BANERJI, J.—This is an untenable appeal. The plaintiff respondent is the purchaser of the rights of two persons who mortgaged certain property to the defendant appellant. The amount of the mortgage was deposited by him in Court, and was withdrawn by the mortgagee in full discharge of the mortgage. The mortgagee delivered possession to the plaintiff of the whole of the mortgaged property except a grove which is claimed in this suit. The Courts below have decreed the claim. The first contention urged in this appeal is that the suit is cognizable by a Court of Revenue and not by the Civil Court. That contention is based upon the argument that the plaintiff, by reason of his having applied to the Revenue Court for the ejectment of the defendant under s. 36 of Act No. XII of 1881, is precluded from denying that the relationship of landlord and tenant exists between him and the defendant. It appears that the plaintiff did issue a notice for the ejectment of the defendant under s. 36 of the Rent Act. That notice was contested, and in the result the appellate Court held that the plaintiff was not entitled to eject the defendant under the proceedings taken by him in the Revenue Court. The order of the Board of Revenue, which is the only order on the record of this case, is to the effect that the plaintiff ought to seek his remedy in the Civil Court. From that order it is clear that the Revenue Court did not find that the relation of landlord and tenant existed between the parties. The mere fact [85] of the plaintiff having applied to the Revenue Court for the ejectment of the defendants does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is, as a trespasser. The application made by the plaintiff in the Court of Revenue did not amount to anything more than an admission which was rebuttable. In this case he asserted that the defendant, after having received the mortgage-money, had no right to continue in possession of a part of the property, and that she was thus in possession as a trespasser. A suit brought upon such an allegation can only be brought in the Civil Court. It has been found that the relation of landlord and tenant does not exist between the parties. It was never stated in the pleadings that such relation subsisted between the parties. The only ground upon which the defendant contended in the Courts below that the suit was not cognizable by the Civil Court was the ground stated in the first plea in the memorandum of appeal to the lower appellate Court, namely, the fact that the plaintiff had issued a notice of ejectment under s. 36 of Act No. XII of 1881. Upont he allegations

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made in this case and the findings of the Court below this was a suit which was exclusively cognizable by the Civil Court. The lower appellate Court has found that the grove in question was planted during the time when the defendant was in possession as an usufructuary mortgagee, and that it is thus an accession to the mortgaged property. It has found that separate possession and enjoyment of the grove without detriment to the principal property is not possible. It has further found that the planting of the grove was not necessary to preserve the property from destruction, forfeiture, or sale, and that the grove was not planted with the consent of the mortgagor. Consequently under s. 63 of the Transfer of Property Act the mortgagor is entitled to obtain delivery of possession over the accession made to the mortgaged property. It is true that the lower appellate Court in its judgment uses the word plaintiff when referring to the question of consent; but having regard to the fact that the Court in distinct terms referred [86] to the provisions of the second paragraph of s. 63, and that it was considering whether all the conditions mentioned in that section applied, it is clear that the Court meant to find that the grove was not planted with the consent of the original mortgagors. Upon the findings of the lower appellate Court the second contention raised in this appeal cannot be sustained. It is urged, lastly, that the plaintiff ought to have sued for redemption of the mortgage. It has been found, and it is a fact which was evidently admitted on the pleadings, that the defendant received the whole of the mortgage money in full satisfaction of the mortgage. That being so, there has been a redemption of the mortgage, and as the bulk of the property has been restored to the representative of the mortgagor, the only suit which the plaintiff, as such representative, had to bring was a suit for recovery of possession of the property which was withheld from him. I dismiss the appeal with costs.

Appeal dismissed.

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22 A. 86=19 A.W.N. (1899) 184.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

DHANI RAM (*Defendant*) *v.* CHATURBHUJ AND ANOTHER (*Plaintiffs*).* [15th July, 1899.]

Civil Procedure Code*, s. 244—*Execution of decree—Questions for the Court executing the decree—Sale in execution—Suit by decree-holder and judgment-debtor against auction purchaser to set aside sale alleging an uncertified adjustment of the decree prior to the sale.

Held that the provision of s. 244 of the Code of Civil Procedure disallowing a separate] suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram* v. *Fattu* (1), and *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) referred to.

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* First Appeal from order No. 46 of 1899 from an order of W. F. Wells, Esq., District Judge of Agra, dated the 6th May 1899.

(1) 9 A. 146.

(2) 19 C. 688.

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[R., 24 A. 239 (240)=22 A.W.N. 1902 49; 26 A. 447 (459. 460)=1 A.L.J. 65=A W.N. (1904) 61; 34 M. 417 (420)=8 Ind. Cas. 429=21 M.L.J. 928 (932)=9, M.L.T. 152 (154)=1910 M.W.N. 662; 11 Bom. L.R. 699 (705)=3 Ind. Cas. 763.]

[87] THE facts of this case sufficiently appear from the judgment of Aikman, J.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Munshi *Gulzari Lal*), for the respondents.

JUDGMENT.

BLAIR, J.—The plaintiffs' suit, out of which this second appeal arises, is a suit by a decree-holder and a judgment-debtor as plaintiffs against an auction-purchaser at a sale in execution of a decree in which the plaintiffs occupied the position I have mentioned on the ground that an adjustment had been arrived at between them before sale. The Court of first instance dismissed the suit of the plaintiffs, applying the provisions of s. 244 of the Code of Civil Procedure. The appellate Court reversed that decision and remanded the case under s. 562 of the Code of Civil Procedure for decision upon the merits. It is against that order of remand that the present appeal is brought. The ground taken by Pandit *Sundar Lal*, who appears for the appellant, is that the Court of first instance was right in applying s. 244 as a bar to this suit. That practically is the substantial ground of appeal. The fact alleged is, that the plaintiffs had really effected an adjustment, which, if duly certified to and sanctioned by the executing Court, would have put an end to the suit in the execution proceedings. It was manifestly the duty of the decree-holder under s. 258 of the Code of Civil Procedure to certify such adjustment. It was open to the judgment-debtor, upon the decree-holder failing to perform that duty, to protect himself from the further execution of the decree by himself certifying to the Court the fact of such adjustment, whereupon due notice would have been given to the decree-holder to show cause why the adjustment should not be recorded as certified. As a matter of fact neither party took the course which is imposed upon one, and, in case of his default, is allowed to the other, by that section. The consequence was that the sale proceeded and the defendant became a purchaser. It is now sought to set aside that sale. Apart altogether from authorities to [88] which I am bound to conform, it does seem contrary to elementary principles of right and justice to allow two persons, either of whom could have prevented the sale, to put their hands in their pockets till the sale was over, and then to proceed against an innocent auction-purchaser by suit in order to set aside the sale which ought never to have taken place. However, we have abundant authority in the Full Bench decision of this Court in *Basti Ram* v. *Fattu* (1), and the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). The only distinction that appears to us which could possibly be urged between this case and those that have been decided is that the sole defendant here is the auction-purchaser, and it has been contended before us that upon that fact the provisions of cl. (*c*) of s. 244 of the Code of Civil Procedure do not apply. In my opinion the question as to the fact and propriety of this adjustment did arise between the parties to the suit in which the decree was passed, and ought to have been by them decided in the executing Court as provided for by s. 244. I would

(1) 8 A. 146.

(2) 19 C. 683.

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22 A. 86=
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(1899) 184.

allow this appeal, and, setting aside the order of remand by the Court below, restore with costs the decree of the Court of first instance.

AIKMAN, J.— I am of the same opinion. The suit out of which this appeal arises was brought to set aside an auction sale held in execution of a decree on a mortgage. The plaintiffs are the decree-holder and the judgment-debtor in the mortgage suit. The defendant, who is the appellant here, is the auction-purchaser of the mortgaged property. It appears from the statement of facts that on the 10th of March, 1898, the decree-holder and the judgment-debtor in the mortgage suit entered into an arrangement, whereby the judgment-debtor executed a fresh mortgage in favour of the decree-holder in adjustment of the decree which the latter had obtained upon the previous mortgage. Neither of the parties took any steps to have this adjustment certified to the Court, whose duty it was to execute the decree. For anything we know to the contrary, the agreement entered into between the decree-holder **[89]** and the judgment-debtor may have come within the provisions of the second paragraph of s. 257-A of the Code of Civil Procedure, and may have required the sanction of the Court. The 21st of March, 1898, was the date fixed for the sale which, under the provisions of s. 320 of the Code of Civil Procedure, had been transferred to the Collector. On that date the son of the decree-holder presented an application to the officer conducting the sale, asking him to stay the sale on the ground that the decree had been satisfied. That officer refused the prayer of the applicant. The property was sold, and was purchased by the appellant before us. The judgment-debtor applied under s. 311 of the Code of Civil Procedure to have the sale set aside. That application was refused, and no appeal was preferred against the order of refusal. The Court of first instance held that the present suit was barred by the provisions of s. 244 of the Code, and on that ground dismissed it. On appeal the learned District Judge came to the conclusion that s. 244 did not apply to the case, set aside the decree of dismissal, and remanded the suit for decision on the merits. The defendant appeals against this order of remand, contending that the decision of the first Court was right. In my judgment the suit is clearly barred by s. 244. The case is, in my opinion, governed by the decision of the Full Bench of this Court in *Basti Ram* v. *Fattu* (1). That was a case in which a judgment-debtor, whose property had been sold in execution of a decree, brought a suit against the auction purchaser to have the sale set aside on the ground that the property, an occupancy tenure, could not be sold in execution. The Full Bench held that the provisions of s. 244 disallowing a separate suit to determine questions arising between the parties to the suit in which a decree had been passed and bearing upon the execution, discharge or satisfaction of the decree, or stay of the execution thereof, operated not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the **[90]** decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to execution, discharge or satisfaction of the decree. If the question be of this nature in this suit it is one which by s. 244 must be determined by order of the Court executing the decree and not by a separate suit, and it is immaterial whether the party did or did not raise it prior to the auction sale in execution proceedings. If he did not, "suit is not the remedy which the Legislature

(1) 8 A. 146.

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has provided." These remarks in my judgment apply clearly to the present case. A purchaser at an auction sale held in execution of a decree is entitled to take it for granted that questions as to whether the decree under execution is or is not barred by limitation, as to whether the property advertised for sale is or is not saleable under the decree, and as to whether the decree has or has not been satisfied, have been decided by the Court executing the decree. If a suit like the present were held to be maintainable against an auction-purchaser, it would have a most injurious effect upon auction sales. If parties will not adopt the course provided by law for deciding whether a decree has or has not been satisfied, they cannot take advantage of their own laches and neglect of the law to harass an innocent auction-purchaser. I concur in the order proposed.

Appeal decreed.

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22 A. 90=19 A.W.N. (1899) 188.

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice.

MUHAMMAD BAQAR (*Defendant*) *v.* MANGO LAL (*Plaintiff*).*

[26th July, 1899.]

Limitation—Act No. XV of 1877 (*Indian Limitation Act*), *sch. ii, art.* 120—*Suit by auction-purchaser of mortgaged property to cancel a perpetual lease granted by the mortgagor in contravention of a covenant in the mortgage.*

During the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage, and [91] having obtained a decree, put the mortgaged property up to sale. The auction purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease, sued for its concellation and for a declaration that the defendant had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held*, that the limitation applicable to such suit was that prescribed by art. 120 of the second schedule to the Indian Limitation Act, 1877, and not that prescribed by art. 91 or art. 95. The main prayer of the plaint was for a decree declaring and establishing the plaintiff's title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. *Pachamuthu* v. *Chinnappan* (1) and *Uma Shankar* v. *Kalka Prasad* (2) referred to. *Din Dial* v. *Har Narain* (3) followed.

[R., 26 M. 410 (416); 1 C.L.J. 73 (80); 7 Cr.L.J. 89 (91)=10 O.C. 337; 15 Ind. Cas. 819 (820)=5 S.L R. 240.]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

JUDGMENT.

KNOX, ACTING C. J.—The suit out of which this second appeal arises was brought by one Mango Lal, who is now respondent, on the basis of a bond executed by Fazal Husain. The bond is said to have been executed on the 1st of July, 1889, in favour of the predecessor in interest of the plaintiff, and to have been followed by a second bond executed by the same person and in favour of the same ancestor of the plaintiff. On the 26th of January 1890, a suit was brought upon these bonds, and a decree

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* Second Appeal No. 777 of 1898 from a decree of Babu Baijnath, Rai Bahadur, Additional Judge of Saharanpur, dated the 5th July 1898, confirming a decree of Maulvi Shah Amjadullah, Munsif of Saharanpur, dated the 27th July 1897.

(1) 10 M. 213. (2) 6 A. 75. (3) 16 A. 73.

obtained for the enforcement of the hypothecation lien on the 28th of March 1891. The plaint in that case was filed by the father of the present plaintiff. He died before the close of the suit. The plaintiff and his brother obtained a decree under s. 89 of Act IV of 1882, on the 25th of June 1892, and in execution of the decree the entire hypothecated property was brought to sale. The plaintiff purchased the property when it was put up for sale, and the date of his purchase was the 20th of August 1894.

It appears that on the 7th July 1890, Fazal Husain executed a perpetual lease in respect of a portion of the hypothecated property in favour of Muhammad Baqar.

[92] The plaintiff contends that the execution of this lease was in contravention of a covenant not to alienate, which was contained in the mortgage-deed executed by Fazal Husain in favour of Bhagwan Das, and accordingly prays in this suit that the lease be declared null and void.

The date on which the cause of action accrued is entered in the plaint as November 1896, and is set out as being a decision which the Revenue Court gave against the plaintiff when he tried to realize rent from his tenants and found himself opposed by Muhammad Baqar.

The learned Judge found that the suit was within time and rejected the defence set up by the appellant that limitation barred the claim. He also found that the lease was in contravention of the covenant contained in the mortgage-deeds of 1889 and 1890, and granted the respondent the decree prayed for.

It is now contended before me in appeal that the suit is barred by limitation, as the article which applies is either art. 91 or 95 of the second schedule of Act No. XV of 1877. It is also contended that the respondent was aware of the lease on the 5th of July 1893, the date on which Mango Lal, plaintiff, in his defence filed by him in answer to a suit brought by one Musammat Saidunnissa, expressly made mention of this lease, and time began to run from that date; and lastly, that, even if art. 120 of the above named schedule is the article which governs the case, then also time began to run from the date of the execution of the lease, the 7th of July 1890, and in this event also the suit brought was beyond time.

The learned Judge held that the article which governs the suit was art. 120 and the right to sue did not accrue to the plaintiff until he purchased the property in August 1894. In support of his judgment I have been referred to the case of *Pachamuthu* v. *Chinnappan*(1). The difficulty about applying that precedent is that in that suit there was no prayer that the deed which prejudiced the plaintiff's title might be cancelled **[93]** or set aside. I was also referred to the case of *Uma Shankar* v. *Kalka Prasad* (2). This is more in point, for the relief claimed by the plaintiffs was proprietary possessions by establishment of ownership and by removal of the defendants' opposition based on the collusive mortgage. The learned Judges in that case held that the suit was not for relief on the ground of fraud, but for possession of property by right of auction purchase. Similarly in the case before me the prayer is for a declaratory decree declaring and establishing the plaintiff's title, and also declaring that the lease of the 7th of July 1890, is null and void. I think the suit before me may be considered as one in which I should follow the principle laid down in the ruling just quoted of this Court. I find that my

(1) 10 M. 213.

(2) 6 A. 75.

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22 A. 90=19 A.W.N. (1899) 188.

brother Aikman in *Din Dial* v. *Har Narain* (1), had a similar point to decide, and held that the prayer for the cancelment of the deed, which was in the plaint before him, could be treated as merely incidental to the main relief asked. In the present case I too would treat the subsidiary prayer in the declaration prayed for as purely subsidiary. What the plaintiff wants is a declaration that the shadow cast upon his title may be dispersed. It is otherwise nothing to him whether the lease between Fazal Husain and Muhammad Baqar is or is not binding upon those who were parties to it. Accordingly, following it, I dismiss the appeal with costs.

Appeal dismissed.

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22 A. 93=19 A.W.N. (1899), 193.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

HAMID ALI SHAH (*Plaintiff*) *v.* WILAYAT ALI (*Defendant*).*
[2nd August, 1899.]

Act No. XII of 1881 (*N. W. P. Rent Act*), *ss* 36, 96 (*b*)—*Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel · Civil and Revenue Courts—Jurisdiction.*

Held **that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the [94] defendant undsr s. 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court.** *Baldeo Singh* **v.** *Imdad Ali* (2), **and** *Deo Narain Rai* **v.** *Sheo Charan Rai* (3) **distinguished.** *Zubeda Bibi* **v.** *Sheo Charan* (4) **followed.**

[R., 35 A. 14 (17)=10 A.L.J. 408 (411)=17 Ind. Cas. 376 (377); 10 A.L.J. 85=15 Ind. Cas. 303.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendro Krishna Mukerji*), for the respondent.

JUDGMENT.

AIKMAN, J.—This appeal arises out of a suit which was brought by the appellant to eject the defendant from certain plots of land as being a trespasser. The Court of first instance decreed the plaintiff's suit. The lower appellate Court reversed that decree and dismissed the suit upon the ground that it was not cognizable by the Civil Court. It appears that the plaintiff issued a notice to the defendant under s. 36 of the North-Western Provinces Rent Act, 1881, seeking to eject him from the land in suit. The defendant made an application to the Assistant Collector contesting his liability to be ejected. He contended in this application that he was not the plaintiff's tenant, but was himself the owner of the land. The Assistant Collector came to the conclusion that the present plaintiff, Hamid Ali Shah, had proved his ownership of the land, and upon that finding maintained the notice of

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* Second Appeal No. 278 of 1899, from a decree of Rai Pandit Indar Narain, Subordinate Judge of Farrukhabad, dated the 10th January 1899, reversing a decree of Babu Hari Mohan Banerji, B.A., Munsif of Farrukhabad, dated the 31st August 1898.

(1) 16 A. 73.
(2) 15 A. 189.
(3) 13 A.W.N. (1893) 166.
(4) (1899) 22 A. 83.

ejectment. The defendant appealed to the Commissioner, who pointed out that the finding of the Assistant Collector in favour of the plaintiff's ownership of the land was not sufficient to give the Revenue Court jurisdiction. The Commissioner held that the relation of landlord and tenant did not exist between the parties, and reversed the order of the Assistant Collector, holding that the case was "essentially one for the Civil Court." The learned Subordinate Judge refers to a decision of Burkitt, J., in *Baldeo Singh* v. *Imdad Ali* (1). That decision, I may mention, was followed by me in the case of *Deo Narain Rai* v. *Sheo Charan Rai* (2). But the circumstances [95] of the cases dealt with in these two decisions were entirely different from those of the present case. The plaintiffs in both those cases had endeavoured to eject the defendant by taking action under s. 36 of the Rent Act, but the Revenue Court had, on the defendant's objection, held that the defendant was a tenant with right of occupancy. Under these circumstances, my brother Burkitt and I held that no suit was maintainable in a Civil Court to eject the defendant as a trespasser. That this view is right is quite evident from the provisions of s. 96, clause (*b*) of the Rent Act, although that was not referred to in our judgments. The present case is on all fours with an unreported case decided by my brother Banerji—Second Appeal No. 196 of 1899, decided on the 12th July 1899.* In that case, as in this, the Revenue Court held that the relation of landlord and tenant did not exist between the parties. With the following passage of the judgment, I fully concur :—"The mere fact of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is, as a trespasser."

In my judgment the suit was cognizable by the Civil Court. I therefore allow the appeal, and, reversing the decree of the lower appellate Court, remand the suit to that Court under the provisions of s. 562 of the Code of Civil Procedure, with directions to readmit the appeal under its original number on the register, and proceed to dispose of the remaining grounds raised in the memorandum of appeal to it. The appellant will have the costs of this appeal. Other costs in the case will abide the event,

Appeal decreed and cause remanded.

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22 A. 96=19 A.W.N. (1899) 194.

[96] APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

BALBIR SINGH AND ANOTHER (*Plaintiffs*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).†

[9th August, 1899.]

Construction of document—Grant of land—Presumption as to boundaries where grant is described as bounded by a river or a road—Meaning of "river."

If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the

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* Since reported, *Vide* 22 A. 83.

† First Appeal No 96 of 1896 from an order of B. Lindsay, Esq., Subordinate Judge, Dehra Dun, dated the 14th December 1895.

(1) 15 A. 189. (2) 13 A.W.N. (1893) 166.

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language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption ; and this, though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from merely because it is shown that it would have been to the interest of the grantor to retain half the bed of the river. This rule of construction applies equally whether the subject matter be a grant from the crown or a subject. *Micklethwaite* v. *Newlay Bridge Co.* (1), *Ecroyd* v. *Coulthard* (2), and *Lord* v. *The Commissioner for the City of Sydney* (3), followed.

[R., 35 M. 28 (32) = 8 Ind. Cas. 175 = 20 M.L.J. 879 = 9 M.L.T. 44.]

THIS was a suit for the demarcation of the western boundary of the plaintiffs' estate. The plaintiffs were owners of two villages known as upper and lower Ghamandpur. These villages originally formed part of a Government grant of land made to the widow of Captain William Raynor, V.C., and one of the boundaries of that grant, the boundary in question in the present suit, was the bed of a hill stream called the Jakhan Rao. The plaintiffs claimed that the original grantee was in possession of the Jakhan Rao up to the line of mid-stream, the western boundary of the grant being described as the Jakhan Rao. They claimed that possession of the villages purchased by them had been always held according to the boundary alleged. The plaintiffs did indeed admit that in 1883 the Forest Department set up boundary pillars on the east bank of the Jakhan Rao and that on a dispute arising as to the boundary, the question had been decided against [97] them by the Collector, but they claimed to have always remained in possession notwithstanding that decision and that the Collector's order could not affect their rights. The defendant pleaded that ever since the erection of the boundary pillars on the left bank, the Forest Department had been in possession, and that the suit was barred by limitation. It was denied that any portion of the Jakhan Rao was included in the original grant and it was further alleged that the plaintiffs' predecessor had compromised her claim to the Rao by accepting an additional grant of 400 acres.

The Court of first instance (Subordinate Judge of Dehra Dun) dismissed the plaintiffs' suit, holding that the presumption as to the boundary being the middle line of the bed of the Jakhan Rao, applied only in cases where Government makes no claim to the soil of a river bed—not in cases like the present where the Government claims the whole of the river bed as of right and as being the proprietor of all the land in Dehra Dun. The Court also found that the area of the original grant would be made up without including half the bed of the Jakhan Rao, and that therefore the boundary set up by the defendant was correct.

The plaintiffs appealed to the High Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the appellants.

Mr. *E. Chamier* and Mr. *A. E. Ryves*, for the respondent.

JUDGMENT.

KNOX and BANERJI, JJ.—The plaintiffs-appellants are the owners of certain villages in the district of Dehra Dun, which originally formed part of a grant made by Government to the widow of Captain Raynor in 1865.

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(1) (1886) L.R. 33 Ch.D. 133.
(2) L.R. (1897) 2 Ch. D. 554.
(3) (1859) 12 Moo. P.C. 473.

To the west of those villages lies a hill stream called the Jakhan Rao, and to the west of the stream is a forest belonging to Government.

It is alleged on behalf of the plaintiffs that the western boundary of their villages extends to the mid-stream of the Jakhan Rao, and that they are thus the owners of one-half of the bed of the stream. On behalf of the defendant it is asserted that the western limit of the plaintiffs' villages is the eastern bank of the Jakhan Rao, and that the whole of the bed of that stream belongs [98] to the Government. An order to that effect was passed by Mr. Church, Superintendent of Dehra Dun, on the 26th February 1883.

The present suit has been brought by the plaintiffs to have the western limit of their grant determined, and for a declaration that their property extends to the mid-stream of the Jakhan Rao.

The defendant denied the title set up by the plaintiffs and pleaded limitation.

The Court below has dismissed the claim.

The sanad of grant in favour of Mrs. Raynor is printed on page 5 of the appellants' book, and is dated the 3rd of August 1865. By it the Government of the North-Western Provinces, "in consideration of the good services performed by the late Captain William Raynor, V. C., of the Veteran Battalion, one of the gallant defenders of the Delhi Magazine in 1857," granted to "his widow and to his heirs, representatives and assigns, the proprietary right rent-fee in perpetuity in the tract of land measuring 2,000 acres." The boundaries of the land are specified, the western boundary being "Jakhan Rao."

It is contended on behalf of the plaintiffs that the legal effect of this conveyance was to pass to Mrs. Raynor the bed of the Jakhan Rao *usque ad medium filum*.

The rule of law on the subject was laid down by Cotton, L. J., in the well-known case of *Micklethwaite* v. *Newlay Bridge Co.* (1), in the following terms:—"In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expression of the instrument to show that that is not the intention of the party. It is a presumption that not [99] only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted." This rule has been followed in subsequent cases, of which we may only mention the recent case of *Ecroyd* v. *Coulthard* (2). The Court below refused to apply it to the present case on the ground that it is not applicable to a case in which the Crown lays claim to the soil of the bed of a river. We are unable to agree with this view which the learned counsel for the respondent has conceded to be erroneous. In *Lord* v. *The Commissioner for the City of Sydney* (3), it was held that the grant by the Crown of land bounded by a creek passed the soil of the creek *ad medium filum aquæ*, and that this rule "equally applies, whether the subject-matter be a grant from the

(1) (1886) L. R 33 Ch. D. 133 (145).
(2) L.R. (1897) 2 Ch. D. 554.
(3) (1859) 12 Moo.P.C. 473.

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Crown or a subject." And the rulings to which the learned Judge has referred do not lay down a different view.

It was, however, contended on behalf of the respondent that the Jakhan Rao was not a river, and that the rule of midstream did not apply to it. With reference to this contention which, we may observe, was not raised in the Court below, we referred certain issues to that Court. Upon the findings on those issues the Jakhan Rao must be held to be a river. It has a perennial source, a bed and well-defined banks on either side: water flows in it for a part of the year, and it discharges itself in a continuous flow into another river, the Suswa. It has thus all the elements which constitute a river to which riparian rights attach. The water, it is true, dries up, and the bed remains dry for several months in the year, but it is not necessary that "water should flow in it continually." (See Tagore Law Lectures on the Law of Riparian Rights, p. 81, and the authorities cited therein). We therefore hold that the Jakhan Rao is a river. It is so described in the wajib-ul-arzes of the villages through which it passes. It was treated as such in the reports of the revenue officers, and the parties and the Court below proceeded on **[100]** the assumption that it is a river. It is too late therefore now to contend that the presumption of law which arises in the case of rivers does not apply to the Jakhan Rao.

The presumption that by a conveyance of land abutting on a river the bed of the river *ad medium filum* passes to the grantee may no doubt be rebutted, but do any circumstances exist in this case which rebut the presumption? The circumstances relied upon are, that the quantity of land granted is specified in the grant; that when the land was measured and entered in the khasra the bed was not included in the measurement; that in some of the maps the bed was not shown as a part of the grant; that as the bed yields lime-stones, which are a valuable source of income, it would have been to the interest of the Government to retain the bed and it is not likely that it was intended to be conveyed by the grant. All these arguments are fully met by the observations made by Lopes, L.J. and Cotton L.J., in *Micklethwaite* v. *Newlay Bridge Co.*, Lord Justice Lopes said:—"If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river; and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road." And Cotton, L. J., observed:—"When the rule is once established as a rule of construction, we are not at liberty to depart from it merely because it is shown that it would have been to the interest of the vendor to retain the half of the bed of the river." As in that case, so in this, there is nothing in the language of the sanad, or in the nature of the property, or in the surrounding circumstances to exclude the presumption of a grant of a half of the bed of the Jakhan Rao to Mrs. Raynor. **[101]** On the contrary, it appears from a memorandum, dated the 14th April 1874, on the recently settled boundaries in the Dun Forests, forwarded by the Conservator of Forests to Captain Bailey, Superintendent, Forest Surveys, that it was declared by the Forest authorities that "the centre of the Jakhan Rao constitutes the boundary between the

Government forests and the several grants." (*cf.* appellants' book, p. 17). It was urged by the learned counsel for the respondent that had it been intended to make a grant to Mrs. Raynor of any portion of the bed of the Jakhan Rao, the Forest Officers would not have raised objections, so far back as 1877, and asserted that the western boundary of the grant was the eastern bank of the Rao. This argument has no doubt much force, and it derives support from the correspondence printed on page 17 of the appellants' book. It must, however, be remembered that the grant had been made twelve years before, *i.e.*, in 1865. In 1871, Mrs. Raynor asserted that her boundary extended into the bed of the Jakhan, and that she had been taking lime-stones from it for five years preceding the date of her letter. It has been proved by the oral evidence adduced in the case, and specially by that of Mr. Raynor, that pillars were erected shortly after the grant along the middle of the bed of the river, and that lime-stones were appropriated by Mrs. Raynor and her son. The statement of Mr. Reynolds that permission was obtained from Forest Officers by Mrs. Raynor for burning lime is contradicted by that evidence. The inability of Mr. Reynolds to produce any application for permission very much weakens his statements (see correspondence p. 11, respondent's book). Mr. Reynolds has admitted in his deposition that he was not aware of any facts which would prove actual possession of the Rao. The same may be said of the evidence of the other witnesses for the defendant. It has been fully established that in spite of the objections of the officers of the Forest Department, Mrs. Raynor and her successors in title remained in possession of the bed of the Rao, and prevented Government contractors from taking lime-stones from it. The possession of Mrs. Raynor is **[102]** admitted, even in Mr. Church's order of the 26th of February 1883 (pp. 18 and 19, appellants' book). We are unable to agree with Mr. Ryves' contention that this order operates as *res judicata*. We are not satisfied on the evidence that the plaintiffs or their predecessors have been out of possession, that the defendant has been in adverse possession, and that the claim is beyond time.

A faint attempt was made to show that Mrs. Raynor relinquished all claim to the bed of the Jakhan Rao on obtaining 400 acres of land. But there is no satisfactory evidence to connect the grant of the 400 acres with the claim to the land now in question. Mr. Raynor has stated that it had reference to another claim which his mother had against Government.

We hold that the western boundary of the plaintiff's property is the centre of the bed of the Jakhan Rao, and that the plaintiffs are entitled to a declaration to that effect.

We allow the appeal, set aside the decree of the Court below, and decree the claim with costs in both Courts.

Appeal decreed.

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APPELLATE CIVIL.

22 A. 102=19 A.W.N. (1899) 198.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QURBAN HUSAIN (*Plaintiff*) *v.* CHOTE AND OTHERS (*Defendants*).*

[9th August, 1899.]

22 A. 102=19 A.W.N. (1899) 198.

Muhammadan Law—Pre-emption—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.

Held that a Muhammadan of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendors and the vendee were Sunnis. *Gobind Dayal* v. *Inayat-ullah* (1), and *Pir Bakhsh* v. *Sughra Bibi* (2) referred to.

[R., 30 A. 372 (374)=5 A.L.J. 414=A.W.N. (1908) 153; 32 C. 982 (986)=9 C.W.N. 826.]

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Maulvi *Karamat Husain*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

[103] AIKMAN, J.—This appeal arises out of a suit brought to enforce a right of pre-emption based on Muhammadan law and custom.

The plaintiff's suit was dismissed by the Court of first instance, which held that the plaintiff had no right to pre-empt the property sold. This decision was, on appeal, affirmed by the Subordinate Judge.

The plaintiff comes here in second appeal and the sole question for decision is whether, under the circumstances of the case, the plaintiff-appellant has a right of pre-emption in respect of the property sold.

The plaintiff and the vendors are neighbours residing in the town of Koil in which the house property sold, and claimed in this suit, is situated. The plaintiff claims to be allowed to pre-empt the property sold on the ground of vicinage. The plaintiff is a Shia governed by the Imamiya Law, whereas the vendors are Sunnis governed by the Hanifeea law. The vendee is also a Sunni. Now by the Imamiya law, a neighbour, as such, has no right of pre-emption. It is admitted by the learned counsel who appears in support of the appeal that the plaintiff in this case might sell his house to anyone he likes, and that his Sunni neighbours could not successfully assert any right of pre-emption against him. But it is argued that, as according to the doctrines of the Sunni school, neighbours have a right of pre-emption, the plaintiff being a neighbour is entitled to take advantage of this right, even though he is not a Sunni. It is admitted by the learned counsel on both sides that in disposing of this case the Court ought to be guided by the rule of justice, equity and good conscience. But whilst one side argues that it would be in accordance with that rule to let the plaintiff have the benefit of the law governing the defendant-vendor, the other side contends that it would not be consonant with that rule to do so.

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* Second appeal No. 193 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 17th December 1896, confirming a decree of M. Muhammad Shafi, M.A., Munsif of Aligarh, dated the 30th March 1896.

(1) 7 A. 775.

(2) 12 A. W. N. (1892) 34.

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22 A. 102 = 19 A.W.N. (1899) 198.

Very learned and able arguments were put forward by the counsel on either side in support of their respective positions. I do not propose to follow them in these arguments. For, admitting the appellant's contention that the case should be governed by [104] the law of the school to which the vendor belongs, the learned counsel for the appellant has failed to satisfy me that, according to the doctrines of that school, a neighbour against whom a Sunni has no right of pre-emption has nevertheless a right of pre-emption against the Sunni. In my judgment the principle of reciprocity lies at the root of the law of pre-emption.

It is true that according to the Hanifeea law it is not necessary that the pre-emptor should be of the same religion as the vendor. On p. 477 of Baillie's Digest, 2nd edition, that learned author says:—"Islam on the part of the pre-emptor is not a condition." He goes on to say, "so that *zimmees* (*i.e.*, infidels subject to and under the protection of a Muhammadan Government) are entitled to exercise the right of pre-emption *as between themselves* or against Mooslims." Those words *as between themselves* are to my mind an indication that though a person need not be of the same religion as the vendor to entitle him to take advantage of the Hanifeea law of pre-emption, he must yet belong to a class of persons against whom a right of pre-emption can be enforced.

At p. 793 of his exhaustive judgment in the Full Bench case *Gobind Dayal* v. *Inayat Ullah* (1) Mahmood, J., observes:—"The rights and obligations created by that law (*i.e.*, the Muhammadan law of pre-emption) as indeed by every other system with which I am acquainted, must necessarily be reciprocal." It has not, I repeat, been shown to my satisfaction that it was ever the intention of the Hanifeea law to confer a right of pre-emption on a neighbour regardless of the fact that no reciprocal right could be enforced against him.

The case relied on by the lower Courts, namely, *Pir Bakhsh* v. *Sughra Bibi* (2), differs from the present case, for there the plaintiff and the vendor were both Shias, whilst the vendee was a Sunni. But the following observation of the learned Judge who decided that case appears to me to be in point:—"I do not think that any rule of justice, equity and good conscience exists that [105] would enable us to allow the plaintiff, who from the fact of her being a Shia necessarily abhors the doctrines of the Sunni school, to take advantage of the law of that school in regard to pre-emption, and to maintain the pre-emption suit, any more than if the plaintiff stood in the position of the defendant-vendee she could be made liable to the doctrine of the Sunni school if the present vendee stood in the position of the plaintiff pre-emptor." For the above reasons I am of opinion that this appeal cannot succeed, and I would dismiss it with costs.

KNOX, J.—I also am of opinion that this appeal must be dismissed. The plaintiff, now appellant, is a Muhammadan gentleman of the Shia faith. He says in his plaint that he has a right of pre-emption under the Mubammadan law and custom in respect of the house sold, the subject matter of the suit.

The appellant has not proved the custom alleged, and the sole question is whether he has any right of pre-emption under the Muhammadan law.

Now if by the Muhammadan law the plaintiff means the Imamiya doctrines, he has no standing, and he sees this, and therefore urges that

(1) 7 A. 775.

(2) 12 A. W.N. (1892) 34.

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22 A. 102=19 A.W.N. (1899) 198.

the decision should be in accord with the doctrines of Abu Hanifa, and if not with these, still under the general rule of justice, equity and good conscience, which he considers would award him his claim.

His learned counsel addressed us very able arguments on this view of the question, but I think the question must be decided upon the general principles of Muhammadan law.

The appellant is claiming what has been properly described as a weak right. He is trying to place a restriction upon liberty of transfer of property. It is for him to show that he is vested with some right or power to make such restrictions. The Shia law gives him—a Shia—no such right under the present circumstances, and it is for him to show us that he can take advantage of the Sunni law, which he would be the first to repudiate did it place any similar restriction upon himself. As he has shown no law or precedent to the above effect, I would hold that he has not proved **[106]** the existence of any such right of pre-emption in himself, and would dismiss the appeal with costs.

ORDER.—Appeal dismissed with costs.

Appeal dismissed.

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22 A. 106=19 A.W.N. (1899) 211.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* ADAM KHAN AND ANOTHER.*

[7th November, 1899.]

Procedure—Complaint—Criminal Procedure Code, s. 203—Dismissal of complaint—Subsequent complaint arising out of the same matter.

When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) and *Komal Chandra Pal* v. *Gourchand Audhikari* (2) followed. *Queen-Empress* v. *Puran* (3) and *Queen-Empress* v. *Umedan* (4) referred to.

[Diss., 2 L.B R. 27 ; **F.**, 28 M. 255 (256)=2 Cr. L J. 752=2 Weir 247 A ; **R** , 28 C. 652 (669) (**F.B.**) ; 8 Cr. L.J. 249=26 P.W.R. 1908 Cr ; 1 N.L.R. 18 (20) ; **D.** 29 A. 7 (10)=3 A.L.J. 562=A.W.N. (1906) 245 ; 24 M. 337 (339)=2 Weir 251 ; 29 M. 126 (135)=3 Cr. L.J. 274=16 M.L.J. 79=1 M.L.T 31 ; 5 A.L J. 137=A. W.N. (1908) 67=7 Cr. L.J. 297 **]**

THIS was a reference, under s. 438 of the Code of Criminal Procedure, made by the Superintendent of Dehra Dun through the Sessions Judge of Saharanpur. One Hira Lal brought a complaint against Adam Khan and Pandey Khan under s. 406 of the Indian Penal Code in the Court of an Honorary Magistrate. The Magistrate took the complainant's statement and dismissed the complaint under s. 203 of the Code of Criminal Procedure. The complainant then made a similar complaint arising out of the same circumstances against the same men in the Court of a Deputy Magistrate. The Deputy Magistrate entertained the complaint and issued warrants for the arrest of the accused, who were put in the lock-up.

The case being brought to the notice of the Magistrate of the District, he made the present reference to the High Court with a view to having the order of the Deputy Magistrate set aside.

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* Criminal Reference No. 463 of 1899.

(1) 23 C. 983. (2) 24 C. 286. (3) 9 A. 85. (4) 15 A.W.N. (1895) 86.

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22 A. 106 = 19 A.W.N. (1899) 211.

Mr. *C. Dillon*, in support of the reference.

Pandit *Moti Lal* (for whom Babu *Durga Charan Banerji*), for the complainant, Hira Lal.

JUDGMENT.

[107] BLAIR and BURKITT, JJ.—This case has been referred to a Divisional Bench upon the ground of the extreme probability that similar cases occur and are likely to occur with great frequency, and it is therefore important that there should be a clear decision of this Court upon the point at issue. The case comes before us upon a reference from the District Magistrate of Mussoorie, forwarded through the Sessions Judge of Saharanpur. It contains a recommendation that the proceedings in the Court below should be set aside as illegal.

The facts are that one Hira Lal lodged a complaint before a Bench of Honorary Magistrates at Mussoorie against Adam Khan and others, charging them with criminal breach of trust under s. 406 of the Indian Penal Code. The Bench after examining the complainant dismissed the complaint upon the ground that the matter complained of was one which ought to be tried in a Civil and not in a Criminal Court. At a later period the same Hira Lal preferred precisely the same complaint in the Court of another Magistrate, who thereupon took cognizance of it and issued warrants for the arrest of the accused. The warrants were executed. The accused were taken into custody, and remained there for a month before they were liberated by an order of a superior Court. It is upon the petition of the person so imprisoned that this reference, with the recommendation of the District Magistrate, has been forwarded to us. Mr. *Dillon*, who appears to support the recommendation, has cited to us two recent rulings of the High Court at Calcutta: one *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) and the other *Komal Chandra Pal* v. *Gour Chand Audhikari* (2) which simply follows the ruling in the previous case. We have also been referred by Mr. *Dillon* to a recent unreported decision of this Court in *Karim Bakhsh* v. *Adil Khan*, decided by Mr. Justice Aikman on the 17th of June of the present year. The facts in the Calcutta cases are on all fours with those in the case which we have to decide. The rule laid down in those cases appears to us to be founded upon thoroughly satisfactory **[108]** reasons. The facts in the case decided by our brother Aikman in no way resemble those in the Calcutta cases, and our brother Aikman's decision is not inconsistent with the rule laid down in them. On the other hand, we have had cited to us the case of *Queen-Empress* v. *Puran* (3) and the case of *Queen Empress* v. *Umedan* (4), in which it has been held that a Magistrate who has dismissed a complaint is not thereby precluded from himself entertaining again what is in substance the same complaint. That is the only authority upon which Mr. *Durga Charan* relies. It does not, in our opinion, conflict with the rulings either of the Calcutta Court or of our brother Aikman. We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. For these reasons, we accept the recommendation of the District Magistrate and set aside the proceedings pending in the Court below. We desire it to be distinctly understood that we decide

(1) 23 C. 983. (2) 24 C. 286. (3) 9 A. 85. (4) 15 A. W. N. (1895) 86.

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nothing except the question actually raised by the facts in this case, which is, that when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it.

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22 A. 106=19 A.W.N. (1899) 211.

22 A. 108=19 A.W.N. (1899) 205.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

DAULAT SINGH AND ANOTHER (*Defendants*) *v.* JUGAL KISHORE (*Plaintiff*).* [10th November, 1899.]

Execution of decree—Civil Procedure Code, s. 244—Question "arising between the parties to the suit"—Sale of property by the Collector as ancestral property—Suit to set aside sale on the ground that property was not ancestral.

Certain property of a judgment-debtor having been sold by the Collector acting under s. 320 of the Code of Civil Procedure as being ancestral [109] property, the judgment-debtor sued the decree-holder and the auction purchaser to have the sale set aside upon the two main grounds that the property was not ancestral, and therefore could not legally be sold by the Collector, and that the real purchaser at the auction sale was the decree holder himself who had not obtained the leave of the Court to bid. *Held* that the questions thus raised were questions arising between the parties to the suit within the meaning of s. 244 of the Code of Civil Procedure and that the suit would not lie. *Basti Ram* v. *Fattu* (1) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2), referred to.

[R., 24 A. 239 (240)=22 A.W.N. (1902) 49; 26 A. 447=1 A.L.J. 65=A.W.N. (1904) 61; 34 M. 417 (420)=3 Ind. Cas. 429; 8 Ind. Cas. 429=21 M.L.J. 928 (932)=9 M.L.T. 152 (154)=1910 M.W.N. 662.]

THE facts of this case are sufficiently stated in the judgment of the Chief Justice.

Maulvi *Ghulam Mujtaba*, for the appellants.

The respondents were not represented.

JUDGMENT.

STRACHEY, C. J.—The plaintiff in this case claims to recover certain immoveable property, which was sold by the Collector in execution of a decree transferred to the Collector for execution under the rules made under s. 320 of the Code of Civil Procedure, from the second defendant, who was the purchaser at that sale. The plaintiff was the judgment-debtor: the first defendant is the decree-holder: and the object of the suit is to recover possession of the property, notwithstanding the execution sale, on the ground that the sale by the Collector was vitiated by certain defects. After a remand made by the lower appellate Court to the Court of first instance, both Courts have decreed the claim. The question raised by this appeal on behalf of the defendants is whether the suit will lie.

Now the first ground on which the suit is based is that the property in question was not ancestral property, and that consequently the decree ought not to have been transferred for execution to the Collector. Before making its order of transfer the Civil Court, in accordance with the rules

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*Second Appeal No. 937 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 3rd August 1896, confirming decree of Babu Shiva Charan Lal, B.A., Munsif of Nagina, dated the 27th May 1896.

(1) 8 A. 146.

(2) 19 C. 683.

made by this Court, issued notice to the decree-holder and the judgment-debtor for the determination of the question whether the property was ancestral or not. The judgment-debtor, the present plaintiff, did not contest that application, and the order for transfer was thereupon made. It is clear, therefore, that the question whether the [110] property was ancestral or not was a question arising between the parties to the suit—the decree-holder and the judgment-debtor. That being so, the present suit, so far as this first point is concerned, is barred by s. 244 (*c*) of the Code of Civil Procedure, having regard particularly to the interpretation placed on that clause by the Full Bench of this Court in *Basti Ram* v. *Fattu* (1). It was there pointed out that the section prohibits not only a separate suit between the parties to the decree or their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of a decree, the object of which is to determine a question which properly arose between the parties or their representatives, and which relates to the execution, discharge, or satisfaction of the decree. As I have already stated, the question whether this property was ancestral did arise between the parties to the suit. It clearly related to the execution of the decree, because on it depended the Court which should have jurisdiction to execute the decree and the procedure by which the decree should be executed. The Full Bench decision to which I have referred is supported by the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2), decided by their Lordships of the Privy Council. For these reasons it appears to me that, so far as the suit is based upon an allegation that the property was being wrongly treated as ancestral for the purposes of execution, it is barred by s. 244 of the Code.

The second ground upon which the suit is based is that the auction-purchaser in this case in execution of the decree, although nominally the second defendant, who is the son of the decree-holder, was really the first defendant, the decree-holder himself, and that as the purchase by the decree-holder was without the permission of the Court, it was in violation of s. 294 of the Code. As to that it is sufficient to say that this question too falls within s. 244 of the Code, because, on the plaintiff's own showing, it is a question arising between the parties to the suit and relating [111] to the execution of the decree. So far as regards the second point, therefore, the suit is also barred by s. 244.

The third point raised by the suit is that the sale was effected by the Collector in disregard of an order directing the postponement of the sale passed by the Munsif who had transferred the execution of the decree to the Collector. As to that it is sufficient to say that no such order of postponement could be legally made by the Munsif. The execution having been transferred to the Collector, the Munsif, so long as it remained with the Collector, had no power to interfere with the proceedings, as by postponing the date of sale: only the Collector himself could do that.

These are the only grounds on which the suit has been brought. It follows from what I have said that the suit ought to have been dismissed. This appeal is allowed, the decrees of the Courts below set aside, and the suit dismissed with costs in all Courts.

BANERJI, J.—I am of the same opinion.

Appeal decreed.

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(1) 8 A. 146.

(2) 19 C. 683.

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REVISIONAL CRIMINAL.

22 A. 111=19 A.W.N. (1899) 202.

22 A. 111=19 A.W.N. (1899) 202.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

W. J. ELLIS (*Applicant*) v. THE MUNICIPAL BOARD OF MUSSOORIE, (*Opposite Parties.*)* [18th August, 1899.]

Act No. XV of 1883 *(N.W.P. and Oudh Municipalities Act), s.* 46—*Issue of distress warrant for recovery of alleged arrears of Municipal tax—Jurisdiction of Magistrate.*

Held, that where a Magistrate, acting under s. 46 of Act No. XV of 1883, issues a warrant for the realization of arrears of Municipal taxes alleged to be due, the Magistrate is acting in a ministerial capacity only and has no jurisdiction to inquire as to whether such arrears are really due or not.

[**R**, 11 Cr.L.J. 87 (89)=4 Ind Cas. 951 (953)=2 P.R. 1910 (Cr.)=100 P.L.R. 1909=23 P.W.R. 1909 (Cr.); **D**, 130 P.L.R 1903.]

THIS was an application for revision arising out of the following circumstances. The Secretary of the Municipal Board of Mussoorie wrote to the Magistrate of Mussoorie, on the 2nd May 1899, stating that a sum of Rs. 135-9-9 was due from one W. J. Ellis, Esq., of Kennith Lodge, Mussoorie, on account of Municipal taxes from 1894 to 1898, and requesting the Magistrate to realize such amount under s. 46 of Act No. XV of 1883. [112] Orders were thereupon issued by a Magistrate of the first class to the police for the realization of the sum in question, no intimation of the application of the Board having apparently been given to the alleged defaulter. Mr. Ellis declined to pay the sum demanded and applied to the High Court for revision of the Magistrate's order for realization of the said sum. The main grounds of the application were that no arrears of any tax imposed under Act XV of 1883 were due by the applicant to the Municipal Board and, that no opportunity was given to the applicant to show cause why distress should not be levied on his property. Applicant's counsel relied on *Municipality of Ahmedabad* v. *Jumna Punja* (1).

Mr. *W. Wallach*, for the applicant.

The Government Pleader (for whom Munshi *Gulzari Lal*), for the Municipal Board.

JUDGMENT.

BLAIR, J.—In this case a Municipality has levied a tax; it has charged the present applicant with certain arrears alleged to be due. It has applied to a Magistrate for recovery of those arrears by distress and sale of the moveable property of the applicant. Under protest payment was made. The applicant here challenges the right of the Magistrate to make such an order, and contends that the Magistrate ought to have judicially heard and determined the question whether any such arrears were due at all. The action which was taken by the Municipality and the Magistrate was apparently taken under s. 46 of Act No. XV of 1883. That section is couched in the following words:—"Arrears of tax imposed under this Act may be recovered, on application to a Magistrate having jurisdiction within the limits of the Municipality, by the distress and sale of any moveable property belonging to the defaulter within those limits." There are no provisions indicating that the Magistrate is

* Criminal Revision No. 438 of 1899.

(1) 17 B. 731.

applied to in a judicial capacity, and no provision for a judicial dealing with the case by him. I do not find my mind influenced by a decision cited from I.L.R., 17 Bom., 731, because that decision was upon a section of an Act containing words which did import a judicial determination. Nor do I find myself able to draw any inference from the statutory provisions [113] for the enforcement of the recovery of income-tax or land revenue. It seems to me that, had the Legislature intended to impose upon the Magistrate the duty of judicial inquiry and finding, it would have used appropriate words. In the absence of such words, I find it impossible to believe that the Legislature intended to confer upon the youngest and most inexperienced officer a function of trying such a question, for instance, as the legality of the imposition of a tax.

In my opinion, the duty imposed on the Magistrate is purely ministerial, and provides the means whereby the recovery of the taxes could be enforced by a legal authority. This petition is therefore dismissed.

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22 A. 113 = 19 A.W.N. (1899) 215.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS v. NANNI AND OTHERS.*

[6th November, 1899.]

Act No. XLV of 1860 (*Indian Penal Code*), *ss.* 268, 290—*Public nuisance—Soliciting for purposes of prostitution.*

Held **that the soliciting for purposes of prostitution of passers-by on a public road is not a public nuisance as that term is defined in s. 268 of the Indian Penal Code.**

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Shahjahanpur. Three persons, prostitutes, being on a public road in Shahjahanpur about midnight, accosted a person who was going along the road and solicited him to go with them. The person thus accosted, being a Reserve Inspector of Police, caused the three women to be taken into custody, and they were tried for and convicted of the offence punishable under s. 290 of the Indian Penal Code, *viz.*, a public nuisance. The accused applied for revision of their convictions and sentences to the Sessions Judge, who, being doubtful whether the acts complained of could properly be regarded as constituting a public nuisance, as that term is defined in s. 268 of the Indian Penal Code, referred the case to the High Court. On this reference the following orders were passed.

ORDER.

KNOX, J.—This is a reference by the Sessions Judge of Shahjahanpur. The District Magistrate at Shahjahanpur has convicted three persons, prostitutes, of an offence which he [114] considered they have committed under s. 290 of the Indian Penal Code. The evidence against them shows that all three came out on to a public road, and, thinking that a Reserve Inspector of Police, who was passing by, was a soldier, called out to him and solicited him to go back with them. The District Judge before whom the case was taken in an application in criminal revision was doubtful whether an annoyance caused

* Criminal Reference No. 345 of 1899.

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REVISIONAL CRIMINAL.

822 A. 113=
19 A.W.N.
(1899) 215.

in a public place to a single person could be brought under the definition of a public nuisance, on the ground that it might have been any member of the public to whom the annoyance was caused. He has accordingly submitted the case to this Court under s. 438 of the Code of Criminal Procedure. Section 290 renders punishable what are known as public nuisances in the Indian Penal Code. The definition of public nuisance is to be found in s. 268. A person is guilty of a public nuisance when (omitting that part of the section which does not refer to the present case) he does an act which must necessarily cause annoyance to persons who may have occasion to use any public right. Acts of a similar kind, and more particularly the act of loitering or importuning for the purpose of prostitution, can be provided against in Cantonments by the Cantonments Act of 1889. Further, a Municipal Board may, under Act No. XV of 1883, make rules for prohibiting, preventing, and punishing such acts within the Municipality as may, in the opinion of the Board, cause, or tend to cause, annoyance to persons who have occasion to use a public right. The language used in Act No. XV of 1883 at once shows the difference between the powers given to a Municipal Board and the powers given to Magistrates under s. 290 of the Indian Penal Code. In the latter case the act done is only punishable when it is an act which must necessarily cause annoyance to persons who have occasion to use any public right. We are not at the present moment considering acts or omissions which are the cause of common injury, danger, or annoyance to the public, or to the people in general, who dwell or occupy property in the vicinity. The difficulty in the present case lies in the words "must necessarily" which occur in s. 268. The Magistrate was satisfied that in the present case annoyance was caused, at least so we learn from the remarks which he **[115]** has sent up to this Court along with the reference, and there can be no doubt that annoyance is frequently caused by acts of this kind. We are not satisfied that the act of the women in this case was one which must necessarily have caused annoyance. If the act, of which these women were found guilty, was an act entirely without a remedy, it might be necessary to call attention to the absence of all remedy. All that need be done in the present case is to say that the Sessions Judge is so far right when he says that the act does not fall within s. 290 of the Indian Penal Code. The conviction will have to be set aside, and the fines, if paid, be refunded to the person or persons who paid them.

AIKMAN, J.—I am of the same opinion. In my judgment persons who are exercising the right of passing along a public road ought to be protected from being importuned for the purpose of prostitution. Within the limits of Cantonments such protection may be afforded by rules framed under s. 26, clause 23, of the Cantonments Act of 1889; similarly within the limits of Municipalities, protection may be afforded by rules framed by Municipal Boards under the provisions of s. 55, clause 1, of Act No. XV of 1883. But the sole question we have to deal with now is, whether the conduct of petitioners amounted to a public nuisance as defined in s. 268 of the Indian Penal Code. I entirely concur with my learned brother in holding that it did not. The conviction and sentence must therefore be set aside.

22 A. 115 = 19 A.W.N. (1899) 207.

APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* KHEM.* [14th November, 1899.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 193 —*Criminal Procedure Code, s.* 164 —*Statement made in the clause of a "judicial proceeding"*— *Statement made before a Magistrate under s,* 164.

Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under s. 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly **[116]** be convicted under the second—if not under the first—paragraph of s. 193 of the Indian Penal Code. *Queen-Empress* v. *Bharma* (1), considered and distinguished.

[F., A.W.N. (1908) 73 = 7 Cr.L.J. 302 ; **R.** 14 Bom.L.R. 753 = 13 Cr.L.J. 709 (710) = 16 Ind.Cas. 517 ; 13 Cr. L.J. 33 (35 = 13 Ind. Cas. 273 = 5 S.L.R. 174.**]**

THIS was an appeal by the Local Government from the acquittal of one Khem by the Sessions Judge of Farrukhabad on a charge under s. 193 of the Indian Penal Code. The facts were, briefly, that Khem had been put before a Magistrate of the third class as a witness in a case of theft and had made a statement before the Magistrate under s. 164 of the Code of Criminal Procedure on solemn affirmation. Subsequently Khem, as a witness before the first class Magistrate who tried the case, made a diametrically opposite statement, also on solemn affirmation. Khem was tried on a charge framed in the alternative in respect of these two statements, and was convicted under s. 193 of the Code of Criminal Procedure by a Magistrate of the first class. Khem appealed to the Court of Session, and that Court acquitted him on the ground that the statement made by Khem under s. 164 of the Code of Criminal Procedure before the third class Magistrate was not made in the course of a judicial proceeding, and with reference to the case of *Queen-Empress* v. *Bharma* (1). From this acquittal an appeal was preferred by the Local Government.

The Government Advocate (for whom Mr. *W. K. Porter*), for the Crown.

JUDGMENT.

KNOX and AIKMAN, JJ.—In this case, as in the cases which have preceded, the accused had been convicted on an alternative charge of giving false evidence in that he made two contradictory statements. The first statement was made before a Magistrate of the third class while a police investigation in a case of theft was pending. The second was made before a Magistrate of the first class who tried the case. Khem in his defence stated that the statement which he had made in the Court of the Magistrate who tried the theft case was a true statement, and that the statement which he had made to the effect that three other persons had been present at the theft, namely, the statement which he made before the Magistrate of the third class, was made through fear and at the instigation of the police. The learned Sessions **[117]** Judge on Khem's appeal considered himself bound to follow the ruling *Queen-Empress* v. *Bharma* (1) and to hold that a statement taken

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* Criminal Appeal No. 848 of 1898.

(1) 11 B. 702.

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down in the course of a police investigation by a third class Magistrate is not evidence in a stage of a judicial proceeding within the meaning of ss. 191 and 193 of the Indian Penal Code. Even if this were a right view of the law, the false statement made under such circumstances would fall within the second paragraph of s 193 of the Indian Penal Code. Moreover, the ruling which the learned Sessions Judge has followed is not one which applies to the present case. The statement with which the Bombay Court was dealing was a statement taken by a third class Magistrate in an investigation into a charge of murder, and it was on the ground that such Magistrate had not authority to carry on the preliminary inquiry in the case that the statement so recorded was held not to be evidence in a stage of judicial proceeding within the meaning of ss. 191 and 193 of the Indian Penal Code. If the view of the Bombay Court taken in that case is a correct view, it does not apply to the case before us, in which the Magistrate who recorded the statement under s. 164 of the Code of Criminal Procedure had himself authority, inasmuch as the case was one of theft only, to complete the trial. We have examined the statements made by Khem on the 18th and 23rd of January. They are statements so contradictory that we cannot see any way of reconciling them, and one or the other of them must have been false to the knowledge of the accused. We accordingly allow the appeal, and, setting aside the appellate judgment of acquittal, restore the conviction of the Magistrate. We think, however, that it will be sufficient to direct that the accused suffer rigorous imprisonment for the space of three months with effect from to-day's date. Any portion of the imprisonment or detention since this appeal was filed that the accused has undergone on this charge will be deemed to be part of the substantive sentence.

[*See* also in this connection *Queen-Empress* v. *Alagu Kone* (1) and *Queen-Empress* v. *Puran* (2)—ED.]

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22 A. 118=19 A.W.N. (1899) 213.

[118] APPELLATE CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* GANGA DIN.*
[15th November, 1899.]

Act No. XI of 1878 (*Arms Act*), *ss.* 19, 27—*Exemptions from provisions of Arms Act—Government Notification No.* 518 *of the* 6*th March* 1879—*Government Notification No.* 458 *of the* 18*th March*, 1898—"*Personal use*" *of Arms—Arms carried and used by servant of exempted person.*

By a notification under s. 27 of the Arms Act (Act No. XI of 1878) issued by the Government of India, certain persons, amongst them Rajas and Members of the Legislative Council of the Lieutenant-Governor of the N.W.P., were exempted from the operation of ss. 13 and 16 of the said Act; but with this proviso, that, "except where otherwise expressly stated, the arms or ammunition carried or possessed by such persons shall be for their own personal use, &c., &c." *Held* that the terms of this proviso would allow of a person exempted under the notification above alluded to sending a servant armed with a gun into a neighbouring district to shoot birds for him, and that a gun so carried and used by the servant of the exempted person was in the "personal use" of the exempted person within the meaning of the notification.

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* Criminal Appeal No. 569 of 1899.

(1) 16 M. 421.

(2) 19 A.W.N. (1899) 39.

[Diss., 12 Cr. L.J. 122=9 Ind. Cas. 720 (721)=4 S.L.R. 214 (216); 4 S.L.R. 211; R., 13 C.W.N. 124=10 Cr. L.J. 555 (557)=4 Ind. Cas 333 (334).]

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THE facts of this case were as follows:—

One Ganga Din Pasi, a servant of Raja Rampal Singh, a Member of the Local Legislative Council, was found within the district of Allahabad carrying a gun and ammunition and using the gun for the purpose of shooting game. On being asked by the Police for his license he replied that he had none, but that he was a servant of Raja Rampal Singh, to whom the gun and ammunition belonged, and was out shooting under his master's orders and for his master's benefit. Ganga Din was put upon his trial before a Magistrate of the first class for an offence under s. 19 of the Arms Act, 1878, but was acquitted with reference to the ruling of the High Court in *In re Hurley* (1). Against this order of acquittal an appeal was filed by the Local Government.

Prior to the year 1898, a notification of the Government of India, (No. 518 of the 6th March 1879) was in force, which, so far as the question raised by the present case is concerned, ran as follows:—"The Governor-General in Council is pleased, under s. 27, to exempt from the operation of all prohibitions and direction contained in ss. 13, 14, 15 and 16 of [119] the Indian Arms Act, 1878 * * * * the under-mentioned persons, namely:—

(1) All Maharajas, Rajas, &c., &c.

(2) All Members * * * of the Council of the Lieutenant-Governor of the North-Western Provinces and Oudh.

(3) All Military and Naval officers, * * * *

subject to the proviso that the arms and ammunition carried or possessed by such persons shall be for their own personal use, &c., &c."

By a notification of the Government of India of the year 1898 (No. 458 of the 18th March 1898) the proviso to clause (3) above quoted was removed from its situation at the end of clause(3) and appended to the first paragraph of section I of the Notification preceding clauses (1), (2), (3), &c.

The ground of appeal in the present case was that by reason of the new Notification the proviso above-mentioned applied not only to Military and Naval officers and others mentioned in clause (3), but to the persons designated in clauses (1) and (2) and that it could not be said that a gun in the possession of a servant in another district from that in which the master ordinarily resided was in the personal use of the master within the meaning and intention of Government Notification.

The Government Advocate, (for whom Mr. *W. K. Porter*) for the appellant.

Pandit *Madan Mohan Malaviya* (for whom Pandit *Tej Bahadur Sapru*), for the respondent.

JUDGMENT.

KNOX and AIKMAN, JJ.—This is an appeal preferred by Government from an original order of acquittal passed by a Magistrate of the first class, Allahabad. One Ganga Din, servant of Raja Rampal Singh, a Member of the Legislative Council, N.W.P. and Oudh, was found within the district of Allahabad carrying a gun and ammunition, and

(1) 1 A. W. N. (1881) 7.

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using the gun for the purpose of shooting game. Upon being asked by the Police to show his license he replied that he had no license, but that he was a servant of Raja Rampal Singh, who had ordered him to shoot game for him (the Raja), and that the gun and ammunition belonged to the aforesaid Raja. The Magistrate, we must take it, has found that [120] the pleas raised by Ganga Din are all true, that he is the servant of a mas er exempted from the operations of ss. 13 and 16 of Act No. XI of 1878. Following a precedent of this Court, *In re Hurley*, decided on the 12th January, 1880, and to be found at page 7 of the Weekly Notes for 1881, the Magistrate found the accused not guilty of any offence under s. 19 of the Arms Act, and acquitted him. It was contended by the Government in this appeal that the accused is guilty, and that the Magistrate has overlooked the fact that the rules in force, when the ruling cited by him was pronounced, have been amended by the Government Notification No. 458 of the 18th March, 1898. The last named notification is a notification amending a prior notification No. 518 of the 6th March, 1879. So far as this case is concerned, the amendment is one which purports to impose a limit or qualification upon the general exemption which under the notification of 1879 was conferred upon all Rajas. The general exemption thus conferred is now controlled by the proviso that the arms or ammunition carried or possessed by such Rajas shall be, except when otherwise expressly stated, for their own personal use. The learned counsel for the Crown contends that the use by Ganga Din, under the circumstances we have set out above, cannot be deemed the personal use of the Raja. We have considered his argument very carefully in view of the serious results which will follow from so literal an interpretation of these words. We are unable to construe, and have been shown no authority for construing, these words in the strict sense contended for. We are unable to hold, as the learned counsel desires us to, that the meaning is that only the Raja who may be exempted under the above notification, can carry on his own person the arms which he may happen to possess. It was allowed in the argument that personal use might extend to a case where the Raja might be intending to use the arms personally, and such arms were in the meantime being carried for the Raja by some servant or retainer. We cannot believe that the intention of the Government, when they granted the exemption, was that the privilege of the exemption should only extend to personal use by the Raja in the narrow sense contended for. Take, for instance, the case of the Raja's residence being attacked by dacoits; it surely never could be contended [121] that personal use extended only to the use of arms repelling the attack by the Raja, and that the use by any of the Raja's retainers for such purpose was not equally within the intention and scope of the exemption. If the Government did intend to limit the exemption to the extent now contended for, we should expect words of a far more stringent and limiting nature. In the present case we hold that Ganga Din has established to the satisfaction of the Court that he was using the arms he carried for what may fairly be termed the "personal use" of the Raja. We accordingly dismiss the appeal. Let the record be returned.

Appeal dismissed.

22 A. 121 = 19 A W.N. (1899) 219.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

JHAMMAN LAL AND ANOTHER (*Plaintiffs*) *v.* KEWAL RAM (*Defendant*).* [21st November, 1899.]

Execution of decree--Civil Procedure Code, s. 244—Suit brought under circumstances where the proper remedy was by application under s. 244--Discretion of Court to treat the plaint as an application under s. 244.

Where certain judgment-debtors, whose property had been sold in execution of a decree, brought a suit to have the sale in execution set aside under circumstances in which their proper remedy in law, if any, was by means of an application under s. 244 of the Code of Civil Procedure, it was *held* that it was not an improper exercise of the discretion of the Court in which such suit was brought to treat the plaint as an application under s. 244 of the Code. *Biru Mahata* v. *Shyama Churn Khawas* (1) followed. *Mayan Pathuti* v. *Pakuran* (2) referred to.

[**Not F.**, 5 Bom L R 1036 (1041); **F.**, 28 M. 64 (66); 5 P.R. 1907 = 23 P.L R. 1908 = 40 P.W.R. 1907; **R.**, 32 M. 425 427 = 4 Ind Cas. 723 (724; 17 C.P.L.R. 178 (182); 7 Ind. Cas. 55 (59); **D.**, A.W.N. (1900) 196.]

THE facts of this case, as stated in the judgment of the lower appellate Court, were as follows:—

"Khushwakt Rai, the father of the plaintiffs, owed a debt to Data Ram and others under a hypothecation bond, dated the 11th August, 1875, Data Ram and others brought a suit for the debt, and on the 25th August 1887, obtained a decree against the plaintiffs and Chunni Ram, their nephew (brother's son). In execution of this decree the hypothecated and unhypothecated [123] property of the judgment-debtors was sold at auction on the 26th April 1893, and the 20th February 1894, and the said auction sales were confirmed, and mutation of names was effected in favour of the auction-purchasers. The plaintiffs now contend that as they were employed in another district, they could not present themselves in Court at the time when the decree was passed in that case, nor could they obtain a knowledge of the execution proceedings; that the decree is in a great measure contrary to the judgment and is absurd: that the amount of the decree, in satisfaction of which the auction sales took place, has been overstated and is wrong; that the invalid and fraudulent proceedings taken by the defendant have caused great loss to the plaintiffs. Hence the plaintiffs pray that the decree passed on the 25th August 1887, so far as the defendant has fraudulently caused it to be prepared contrary to the judgment and prejudicial to the rights of the plaintiffs, may be set aside, and that the auction sale of the plaintiffs' purchased property detailed at the foot of the plaint, which, according to law, could not be sold in execution of the said decree, may be set aside, together with all the other fraudulent application proceedings. The Munsif, considering the suit to be an application under s. 244, has set aside the sale of the zamindari share in claim. The substance of the grounds of appeal, as stated by the pleader for the appellant, is as follows:—(1) that the Munsif had no jurisdiction to set

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* Second Appeal No. 419 of 1897 from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 8th April 1897, reversing the decree of Maulvi Muhammad Azim-ud-din, Munsif of Aligarh, dated the 1st June 1896.

(1) 22 C. 483.

(2) 22 M. 347.

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22 A. 121=19 A.W.N. (1899) 219.

aside the auction sale, treating the regular suit as an application under s. 244. The finding of the lower Court is *ultra vires*."

On this first plea of the defendant-appellant the lower appellate Court set aside the decree of the Munsif, who had set aside the sale of the 20th February 1894, and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court, their first plea being that "there is nothing in law to prevent the appellants' plaint being treated as an application under s. 244 of the Code of Civil Procedure when it fulfils the other requirements of that section."

Babu *Durga Charan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom *Harendra Krishna Mukerji*), for the respondent.

JUDGMENT.

[123] BLAIR and BURKITT, JJ.—We thoroughly concur in the reasoning which has induced the Calcutta High Court in *Biru Mahata* v. *Shyama Churn Khawas* (1), and the Madras High Court in *Mayan Pathuti* v. *Pakuran* (2), to pass by the formal defect in bringing a suit instead of making an application under s. 244 of the Code of Civil Procedure. It seems to us a reasonable exercise of discretion and one which could do no injury to the parties. The appeal is decreed. The decree of the lower appeliate Court is set aside, and that of the first Court is restored with costs in all Courts.

Appeal decreed.

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22 A. 123 (F.B.)=20 A.W.N. (1900) 18.

FULL BENCH.

Before Sir Arthur Strochey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

M. J. POWELL (*Applicant*) *v.* THE MUNICIPAL BOARD OF MUSSOORIE (*Opposite Party*).*

[15th December, 1899.]

Act No. XV of 1883 (*N.W.P. and Oudh Municipalities Act*), *s.* 69—*Complaint of offence against Municipal bye-law—Power of Municipal Board to give a general authority to institute complaints on its behalf.*

Held that s. 69 of the N.W.P. and Oudh Municipalities Act, 1883, confers upon Municipal Boards in the North-Western Provinces and Oudh the power to delegate generally their authority to make complaints in respect of municipal offences; and this general delegation includes not merely the giving of authority to do the formal act of presenting a complaint to a Court, but the exercise of discretion as to whether in any given case a complaint shall or shall not be made.

[R., 26 A. 482 (486).]

[N.B.—See in this connection 20 A W.N. (1900) 41 an offshoot of 22 A. 123.—ED.]

THIS was a reference to a Full Bench of a question arising out of an application for revision of an order convicting the petitioner of an offence against the bye-laws of the Municipal Board of Mussoorie, namely, to what extent a Municipal Board is competent, under s. 69 of Act No. XV of 1883, to delegate its powers as to making complaints in respect of

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* Criminal Revision No. 442 of 1899.

(1) 22 C. 483.

(2) 22 M. 347.

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22 A. 123 (F.B.)= 20 A.W.N. (1900) 18.

municipal offences. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Chief Justice.

[124] Mr. *W. Wallach*, for the applicant.

The Municipalities Act enables municipal boards to frame rules and bye-laws encroaching on ordinary rights of the public and constituting offences of acts which according to the ordinary law of the land are not offences. Section 69 has been passed as a safeguard for the protection of the public and ought as such to be strictly construed. Its object is to prevent people who are innocent or may have been guilty of purely technical offences against municipal rules or bye-laws from being needlessly harassed by prohibiting a Court from taking cognizance of offences punishable under the Act or rules made under the Act, except on complaint of the Municipal Board or "some one authorized by the Board in this behalf," *i.e.*, in behalf of each particular complaint. The Board has a duty imposed upon it, of which it cannot divest itself. The whole object of the section fails, if the Board be allowed to delegate its authority to a person to generally institute prosecution on behalf of the Board. If that construction were adopted the Board could vest a chaukidar or police constable with power to institute prosecutions under the Act whenever he thought fit; and the authority thus granted under s. 69 would very likely be frequently used as a means of oppression and annoyance. The same might be said in the case of small municipalities, where the authority in question would most likely be vested in a poorly paid secretary.

Counsel referred to kindred English Acts and pointed out that although local governments are of very long standing in England, no English Statute seems to go so far as to enable local bodies to generally vest the power to institute prosecutions in any one. Powers of delegation in English Acts are not granted in a vaguely worded section, but whenever they occur they are strictly specified and limited.

Counsel also referred to the explanations added to the corresponding sections in the recent Punjab Municipalities Act (Act XX of 1891, s. 186) and Burma Municipalities Act (Burma Act III of 1898, s. 195), to show that in those Acts an explanation was deemed requisite to invest the Board with the power of general delegation.

[125] Mr. *E. Chamier*, for the Municipal Board.

The words "authorised by the Board in this behalf" in s. 69 of Act No. XV of 1883 are wide enough to include a general authority; the construction contended for by the applicant is unnatural and would in the case of any large Municipality bring about a dead-lock, as the Board could not itself deal with every breach of the bye-laws and decide whether a prosecution should be instituted. The words "authorised in this behalf" are used in other Acts to denote a general as well as a special authority. See s. 59 of Act No. XII of 1881; s. 51 of Act No. XIV of 1882; s. 19, explanation 2, of Act No. XV of 1877.

No argument can be founded on the desirability or otherwise of allowing the delegation of the power to institute prosecutions. The Act contemplates the delegation by the Board of important functions: see ss. 26, 34 (*e*), 58, &c.

Unless compelled to do otherwise, the courts should place such construction upon s. 69 as will effectuate the obvious intention of the Legislature and not produce serious inconvenience. See Maxwell on

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Statutes, pp. 319 and 423, Hardcastle on the interpretation of Statutes, pp. 99—102. *Queen-Empress* v. *Hori* (1).

Section 69 of Act No. XV of 1883 now in question is a reproduction of s 46 of Act No. XV of 1873 and earlier enactments. The words "authorized in this behalf" have for a great many years been understood as including a general authority. In re-enacting this provision the Legislature must have been aware of the construction which had been placed upon it, and must have intended that the words should be understood in their received meaning. See *Commissioners for Income Tax* v. *Pemsel* (2).

JUDGMENT.

STRACHEY, C.J.—The petitioner in this case has been convicted and sentenced by a Magistrate of the Dehra Dun district for a breach of rule 19, part 2 of the bye-laws made by the Municipal Board of Mussoorie under the North-Western Provinces and Oudh Municipalities Act (No XV of 1883). The first ground stated in the petition is as follows:—"Because the Magistrate could not legally take cognizance of the offence **[126]** complained of, as no complaint was made either by the Municipal Board or by any person authorized by the Board on that behalf." That is the only point which the Division Bench dealing with this case has referred to the Full Bench. It relates to s. 69 of Act No. XV of 1883, which provides that "a Court shall not take cognizance of an offence punishable under this Act, or the rules made under this Act, except on the complaint of the Municipal Board, or of some person authorized by the Board in this behalf. Now on the 27th April 1897, as appears from a copy of the minutes of the Board, the following resolution was passed under the head of "Appointment of Public Prosecutors." "Resolved that the Chairman, Vice-Chairman, Health Officer and Secretary be vested with authority under s. 69, Act XV of 1883, to institute prosecutions on behalf of the Board." In the present case a complaint against the petitioner of a breach of the bye-law in question was made to the Magistrate by the Secretary of the Board. There can be no doubt that the authority under which he professed to make the complaint was the resolution which I have just quoted. It is not shown or suggested that, apart from that resolution, the Board gave any authority for the prosecution. The question is whether, by reason of the resolution, the Secretary was a person authorized by the Board in this behalf within the meaning of the section so as to entitle the Court to take cognizance of the offence on his complaint. On behalf of the petitioner it has been contended that the words "authorized by the Board in this behalf" do not include a general authority to prosecute in regard to offences under the Act or rules generally, such as that given by the resolution, but are confined to a specific authority to be given by the Municipal Board in relation to the specific offence for which the accused is to be prosecuted. In other words, that the case contemplated by the closing words of the section is one in which the determination to prosecute for the offence is the determination of the Municipal Board alone, and in which the Municipal Board having decided that there shall be a complaint, merely authorizes some person to lay that complaint before the proper Court. There is no authority to be found upon this point. It is clear that the section was enacted with a twofold purpose. The object was, in the first place, to exclude **[127]** prosecutions for what may be called muncipal offences from the

(1) 21 A. 391.

(2) L.R. (1891) A.C. 531 at pp. 590—91.

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interference of irresponsible persons, and to secure that such prosecutions should have the guarantee of the responsibility of the Municipal Board. A further object, in my opinion, was to relieve the Municipal Board of the necessity of itself dealing with each individual case of prosecution for a municipal offence, and to enable it to assign that particular function to some other person or persons. Now the first complaint spoken of in the section is the complaint of the Municipal Board. It is clear that the Municipal Board can make a complaiant. But, as it is a corporate body, the only way in which it can make a complaint is to authorize some person to make one on its behalf, just as it can only do any other act through the instrumentality of some agent. So that, if the section stopped there, such cases could only be prosecuted by the Municipal Board considering the individual case and the propriety of the prosecution, passing a resolution that the prosecution should be instituted, and directing its officer to take the necessary proceedings. That is how the matter would stand if the section ended with the words "Municipal Board." It is clear that the remaining words of the section were intended to provide for another sort of case. If the argument for the petitioner is sound, in a case where a Municipal Board desired not itself to make a complaint, but to authorize some other person to make one, it would have to adopt exactly the same procedure as I have just pointed out, it would have to adopt if making the complaint itself. The argument is that the authority there spoken of only means an authority to file the particular complaint, that authority being conferred after the Board had, as in the other case, itself determined on a prosecution by resolution passed at one of its meetings. It appears to me that such a construction involves two consequences, each of which is sufficient to condemn it. The first is that it renders the concluding words of the section absolutely superfluous. The second is that it entirely defeats what I think was the obvious intention of the Legislature that some relief at all events should be given to the Municipal Board, which has necessarily other and many duties to perform, without forcing on it that detailed and individual examination of every case which is required where the complaint is made by the [128] Board itself. Of course the wording of the section is not quite as exact as might be wished, because to some extent, and taken literally, the two parts of it overlap each other. A "complaint of the Municipal Board" in itself implies the Board authorizing somebody to make the complaint, because, as I have said, the Board being a corporate body cannot make a complaint at all without authorizing some one to make it. Again, if the Board does authorize some person in the words of the second part to make a complaint, that complaint is, strictly speaking, the complaint of the Board itself. But when you look at the section with an eye to the object which the Legislature had in view, I think the meaning is pretty clear. "Complaint of the Municipal Board" I think refers to a case where the Board is the real author of the complaint, in the sense that the complaint is the result of the determination of the Board itself. The complaint spoken of in the last words of the section similarly means, in my opinion, a complaint which is the result of a determination, not by the Board itself but by some person authorized by the Board in that behalf. That appears to me to be the only way in which you can give effect to the distinction which the Legislature evidently had in view, and to all the words of the section which the Legislature has enacted. If this view, is correct, it follows that the Legislature

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meant by the concluding part of the section to empower a Municipal Board to give authority to some other person, not merely to do the formal or mechanical act of putting a complaint before the Magistrate, which it would have to do if it desired to make the complaint itself under the first part of the section, but to determine whether there should be a complaint at all. Is there anything in any word of this section which is inconsistent with this view? The words used are as general as possible:—"Authorized by the Board in this behalf." A general authority, that is an authority, to act in all cases or in a class of cases, is a familiar form of authority to an agent or an officer. The word "authorized" would include it just as much as the narrower kind of authority, which consists in authorizing an agent merely to take specific action in a particular case. That the wider meaning is not an exceptional or anomalous one is further shown by the instance cited by Mr. *Chamier* of **[129]** other enactments, such as s. 59 of the N. W. P. Rent Act, 1881, s. 51 of the Code of Civil Procedure, and s. 19, explanation 2, of the Limitation Act, 1877, in which the same words "authorized in this behalf" are clearly used in the sense of a general authority. Then if the language used is wide enough, why should we go out of our way to place restrictions on it? The Government Advocate has pointed out what would be the result of restricting it in the manner suggested In some of the larger Municipalities constituted under this Act he said—and I think with truth—that the section would be utterly unworkable if so restricted. In a large community with a multiplicity of local business, and where offences against bye-laws of greater or less importance are of constant occurrence, it is impossible that the Municipal Board should meet and deliberate and pass resolutions in every case before any complaint could be instituted. The meetings of the Board are subject to regulations as regards convening, notices to be sent to the members, and as to quorum, and so pre-suppose a machinery which often means considerable delay, and which could not possibly be applied as a preliminary to each and every prosecution for a municipal offence. That is precisely the consideration which induced the Legislature to enact the concluding words of s. 69. I can see no *a priori* improbability, no considerations of public policy which would make it unlikely that the Legislature should entrust to a Municipal Board power to confer on other persons not only a specific authority to file a particular complaint, but a general authority to prosecute for municipal offences, including authority to determine whether a prosecution is desirable. Such a power might, it is said, be abused. If it were abused, a remedy might be found in Chapter V of the Act. That the Legislature itself regards such a power as one which may properly be given to a Municipal Board may be inferred from s. 186 of the Punjab Municipal Act, 1891, which is in terms practically identical with s. 69 of Act XV of 1883, but to which an "Explanation" is appended providing that "the committee may authorize persons to prosecute either generally in regard to all offences under this Act and the rules thereunder, or particularly in regard only to specified offences or offences of **[130]** a specified class." The Burma Municipal Act, 1898, s. 195, contains a similar explanation. These provisions cannot, of course, be used for the purpose of construing Act XV of 1883, but they appear to me to support the view that there is no reason of public policy or convenience why a general authority should not have been included within the words which s. 69 uses. For these reasons I have come to the conclusion that the complaint in the present case was made by a person authorized by

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the Board within the meaning of s. 69, and that the first ground for the present petition therefore fails. This is my answer to the reference.

KNOX, J.—I concur in the answer given and in the reasons therefor.

BLAIR, J.—I find myself constrained to give the same answer to the question propounded as has been given by the Chief justice, and I find myself constrained to that conclusion by the consideration that any other construction would impose on Municipal Boards burdens absolutely intolerable. The section appears to me to be unfortunately drawn, and there are points of view from which I should have been inclined to adopt another interpretation, but I cannot believe that the Legislature intended by that section to make Municipal institutions unworkable.

BANERJI, J.—I would make the same answer to the reference as the learned Chief Justice. I find nothing in s. 69 of Act No. XV of 1883 to justify the contention that there cannot be a general delegation of authority by a Municipal Board in the matter of initiating and instituting complaints. The language of the section is wide and flexible enough to authorize a general delegation of the Board's discretion, and as the limitation of its provisions for which the petitioner contends will lead to great practical inconvenience, I see no reason for so construing those provisions as to give rise to such inconvenience.

BURKITT, J.—In this matter the argument *ab inconvenienti* is, in my opinion, overwhelmingly strong. It is clear from the arguments which we have heard to-day that unless the construction put on s. 69 by the learned Chief Justice be adopted, it will be impossible for any but the smallest Municipalities in these Provinces to cope with the absolutely **[131]** necessary work of prosecuting persons who have been guilty of breaches of Municipal bye-laws. For that reason, though I cannot wholly adopt the views of the learned Chief Justice, I am not prepared to record a dissentient judgment.

AIKMAN, J.—I concur in the answer proposed to be given to the reference by the learned Chief Justice and my brother Judges. The language of s. 69 of the N. W. P. and Oudh Municipalities Act, 1883, is, in my opinion, susceptible of the interpretation for which the learned Government Advocate contends. That interpretation is, to my mind, the most natural construction of the section, as it is undoubtedly the most convenient, and it is the construction which has all along been placed on the section by the Boards which have had occasion to act under it.

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22 A. 131 (F.B.) = 20 A.W.N. (1900) 15.

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Before Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

IN THE MATTER OF THE NEW EGERTON WOOLLEN MILLS.*

[21st December, 1899.]

Stamp—Articles of association—Special resolution—Resolution superseding articles of association—Act No. VI of 1882 *(Indian Companies Act), ss.* 76, 79*—Act No. I of* 1879 *(Indian Stamp Act), sch. i, art.* 8.

A company limited by shares and already possessing articles of association proceeded to pass a special resolution, in virture of which a document was

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* Miscellaneous No. 183 of 1899.

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drawn up entitled "articles of association" in supersession of the articles theretofore in force. The record of this special resolution was, under the provisions of s. 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as articles of association and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of s. 46 of the Indian Stamp Act, 1879, as to whether the document in question required to be stamped *Held* that the Indian Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped.

THIS was a reference made by the Board of Revenue for the North-Western Provinces and Oudh, under s. 46 of Act No. I of 1879. The circumstances which gave rise to the reference were, briefly, as follows. The new Egerton Woollen Mills, a company limited by shares and already possessing articles of [132] association, came to the conclusion that their articles of association stood in need of amendment. They accordingly passed a special resolution very largely altering and amending the articles, and the result of this resolution was embodied in a document headed "articles of association." This document, or a copy of it, was forwarded to the Registrar of Joint Stock Companies under the provisions of s. 79 of the Indian Companies Act, 1882, to be recorded by him. The Registrar impounded it, being of opinion that, owing to the procedure adopted by the company in entirely recasting their articles of association, the document constituted new articles of association and required a stamp of Rs. 25 under art. 8 of the second schedule to the Indian Stamp Act, 1879. At the instance of the Company the Board of Revenue referred to the High Court the question whether the document required to be stamped as articles of association, or whether it was merely the record of a special resolution.

Mr. *W. K. Porter*, for the New Egerton Woollen Mills, contended that the document in question was not articles of association; and did not require to be stamped as such. The Indian Companies Act, 1882, (*vide* ss. 37 and 39) contemplated that there should be only one set of articles of association during the existence of a Company. But by s. 76 of the Act a Company was empowered to "alter all or any of the regulations of the Company contained in the articles of association" by means of a special resolution, as defined by s. 77. This was what had occurred in the present case. The Company had by special resolution altered most of the articles of association, and, instead of publishing what was new in the form of an amendment to the articles of association, had entirely recast the articles. Such procedure was adopted for the sake of convenience, but it was not the making of "new articles of association." In point of law the document in dispute was nothing more nor less than the record of a "special resolution" a copy of which had, by reason of s. 79, to be forwarded to the Registrar of Joint Stock Companies for the purpose of being recorded by him; it did not constitute "articles of association" requiring to be registered under s. 40.

[133] Mr. *E. Chamier*, *contra*, argued that articles of association were in *pari materia* with rules which partners might make for themselves for the conduct of the partnership business. As such rules might be changed as often as the partners desired, so might articles of association of a Company. The document in question was on the face of it a complete set of articles of association, and required to be stamped as such. It was not permissible to look outside the document itself to ascertain what

it was for the purposes of the stamp law. *Chandrakant Mookerjee* v. *Kartikcharan Chaile* (1) and *Ramen Chetty* v. *Mahomed Ghouse* (2).

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JUDGMENT.

KNOX, BANERJI and AIKMAN, JJ.—This is a case stated under s. 46 of Act No. I of 1879 by the Board of Revenue for decision of the question raised in the statement. The statement commences by asking for a ruling regarding the question of the stamp-duty payable on what are termed the New Articles of Association of the New Egerton Mills Company, Limited. It then sets out that an authenticated copy of these so-called "New Articles of Association" was submitted to the Registrar of Joint Stock Companies for registration, and that he impounded them, as he was of opinion that they required to be stamped. The reasons why the Registrar of Joint Stock Companies considered that the document was liable to stamp-duty are that, in his opinion, the New Egerton Woollen Mills Company, instead of altering its existing regulations or making new regulations to the exclusion of those already existing, as they were entitled to do under s. 77 of the Companies Act, had, for the sake of greater convenience and perspicuity, preferred to adopt an entirely new set of articles of association as the regulations of the company, to the exclusion of those before in force, they were therefore the articles of association of the company, and required to be stamped under art. 3 (presumably art. 8) of sch. I of the Stamp Act, 1879. The Board state that they agree with the view thus stated by the Registrar of Joint Stock Companies. Before proceeding further, we would point out that the word "New" is a word imported by the Registrar of Joint Stock Companies into the case. The document, which was presented to the Registrar of Joint **[134]** Stock Companies, and which is before us, is headed "Articles of Association of the New Egerton Wollen Mills Company Limited," and not "New Articles of Association," as set out in the reference. After carefully considering the provisions of the Indian Companies Act, 1882, and hearing all that has been said to us by the learned Government Advocate, we are of opinion that there can be no such document under the Indian Companies Act of 1882 as "New Articles of Association." Articles of association are specially referred to in s. 37 and following sections of the Act. The sections provide that a company limited by shares may, when on the eve of incorporation, draw up a memorandum of association, and may link with that document articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. If they do not add articles of association so executed to their memorandum of association, in that case the regulations contained in the table marked A in sch. I to the Indian Companies Act, 1882, shall be deemed to be the regulations of the Company in the same manner and to the same extent as if they had been inserted in the articles of association and the articles had been duly registered. We have not been referred to any section throughout the Act which provides for the framing of new articles of association, and it seems to us that such would really be a contradiction in terms. We can understand a body of individuals who are about to incorporate themselves into a company drawing up and executing articles of association which shall govern them when so incorporated, and

(1) 5 B.L.R. 103.

(2) 16 C. 432.

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we can understand a company when incorporated resolving that there shall be new regulations which shall supersede or modify the articles which were drawn up at the time when the association was first determined upon. This is provided for by s. 76 of the Indian Companies Act, and provision is made in s. 79, whereby any and every resolution to this effect shall be printed and forwarded to the Registrar of Joint Stock Companies and be recorded by him. Bearing all this in mind, we are satisfied that the document which was submitted to the Registrar of Joint Stock Companies was submitted to him under s 79 to be recorded by him, and not, as he [135] states, for registration. The document was not new articles of association, or articles of association at all within the meaning of the Indian Companies Act. It was a copy of the special resolution passed by the company, notifying to the Registrar, and through him to the world concerned, that the regulations of the company, which were covered by the resolution, would be the regulations by which the company would in future be bound. These regulations, even though they were new regulations to the exclusion of all the existing regulations of the company, are, by the second paragraph of s. 76, to be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association. The law does not say that they are to be deemed articles of association, but expressly declares that they are to be deemed regulations of the same validity as if they had been contained in the articles of association. The document which has been forwarded to us is certainly not one which falls within art. 8 of sch. I of the Stamp Act of 1879, and is not liable to stamp-duty as provided by that article. This is our decision. Let the Registrar certify it as our answer to this reference.

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22 A. 135=20 A.W.N. (1900) 12.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Aikman.

RAM BHAROSE (*Defendant*) *v.* KALLU MAL AND OTHERS (*Plaintiffs*).*
[11th December, 1899.]

Partnership—Arbitration—Authority of one partner to sue on behalf of the firm—Authority of one partner to bind the firm by a submission to arbitration—Act No. I of 1877 (Specific Relief Act), s. 21.

Held that one partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. *Stead* v. *Salt* (1) and *Strangford* v. *Green* (2) referred to.

[Appr., 11 C.L.J. 658=14 C.W.N. 1106 (1112)=6 Ind. Cas. 63; R., 1 Ind. Cas. 937; 103 P.L.R. 1902; D., 3 S.L.R. 5.]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. M. Colvin* (for whom *Wallach*), for the appellant.

Pandit *Moti Lal*, for the respondents.

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* First Appeal No. 29 of 1899 from an order of Babu Nil Madhab Roy, Small Cause Court Judge, Cawnpore, dated 27th February 1899

(1) (1825) 3 Bing. (101).

(2) (29 Car. II) 2 Mod. 228.

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JUDGMENT.

[136] BLAIR, J.—This suit was brought by the plaintiffs to recover money due to them for groceries sold and delivered to the defendant Ram Bharose. The plaintiff's business was a partnership business. One Udai Ram was called the managing partner, but there appears to be no fact found in this case which would distinguish his powers and rights from those of an ordinary acting partner. Proceedings had been commenced by him to recover the debt due to the firm, and we have the authority of English cases, which seem to us to deal with a state of facts in no way different from similar transactions in this country for the proposition that a partner suing to recover a debt due to the firm is acting within the range of his powers; in other words, that he is authorized to adopt the ordinary method provided by law for the recovery of debts due to the firm. Udai Ram, however, before the suit had been decided, referred the matter to arbitration, undertaking no doubt to bind the partnership concern by the award which should be made. Prior to the date fixed for making and publishing the award, a partner, Kallu Mal, gave notice to the arbitrator that he was not bound by the submission to the arbitration, and Udai Ram also repudiated his own liability. The plaintiffs brought this suit to recover their money due to them, narrating in their plaint the general circumstances relating to the arbitration. The substance of their plaint is "we are not bound by those arbitration proceedings. We are entitled to recover just as though they had never taken place." The appellant Ram Bharose set up in his statement of defence that under the true interpretation of s. 21 of Act No. I of 1877, and s. 251 of the Indian Contract Act, the arbitration agreement constituted a bar to the plaintiff's suit. The Munsif tried the issue of fact as to the liability of the partner Kallu Mal for the act of Udai Ram, and found that Kallu Mal had authorized the reference to arbitration, and thereby bound himself and his minor son, who was also a partner. The Court below found otherwise on the question of fact. It found that there was no authority to refer given by Kallu Mal. It discussed and considered no question of implied liability, and we think it reasonable to draw the inference that the question of implied liability of the partnership for the acts of the managing partner **[137]** was not raised before it. At all events there is no finding of such implied liability.

The third point which might have been raised before the lower appellate Court was that, although there might have been in fact no authority conferred upon Udai Ram to refer matters in dispute relating to partnership business to arbitration, still such a representation might have been made to the public as to the nature and extent of his power as to estop the plaintiffs from saying that he had not the fullest authority to enforce the demands of the firm by any machinery he might choose. That question does not appear to have been raised or decided. The defendant therefore having it found against him that there was in fact no authority, has also failed to obtain a finding upon the question whether there was an implied authority or estoppel made by representation of the partners. There was therefore no bar to the consideration of the details of the plaintiff's claim.

An order of remand has been made upon the basis that the plaintiffs have been held entitled to sue as the defendant has failed to establish any bar to their suit. The order of remand, therefore in our opinion, was right. The appeal should be dismissed, and the costs of this appeal should be costs in the cause.

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AIKMAN, J.—This appeal arises out of a suit brought by Kallu Mal, Gopi Ram and Udai Ram, members of a partnership firm, to recover from the defendant Ram Bharose the price of goods supplied. In answer to the suit Ram Bharose pleaded that the matter in dispute had been, under agreement between him and Udai Ram, the managing member of the firm, referred to arbitration, and that consequently the existence of this agreement barred the plaintiff's suit. The Court of first instance sustained this plea and dismissed the suit. On appeal the learned Subordinate Judge set aside the decree of the Court of first instance and remanded the case under s. 562 of the Code of Civil Procedure for decision upon the merits. It is against this order of remand that the present appeal is brought.

It is contended that the reference to arbitration was a valid reference, which binds the partnership, and consequently the suit is not maintainable. The question whether one partner can, without special authority, bind the firm by submission to [138] arbitration, does not appear to have been considered in any Indian case. The English authorities are unanimous in holding that one partner cannot, without special authority, bind his firm by such reference. In case of *Stead* v. *Salt* (1), a firm consisting of five members, brought a suit against the defendant to recover the price of work, labour and materials. It was pleaded that the subject of the demand, for the enforcement of which the action was brought, was concluded by an award. It appeared, however, that submission to the award was signed by three only out of the five members of the firm, and the Court held that submission by three members would not bind the five. There are other cases to the same effect to which it is not necessary to refer. For the appellant to succeed, it appears to me he must show that the reference to arbitration was either an act necessary for, or such as is usually done in, carrying on the business of the firm in question. He has failed to do so. He attempted to show that the other adult member of the firm had expressly consented to the reference, but the lower appellate Court disbelieved the evidence adduced by the defendant and held that no such consent was proved. It appears from the judgment of the lower appellate Court that no attempt was made to argue that Udai Ram, as managing member of the firm, had any implied authority to refer matters to arbitration. I am of opinion, therefore, that the plea, based upon the provisions of the last paragraph of s. 21 of the Specific Relief Act, 1877, fails.

One other contention was urged by the learned counsel on behalf of the appellant, namely, that in any event Udai Ram, who virtually referred the matter to arbitration, was bound by the submission. An old case *Strangford* v. *Green* (2), is cited as authority for this contention. It may be that in a suit against Udai Ram personally the defendant may be entitled to some relief; but this will not affect the suit brought by the firm of which Udai Ram is a member. I concur in the order proposed.

BY THE COURT.—The order of Court is that the appeal be dismissed. Costs of this appeal will abide the event.

Appeal dismissed.

(1) (1825) 3 Bing. 101.

(2) 129 Car. II, 2 Mod. 228.

22 A. 139=20 A.W.N. (1900) 16.

[139] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

BALWANT SINGH (*Plaintiff*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).* [11th December, 1899].

Act No. XIX of 1873 (*N.W.P. Land Revenue Act*), s. 241 (*i*), *Act No. VIII of* 1873 (*Northern India Canal and Drainage Act*), s. 45—*Civil and Revenue Courts—Jurisdiction—Suit to recover alleged excess payments in respect of irrigation dues.*

Held that no suit would lie in a Civil Court to recover payments alleged to have been made in respect of irrigation dues in excess of what was properly leviable on the plaintiff.

THIS was a suit instituted in the Court of the Subordinate Judge of Agra for the recovery of a certain sum of money alleged to have been paid under the following circumstances as detailed in the judgment of the Court of first instance :—

"The plaintiff is the zamindar of two villages, namely Kayatha and Gangni, pargana Firozabad, zila Agra, and pays the irrigation (called the owner's) rate for these villages. The owner's rate is levied on those lands alone which at the time of the last settlement were *usar* or *bunjur* or *khakee*, or *nautor*, and which are now irrigated through the canal; these have been assessed with an irrigation fee of those lands which did not use to be irrigated.

"On account of the village Gangni for the years 1292 to 1296 F. Rs. 833-11-10 were taken in excess of the real dues from the plaintiff's ancestor through mistake on account of owner's rate, that is, on account of those lands which at the time of the last settlement used to be irrigated by canal or wells, or any other means ; that in the same way Rs. 3,709-14-3 were taken in excess of the correct dues for the village Kayatha for the same period ; that the lands for which these fees have been taken are entered in the jamabandis as being *Nahree* or *Chahee*, but the owner's rate was taken with respect to them by mistake. That the numbers of these plots are given in the exhibits marked from A to T.

[140] "The ancestor of the plaintiff and the servants of his estate relying upon the jamabandis supplied to the zamindars twice a year paid the said amounts.

"In May, 1891, the karindas of the estate discovered the mistake, and therefore on the 14th of May 1891, an application was made to the Collector for a refund of the amount, but it was disallowed on the 1st of August, 1891.

"A notice under s. 424 of the Civil Procedure Code was served upon the Collector on the 9th of March 1894.

"The cause of action arose on the 13th of May 1891, when the ancestor of the plaintiff and the servants of the estate discovered the mistake, as well as on the 1st of August, 1891, when the application for a refund of the amount was disallowed.

"Upon these allegations the plaintiff seeks to recover Rs. 4,543 from the defendant.

"The defence is :—

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* Second Appeal No. 194 of 1897, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 21st December 1896, confirming the decree of Maulvi Syed Muhammad Sirajuddin Ahmad, Subordinate Judge of Agra, dated the 6th August 1896.

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"That the plaint has not been properly signed and verified by the plaintiff.

"That the claim is barred by limitation, and the plaintiff has given a wrong cause of action.

"That the amounts in dispute as stated in the plaint are incorrect and greatly differ from the entries in the jamabandis filed by the plaintiff with the plaint.

"That the defendant before the institution of the present suit asked the plaintiff for an account and a list of fields in dispute in order to decide whether any mistake had really been made, but the plaintiff neither sent the said papers to the defendant nor showed them to his pleader.

"That no excess irrigation dues have been realized from the plaintiff, and the dues referred to in the plaint having been fully examined, have been rightly assessed and recovered.

"That the plaintiff and his ancestor had been always paying the irrigation dues and deriving benefits thereof, and the jamabandis have been always in their hands; they never raised any objection; that the present plaintiff has no *locus standi*. The allegation that the said dues were paid by mistake and the mistake was discovered on the 13th of May 1891, is wrong.

[141] "That the plaintiff applied to the Collector of Agra for a refund of the amount but it was rejected on the 1st of August 1891; that no excess irrigation fee has been recovered from the plaintiff, and if any has been recovered, he is not entitled to its recovery under circular A.D. of July 1883."

Upon these pleadings the Court of first instance dismissed the suit as barred by limitation.

The plaintiff appealed, and the lower appellate Court (District Judge of Agra) dismissed the appeal, finding the suit barred by limitation under art. 14 of the second schedule to the Indian Limitation Act, 1877.

The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *E. Chamier*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—In our opinion the suit does not lie by dint of s. 241, second paragraph of cl. *(i)*, of the Land Revenue Act, No. XIX of 1873, and s. 45 of Act No. VIII of 1873. This question was not raised in the appeal or indeed elsewhere at all. The Court below dismissed the suit by the application of art. 14, sch. II of the Limitation Act. The appeal is therefore dismissed, but under the circumstances, without costs.

Appeal dismissed.

22 A. 141=20 A.W.N. (1900) 2.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KANHIA LAL (*Plaintiff*) *v.* DEBI DAS AND ANOTHER (*Defendants*).* [16th December, 1899.]

Hindu law—Joint Hindu family—Suit for partition—Plea by defendants that some of the property in suit was their self-acquired property—Burden of proof.

In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. *Held*, that the burden of proof was on the defendants to show that such property was their self acquisition. **[142]** *Gajendar Singh* v. *Sardar Singh* (1), *Dhurm Das Pandey* v. *Mussumat Shama Soondari Dibiah* (2), and *Gobind Chunder Mookerjee* v. *Doorgapersaud Baboo* (3), referred to.

[**F.**, 4 C.L.J. 56 (59); **R.**, 33 A. 677 (682)=8 A.L.J. 723 (730)=10 Ind. Cas. 543; **D.**, 16 C.P.L.R. 3 (6).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, Babu *Ratan Chand* and Munshi *Gokal Prasad*, for the appellant.

The Hon'ble Mr. *Conlan* and Mr. *D. N. Banerji*, for the respondents.

JUDGMENT.

BURKITT, J. (BLAIR, J., concurring).—This is a second appeal in a partition suit. The reply of the defendants to that suit was that the great bulk of the property sought to be partitioned was their self-acquisition, and that it did not belong to the joint family. It was admitted that some of the property scheduled in the plaint was joint property.

At the hearing in the first Court the Subordinate Judge very properly placed on the defendants the onus of proving that the property claimed by them was their self-acquired property. The defendants refused to accept the ruling of the Court in that matter. They persisted in their contention that the onus lay on the plaintiff, and declined to call any evidence in support of their case. They contented themselves with putting in certain sale-deeds and such like documents. As to those papers it is sufficient to refer to the case of *Gajendar Singh* v. *Sardar Singh* (1). Such documents unsupported by any parol evidence, are insufficient to establish the defendants' case. The first Court gave the plaintiff a decree. On appeal the District Judge has reversed that decision. He held that the onus of proof lay on the plaintiff. In so holding we have no doubt he was entirely wrong, and we say so on the authority of *Dhurm Das Pandey* v. *Mussumat Shama Soondari Dibiah* (2) and of the High Court of Bengal in the case of *Gobind Chunder Mookerjee* (3), and the cases cited therein. We hold that as the defendants set up their separate acquisition in a suit for the partition of a joint family, which admittedly was possessed as such of some property, the presumption of law was that the whole of the property of each individual belonged to the common stock. The burden of

* Second Appeal No. 410 of 1897 from a decree of C. Rustomjee, Esq. District Judge of Moradabad, dated the 24th March 1897, reversing the decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 11th December 1893.

(1) 16 A.W.N. (1896) 23. (2) 3 M. I. A. 229. (3) 22 W. R. C. R. 248.

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proving separate self-[143]acquisition lay on the person asserting it. In our opinion therefore the decision of the Judge was absolutely wrong. We set aside his decree dismissing the suit.

It was urged for the respondents that we should now remand the record so as to give them an opportunity of putting in their evidence. We refuse to adopt that course. The defendants had ample opportunity to produce their evidence. They absolutely refused to submit to the ruling of the first Court and declined to produce evidence. They have only themselves to thank for the consequences. We refuse to assist them. The suit then was practically undefended and was properly decreed by the Court of first instance in the absence of any evidence for the defence. That was a right decree. We restore it, and (setting aside the decree of the lower appellate Court) we allow this appeal with costs.

Appeal decreed.

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22 A. 143 = 20 A.W.N. (1900) 4.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ABDUR RAHIM (*Plaintiff*) *v.* THE MUNICIPAL BOARD OF KOIL (*Defendant*).* [16th December, 1899.]

Suit for declaration of right to be entered in list of candidates for appointment as member of a Municipal Board—Jurisdiction—Suit brought against the Municipal Board in its corporate capacity.

Where a plaintiff sued for a declaration of his right to have his name entered in the list of persons entitled to be candidates for election as members of a Municipal Board and brought his suit against the Board in its corporate capacity, it was held that such a suit would not lie against the Board, even if, which was not decided, it might lie against the revising authority, by the irregular action of which, it was alleged, the plaintiff's name had been excluded from the list of candidates.

[R., 18 Ind. Cas. 122 (124) = 16 O. C. 36 (39).]

THE facts of this case sufficiently appear from the judgment of the lower appellate Court, which was as follows :—

"The plaintiff appellant asks for a declaratory decree against the Municipal Board of Aligarh (*sic*), to the effect that he is entitled to be entered in the list of candidates for election as a member of the Board, and for damages amounting to Rs. 1,100.

[144] " His allegation is that he was elected as a member in March 1894, but his election was set aside by the Magistrate's order passed in May 1894.

"After this the Municipal Board appointed Mr. H. J. Smith, K. Muhammad Yusuf, L. Sri Lal and Sheikh Amin-ud-din as a revising authority for correcting the list of voters, for 1895.

" Muhammad Nur Khan, his former opponent, raised an objection to entry of name of plaintiff on list of voters, on the ground that he paid a monthly rent of less than Rs. 10. The matter was brought up before the revising authorities on 26th January, 1895, and some irregular and illegal

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* Second Appeal No. 298 of 1897, from a decree of L.G. Evans, Esq., District Judge of Aligarh, dated the 4th March 1897, confirming a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh dated the 6th December 1895.

proceedings took place, as detailed in the plaint, in consequence of which the name of plaintiff appellant was struck off list of candidates for membership. It is alleged that the order passed by the revising authority was passed *mala fide* at the instigation of Muhammad Nur Khan, to whom the members of the revising tribunal were partial (Mr. Smith alone excepted). In consequence of this illegal action of the revising tribunal plaintiff appellant failed to be elected in 1895, and this suit is the result.

"The learned Subordinate Judge fixed several issues and decided as below :—

1. The suit is cognizable by a Civil Court.
2. The order of the revising authorities was not wholly regular and the decision was erroneous.
3. The suit is not barred by s. 42, S. R. A.
4. The plaintiff is qualified to be a member.
5. The plaintiff can maintain a suit for damages, but he cannot get any because he has failed to prove malice on part of the revising authorities.

"The plaintiff has appealed against this decision. No objection has been taken under s. 561, Civil Procedure Code, by the defendant Municipal Board, but I hold that the defendant can nevertheless contest the findings of the lower Court where they are against them. 'A respondent who fails to file a petition under this section is not bound by the findings arrived at against him by the lower Court'—*Bhagoji* v. *Bapuji* (1), and may take any objection to the decree of the lower Court which he **[146]** might have taken if he had preferred a separate appeal—*Kamat* v. *Kamat* (2); *In re M. Himmat Bahadur* (3).

"Under these circumstances the Government Pleader on behalf of the Municipal Board urges :—

(1) that the suit is not cognizable by a Civil Court ;

(2) that the plaintiff is not entitled to the declaration asked for as against the defendant Board.

"I am referred to the ruling of the Calcutta High Court in *Sabhabat Singh* v. *Abdul Gaffur* (4) on behalf of the Board.

"The remarks of Mr. Justice Trevelyan, p. 111 *et seq* point to the conclusion that a suit would lie under the circumstances stated by the plaintiff appellant, that is, assuming that the allegation of the plaintiff appellant is correct, that his name was struck off the list of candidates in an irregular way by friends of Muhammad Nur Khan, who were not acting in good faith ; it stands to reason that the relief claimed is one which can be considered by the Civil Court acting under s. 42, Specific Relief Act.

"This is clearly the meaning of the ruling of the Calcutta High Court referred to above, and as no ruling can be cited to the contrary, I hold that the learned Subordinate Judge was right in finding that he has jurisdiction to try and decide this suit.

"The next point for decision is more difficult—

Can the plaintiff appellant claim the declaration asked for against the Municipal Board ?

"The plaintiff appellant, who has conducted his own case, admits that his claim is against the corporate body represented by the

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13 B. 75. (2) 8 B. 368. (3) B.L.R. Sup. Vol. 429. (4) 24 C. 107.

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President, and not against the President or any individual member presonally.

"In the Calcutta case above noted it was decided that no action for damages could lie against the Magistrate who set aside the election, as he only acted *bona fide* in pursuance of what he believed to be the duties of his office; and it was further held that no declaration could be made against him, as the matter was not one in which he really had an interest.

[146] "It was held, however, that an action did lie against those persons who denied the right of the plaintiff and put in force machinery which excluded his exercise of that right.

"In this case the plaintiff appellant bases his suit on the allegation that certain specified members of the Municipal Board, acting under the instigation of his opponent Muhammad Nur Khan, put certain machinery in motion, which resulted in his name being struck out of the list of candidates for the year 1895, and on this ground he says he is entitled to a declaration and damages as against the Municipal Board in its corporate capacity. In this case, according to the rules laid down for the Aligarh Municipality (G. O. No. 716, dated 9th August, 1884), the result of the proceedings of the revising authority was that their order became final, not being corrected by the Magistrate within one month from the last sitting. In other words, the proceedings of the revising authorities were automatically ratified by the Board under the rules, and the order of the revising authorities became for all practical purposes an order of the whole Board.

"But it is not contended that the members of the Board in their corporate capacity were actuated by any malice.

"The order of the revising authorities became the order of the Board under force of circumstances, and it is obvious that the position of the Municipal Board in its corporate capacity is in this case similar to the position of the Magistrate in the Calcutta case. The following remarks apply in this case, *mutatis mutandis*. 'What he (the Magistrate) did was done, or at any rate purported to be done, in pursuance of authority given to him by law. There is a question whether he had any authority to do what he did * * *; but even if that be so, the Magistrate acted *bona fide* in pursuance of what he believed to be the duties of his office, and therefore he would not be liable to an action in respect of it. He would certainly not be liable to any action for damages, and, as far as a declaration against him is concerned, that is not a matter in which he really had any interest. * * * We think it very doubtful whether such a decree could be given, and certainly, as a matter of policy, it would not be right for us to do anything which would compel Magistrates of districts to be **[147]** brought in in suits of this kind when the contest is really one between the parties who have opposed one another at an election.'

"In this case, applying the principles laid down above, I hold that the real dispute lies between plaintiff appellant and the friends or partisans of Muhammad Nur Khan, and that the Municipal Board in its corporate capacity cannot be dragged into their quarrels.

"The Municipal Board in its corporate capacity acted *bona fide* in pursuance of rules laid down for its guidance by Government, and is not interested in any way with respect to the title of plaintiff appellant to any particular character or right. In this particular instance the right of plaintiff appellant to be elected a member of the Board is not a matter in which the Board in its corporate capacity is interested in the slightest degree.

"For the above reason, I hold that the plaintiff appellant cannot,

under s. 42, Specific Relief Act, claim any declaration or ask for any damages against the Municipal Board in its corporate capacity, and the suit must therefore fail.

"It is unnecessary, under these circumstances, to express any opinion on the facts; but I may say that I agree with the learned Subordinate Judge in his finding on the sixth issue, *viz.*, that the plaintiff-appellant is qualified under the rules to be a member of the Municipal Board.

"The learned Subordinate Judge for reasons given by him did not award costs to defendant Municipal Board, but in this appeal I am of opinion that the Board is entitled to its costs.

"The plaintiff-appellant should have been content with the finding of the learned Subordinate Judge that the proceedings of the revising authorities were irregular and their decision erroneous.

"It is quite clear that as against the Board in its corporate capacity he has no reasonable ground of complaint.

"Appeal dismissed with costs."

The plaintiff thereupon appealed to the High Court.

Babu *Satya Chandar Mukerji*, for the appellant.

Mr. *E. Chamier*, for the respondent.

JUDGMENT.

BURKITT, J. (BLAIR, J., concurring).—In this appeal various questions have been argued before us, and amongst others the [148] question as to whether any suit having for its object to obtain a declaration that the plaintiff is entitled to have his name entered in the lists of electors or candidates could lie against the Municipal Board. We do not propose to decide any of those questions. We are of opinion that the appeal must fail on the short ground that the suit has been brought against the wrong party. The plaintiff's allegation is that by reason of certain tortious acts committed by the revising authority his name was wrongfully struck off the list of persons qualified to stand as candidates for election to the Municipal Board at the next election. This the plaintiff alleged as done at the instigation of, and with a view to please and show partiality to, a disappointed candidate. It is admitted for the plaintiff that he had a remedy by application to the District Magistrate (who had power to revise and amend the list prepared by the revising authority), but that he did not avail himself of that remedy.

We are clearly of opinion that if the plaintiff had any right of suit, as to which we express no opinion, his suit should have been instituted against the persons of whose alleged wrongful acts and misconduct he complains, namely, the persons who constituted the revising authority, and that the suit, if maintainable at all, would lie against them personally for the individual acts done by them. The revising authority had the duty imposed on it of preparing the lists of voters and candidates, subject to the final orders of the District Magistrate, and if the members of that body are responsible to any Court for wrongful acts done by them in the performance of that duty they are responsible as individuals. The Municipal Board in its corporate capacity is not answerable for the misconduct and wrongful acts of the revising authority in preparing the lists. It has no control over or power of amending those lists. The Magistrate of the District is the only authority by which those lists can be revised or amended.

For the above reasons we are of opinion that this appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

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[149] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Davey, Sir Richard Couch and Sir Edward Fry.

[*On Appeal from the High Court for the North-Western Provinces.*]

BALKISHEN DAS AND OTHERS (*Defendants*) *v.* W. F. LEGGE (*Plaintiff.*) [27th & 28th June, 4th & 5th July and 11th November, 1899.]

Sale of land and agreement for re-purchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations I of 1798 and XVII of 1806—Exclusion of extrinsic evidence to vary written instrument—Act No. I of 1872 (Indian Evidence Act), s. 92.

A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits.

The vendor did not exercise his right of re-purchase; but after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale.

Held: (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in s. 92 of the Indian Evidence Act, 1872.

This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.

(2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan.

(3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1806. The Transfer of Property Act, 1882, s. 58, defines a mortgage of this character stating the already existing law, and practice regarding it; but owing to its date did not apply in this instance.

(4) Redemption had been rightly decreed in the Courts below.

(5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were (*a*), words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; (*b*), the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase; and other matters. *Bhagwan Sahai* v. *Bhagwan Din* (1) distinguished.

[**Diss.**, 33 A. 340=8 A.L.J. 373=13 Bom.L.R. 391 (394)=13 C.L.J. 510=15 C.W.N. 521=11 Ind. Cas 398=21 M.L.J. 1126=10 M.L.T. 23=(1911) 2 M.W.N. 370; **N.F.**, 33 A. 585 (602)=8 A.L.J. 389=9 Ind. Cas. 1013; **F.**, 26 B. 252 (**F.B.**)=3 Bom.L.R. 778; 30 B. 119=7 Bom L.R. 669; 35 B. 231 (235)=13 Bom. L.R. 113=9 Ind. Cas. 941 (942); 25 M. =11 M.L J. 370; 8 C.W.N. 101; 10 Ind. Cas. 630 (631); **F. & Exp.**, 28 C. 289=5 C.W.N. 326; **R.**, 27 A. 612 (617)=2 A.L.J. 360=A. W.N. (1905) 129; 30 B. 426=8 Bom.L.R. 553; 34 B. 59=11 Bom.L.R. 1130=4 Ind. Cas. 257; 35 B. 93=12 Bom. L.R 972=8 Ind. Cas. 644; 30 C. 883 (893); 31 M. 187 (191)=18 M.L.J. 158; 2 Bom.L.R. 1058 (1067, 1068); 8 Bom. L.R. 287 (294); 8 Bom. L.R. 761 (762); 6 Ind. Cas. 817 (818)=6 N.L.R. 65; 8 Ind. Cas. 501; 10 Ind Cas. 1004 (1006)=27 P.R. 1911=191 P.L.R. 1911=118 P.W.R. 1911; 11 Ind. Cas. 124 (125); 14 Ind. Cas. 65 (66)=1912 M. W. N 164 (165); 19 Ind. Cas. 428 (429); 2 L.B.R. 99 (102); 3 L.B R. 227; 3 L.B.R. 100 (108); 24 M.L.J. 91 (92)=

(1) 17 I. A. 98=12 A. 387.

13 M.L.T. 104 (106) ; 2 N.L.R. 57 (60) ; 3 N L.R.19 (26, 23) ; 3 N.L.R. 97 (99) ; 8 O.C. 275 (276) ; 11 O.C. 95 (97) ; 76 P.R. 1901=114 P.L.R 1901 ; U.B.R. (1908), 3rd Qr., Evidence 15 ; **Exp.**, 28 C. 256=5 C.W.N, 351 ; **D.**, 7 A.L.J. 484 =6 Ind. Cas. 183 (184) ; 8 Bom.L.R. 764 ; 6 C.L.J. 208=11 C.W.N. 400 ; 10 C L J. 27 (29)=2 Ind. Cas. 953 (954) ; 11 C.L J. 39 (42)=2 Ind. Cas. 13.]

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[150] APPEAL from a decree (23rd April 1897)* of the High Court, which affirmed, substantially, a decree, (8th February 1895) of the Subordinate Judge of Jaunpur.

The suit was brought by the respondent, William Francis Legge, on the 5th November 1894, for the redemption of an alleged mortgage of the 4th February 1873, on which date he executed to Balkishen Das, the appellant, together with Hari Das, since deceased, a firm of bankers in Benares, a deed of sale to them of his estate, named the Patilah taluk, the price stated being Rs. 1,50,000. The consideration was not paid in cash, but consisted in part of money unpaid upon a previous mortgage to the banking firm effected on the 8th April 1872 by the plaintiff in conjunction with a partner (whom he had since bought out) in carrying on Indigo factories, of which he was the sole owner in February 1873. The rest of the consideration was a balance, retained by the banking firm, of the amount then due on an estimate of expenses for conducting the factories, which they financed for the plaintiff.

A second deed, an ikrarnama, was executed by the banking firm to the plaintiff on the same day, and bore even date with the first deed, the deed of sale. By this ikrarnama the firm agreed that they would sell the taluk back to him if he paid on the 1st March 1876 the sum of Rs. 1,65,000 to them ; and it was thereby agreed :—(1) that, if the buyers or their heirs should raise any objections to receiving the money and to relinquishing the property, the seller should be competent to deposit that sum in cash in the Treasury, and thereupon obtain possession ;—(2) that if the estimate of the expenditure on the Indigo factories should be varied by consent from year to year, then the seller should be liable to pay along with the sum specified above whatever sum might be found to be due at that time, on the factories account.

On the 6th April 1873 a deed was executed between the parties containing "an estimate of expenditure upon the factories ;" and the respondent borrowed money, which was secured to be repaid in December 1873 upon an instrument separately mortgaging the factories ; which, after fresh borrowing and another deed of estimate in 1874, were sold on the 25th March 1875, **[151]** with some other properties, by the plaintiff to the bankers for Rs. 66,000.

The defence of Balkishen Das and of the sons of Hari Das, as his successors in the firm, was that the transaction of the 4th February 1873 was a sale out-and-out of Patilah, and not a mortgage. They denied that any relation of debtor and creditor was subsisting between the parties, and that any agreement to allow the vendor to repurchase for a specified sum, or any relation of mortgagee and mortgagor, continued after the date fixed for payment of the sum for the repurchase, if it was to take place ; that date having been the 1st March 1876.

The question to be decided on this appeal was the main one raised by the issues :—whether the instruments of the 4th February 1873 constituted a mortgage by conditional sale or a sale out-and-out. Oral evidence

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was admitted on each side at the hearing to explain the intention of the parties to the transaction.

The decision of the Subordinate Judge was in the plaintiff's favour. His judgment was that the deeds on their face constituted a conditional mortgage, and he found that by the ancient custom prevailing, the mortgage by conditional sale was generally effected in that way. He referred to the value of the property, which was in excess of the price stated in the sale-deed of 1873, as showing, with clauses in the ikrarnama (including those above mentioned), the intention of the parties to mortgage, and not actually to sell. His decree was for redemption, on payment by the plaintiff of the Rs. 1,65,000 stipulated for the repurchase, with Rs. 6,607 for principal and interest due on a sum left unpaid, on the expenditure estimated, after the sale of the factories in 1875.

This decision was maintained on the defendants' appeal by a Division Bench of the High Court (BANERJI and AIKMAN, JJ.). Their judgment is reported at length in *Balkishen Das and others* v. *W. F. Legge* (1). Upon a consideration of the terms of the ikrarnama, the surrounding circumstances and the oral evidence, they came to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not to be an **[152]** absolute sale with merely a right to repurchase on a certain date. They did not regard as a precedent for this case that of *Bhagwan Sahai* v. *Bhagwan Din* (2), which they distinguished from the present.

Mr. *J. D. Mayne* and Mr. *W. Colvin*, for the appellants, argued that the judgments of the Courts below were wrong upon the construction of the deeds of 4th February 1873. The true intent and meaning of those deeds were that they ended the relation of debtor and creditor between the parties, and that the bankers became absolute owners of the taluka, after the 1st March 1876. The buyers were until that date under contract to convey that property back to the plaintiff if he should tender to them on that date Rs. 1,65,000, and should also pay any balance that might then be due under the deed of estimate of expenditure dated the 8th April 1872. Those sums were neither tendered nor paid on that date and therefore the sale was from that date indefeasible. The High Court had erred in holding that there were in the surrounding circumstances reason for their putting a construction upon the deeds of the 4th February 1873 different from that which the words literally bore. Also, in the absence of fraud, and for purposes other than to prove it, the Courts below were wrong in admitting oral evidence. This they had admitted to explain what the parties intended by the deeds that had passed between them, and to vary the meaning of the words used; so that what had been plainly a sale had been construed to have been a mortgage. This was in contravention of ss. 92 and 93 of the Indian Evidence Act, 1872, which excluded all evidence taken from outside the written agreement. Besides, the evidence for the plaintiff as to the meaning of the parties, even if admissible, was insufficient to outweigh the express words of the registered document. Again, both the Courts below had relied upon an assumed usage of the people to employ language importing a sale with a view to conveying the effect of a mortgage. This was not borne out by evidence. The appellant had the right to contend that there was upon the true construction of the words used in the deeds, not contradicted by any legal evidence, nor by any evidence rightly understood, a sale for valuable **[153]**

(1) 19 A. 434.

(2) 17 I.A. 98=12 A. 387.

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consideration received by the vendor, coupled with a contract under which he was to be allowed to repurchase the property on a fixed day only. When he had failed to repurchase on that day, the right on his part to obtain possession of the property that had passed from him to the defendants ceased to be exerciseable. From and after the 1st March 1876 the relation of debtor and creditor no longer existed. They were then vendor and purchaser. There was no longer any loan, debt or mortgage after that date, the sale having become absolute.

The decision of this committee in *Bhagwan Sahai* v. *Bhagwan Din* (1) was then referred to—wherein was cited the judgment in *Alderson* v. *White* (2), to the effect that the rule of law on the subject was the following:—that *prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In *Sital Pershad* v. *Luchmi Pershad Singh* (3), the plaintiff failed to establish that a sale to him, with a right of repurchase, was in effect a mortgage; but in that case there were special circumstances, not presented in this, it was true. The sale in that case was declared to be an acquittance of the debt, and the money for repurchase was only to be received under circumstances personal to the debtor, and not shown. Here, there had been a resort to other modes of securing and of clearing the debt on the factories followed by the sale of them, which in 1875 left a comparatively small balance. The principle that continuing indebtedness was to support the view of continuing mortgage was referred to in *The Manchester, Sheffield and Lincolnshire Railway Company* v. *The North Central Wagon Company* (4).

Mr. *A. Cohen*, *Q. C.*, and Mr. *L. DeGruyther* (Mr. *A. J. Ashton* with them), for the respondent, contended that the judgments of the Courts below were right as to the effect of the deeds of the 4th February 1873. The terms of those instruments, read together, could not but be construed as supporting **[154]** the view that they were intended to operate as a mortgage, and not as a sale out-and out. Their form was one much used in the North-Western Provinces and elsewhere to constitute a mortgage by conditional sale, termed in the vernacular bai-bil-wafa. It was said to have been the practice of the Muhammadans to employ this form of mortgage, as it avoided, in their opinion, any infringement of their law against the creditor's taking interest from the debtor. Reference was made to Baillie's Moohummudan Law. Supplement "Of Sale," 782, 809. But sale and a right of purchasing back were commonly resorted to in transactions intended to have the effect of mortgages. In the present instance the intention of the parties to mortgage was shown in several ways by the provisions made in the deeds themselves; and, first, by the right secured to the vendor, should he conclude to repurchase and should the vendee refuse to accept his tender of the purchase money, to pay it into the District Treasury. That provision was in the words of a clause in Regulation I of 1798 relating to the mortgage by conditional sale, or bai-bil-wafa; secondly, the requirement that advances made, and to be made, for the working of the factories should be repaid at the same time with the payment of the repurchase money; thirdly, the excess of that money, by

(1) 17 I. A. 98 = 12 A. 387.
(2) (1858) 2 Deg. and J. 105.
(3) 10 I. A. 139.
(4) (1888) L.R. 13 A. C. 554 (560).

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Rs. 15,000, over the Rs. 1,50,000, the ostensible sale price mentioned in the deed. Next, reference was made to Regulations I of 1798 and XVII of 1806, and the introduction of the right of redemption into the Indian law of mortgage. A statement of that right was not required to be in the deeds themselves, because it was an incident annexed by law without mention in the written contract. Macpherson on Mortgages, 7th ed., pp. 15, 16; Rashbehary Ghose on Mortgages, Tagore Law Lectures for 1877, pp. 136, 139. In 1865 the law of foreclosure in these mortgages was considered in *Forbes* v. *Amir-un-nissa Begam* (1), where the effect of a bai-bil-wafa, or mortgage by conditional sale, was dealt with as resulting from deeds of sale and defeasance in no way different from those in the present case. On the other hand, in *Pattabhiramier* v. *Vencaturao Naicken* (2), which came before this committee from Madras, to which Presidency the rule of the Bengal Regulations **[155]** allowing redemption at any time before foreclosure had not been extended, a sale was held to have become absolute after default. That was on the ground that the English law relating to the equity of redemption was no part of the ancient Indian law and usage in these matters.

With reference to what was laid down in *Alderson* v. *White* (3), as belonging to mortgage, that the relation of debtor and creditor must be intended to continue, it was argued that the state of things as shown to be in contemplation by the ikrarnama of the 4th February 1873 completely satisfied that requirement. The transaction involved that the security should include the debt upon the factory accounts. The principal English cases bearing upon an actual transaction of mortgage receiving effect, though ostensibly a sale, on the first appearance, upon evidence of the intention of the parties to secure repayment according to contract, instead of selling and buying out-and-out, were collected in *Rochefoucauld* v. *Boustead* (4). In *Rakken* v. *Alagappudayan* (5), the intention and agreement were proved by oral evidence and a suit for possession founded on a deed of sale was defeated by proof of a contemporaneous oral agreement for reconveyance on the payment of money borrowed. In that case was cited by the Court *Bakshu Lakshman* v. *Govinda Kanji* (6); and it was held that, without contravention of ss. 92, 93 of the Indian Evidence Act, 1872, if it is apparent that the transaction has been treated as a mortgage by the parties, a mortgage it will be held to constitute. The admission of oral evidence was shown by those cases to turn on the necessity of admitting it to expose fraud involved in the conduct of a pretended buyer knowing himself to be mortgagee.

Also were cited *Bhup Kuar* v. *Muhammadi Begam* (7); *Ali Ahmad* v. *Rahmat-ul-lah* (8), where the case of *Bhagwan Sahai* v. *Bhagwan Din* (9) is observed upon; *Ramasami Sastrigal* v. *Samayappa Nayakan* (10); *Ras Muni Dibia* v. *Prankishen Das* (11).

[156] Mr. *J. D. Mayne* replied.

Afterwards on the 11th November 1899, their Lordships' judgment was delivered by LORD DAVEY.

JUDGMENT.

In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present appellants

(1) 10 M.I.A. 340 (346). (2) 13 M I.A. 560. (3) (1858) 2 De G. and J. 98.
(4) (1897) L.R. 1 Ch. 196. (5) 16 M. 80. (6) 4 B. 594.
(7) 6 A. 37. (8) 14 A. 195. (9) 17 I.A. 98=12 A. 387.
(10) 4 M. 179. (11) 4 M.I.A. 392.

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are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a taluka called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the businëss there in partnership with one De Momet, his co-sharer. By a deed dated the 8th April 1872 the taluka was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000, and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000, and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and the bankers and was carried into effect by three deeds, of which two relating to the taluka were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February 1873 was, on the face of it, an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, *viz.*, the bankers retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333-6-0 principal with interest up to date which had by calculation been found due by the respondent to the bankers under the mortgage deed of the taluka dated 8th April 1872 and retained the balance Rs. 12,666-10-0 in part payment of the amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

[157] The other deed of the 4th February 1873 was in the following terms :—

"We, Babus Hari Das and Balkishen Das, sons of Babu Padam Das, proprietors of "the firm of Babu Madhuban Das and Dwarka Das, caste Gujrati, resident of "mohalla Gwaldas, in the city of Benares, do declare as follows :—

"The vendor, Mr. William Francis Legge, having, under the sale-deed dated 4th "February 1873 sold absolutely, for Rs. 1,50,000, his zamindari right and property in "the entire 16 annas of taluka Patilah, pargana Ungli, in the district of Jaunpur, "comprising 25 villages, original and attached, together with all sir, sayer items, high "and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands ; village sites, ponds, katcha and pakka wells, "collection houses, tenants, quarters, bamboo clumps, groves and detached fruit and "timber trees of all sorts, and stone and wooden mills, inclusive of all the zamindari "rights and interest appertaining to the said taluka, without exclusion of any right or "property, to us, the executants, has caused mutation of names to be effected. "We, the executants, therefore, of our own free will and accord, covenant and "declare that if the said vendor pays on 1st March 1876, the amount of Rs 1,65,000 "in a lump sum, we shall sell to the said vendor the whole of the said ilaka sold, "as it exists at present, for the said amount of Rs. 1,65,000, and we shall cause "everything connected with mutation of names, &c., to be done, neither we nor our "heirs shall have any objection thereto. If we or our heirs raise any objection to "receive the money and reliuquish the property, the vendor shall be competent to "deposit the said amount in cash in the treasury, by virtue of this agreement, and "obtain possession over the ilaka, we shall have no sort of objection to it. It has "further been stipulated by the executants and the vendor that if the amount of the "estimate money of the Basharatpur concern should keep varying on account of alterations made by consent of us, executants, from year to year, then the vendor shall be "liable to pay along with the sum abovementioned, whatever sum may be found to be "due at that time by him to us executants. The sahib shall not be competent to effect a "sale until the payment of the estimate money relating to the factories of the Basharatpur concern. We shall recover from the vendor any amount of arrear that may

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"be due to us by the cultivators by making an assignment thereof in favour of the "vendor, and after the expiry of 1st March 1876, the said vendor shall not be com- "petent either to pay the money or to make the purchase and the conditions of this "deed of agreement shall be deemed to be null and void."

The question between the parties in this appeal is whether the two deeds together constituted a mortgage of the taluka or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the [158] Basharatpur concern. By the third deed dated the 6th of April 1873, the sum of Rs. 44,223-14-3 was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year, and finally by a deed dated the 25th March 1875 the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953-4-3. There is no deed of defeasance to this deed and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873 the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the taluka.

The respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the taluka, alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By s. 92 of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or [159] their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

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Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bai-bil-wafa" that the mortgagor should make himself personally liable for the repayment of the loan (*see* Macpherson on Mortgages, 5th edition, p. 11).

By Bengal Regulation I of 1798, instituted "a regulation to prevent "fraud and injustice in conditional sales of land under deeds of bai-bil-"wafa or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land, the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description was empowered to redeem the [160] land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier* v. *Vencatarow Naicken* (1) it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the Regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (*c*) of s. 58 of the Transfer of Property Act, 1882: "Where the mortgagor ostensibly "sells the mortgaged property on condition that on default of payment "of the mortgage money on a certain date the sale shall become absolute, "or on condition that on such payment being made the sale shall become "void or on condition that on such payment being made the buyer shall "transfer the property to the seller, the transaction is called a mortgage by "conditional sale." The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulations, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai* v. *Bhagwan Din and others* (2). Their Lordships decided that case on the language of the deeds then in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption [161] after the expiry of the date fixed. The appellants contend that such

(1) 13 M.I.A. 560.

(2) 17 I.A. 98 = 12 A. 387.

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ought to be the conclusion in the present case, seeing that the parties did stand in relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinon in this case, for the documents in question contain important indications of the intention of the parties. The second deed or ikrarnama provides that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the ilaka. This provision at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while, on the other hand, the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the taluka for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance npon it.

Their Lordships hold that the transaction was intended to be, and was, a mortgage by conditional sale, and they will therefore **[162]** humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Ranken, Ford, Ford* and *Chester*.

Solicitors for the respondents—Messrs. *Young, Jackson, Beard* and *King*.

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CIVIL REFERENCE.

CIVIL REFERENCE.

22 A. 162.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

CHAND MAL AND OTHERS (*Applicants*) *v.* LACHHMI NARAIN (*Opposite Party*).* [20th November, 1899.]

Act No. V of 1881 (*Probate and Administration Act*), *s.* 3—*Probate—Will—Document intended to take effect partly in the lifetime of the executant and partly after the executant's death.*

There is no objection to one part of an instrument operating *in præsenti* as a deed and another *in futuro* as a will. *Cross* v. *Cross* (1) referred to.

THIS was a reference under ss. 17 and 18 of the Ajmere Courts Regulation (No. I of 1877). The facts out of which it arose appear from the order of reference, which was as follows :—

"The plaintiffs in the above case applied, on the 29th March, 1898, to the Commissioner, Ajmere-Merwara as District Judge of Ajmere, under s. 56 of the Probate and Administration Act (V of 1881) for the grant of probate of a document purporting to be the will, executed on the 10th April 1887, of Mussammat Gulab Kunwar, widow of Seth Sobhagmal of Kuchawan. The said Mussammat Gulab Kunwar died on the following day, *viz.*, on the 11th April 1887, at Ajmere, leaving, as is alleged, assets to the value of Rs. 7,200 at Beowar and Pushkar within the Ajmere District.

"After the application for probate was made, the defendant Lachhmi Narain, minor son of Seth Har Narain, deceased, of Ajmere, by his guardian his mother Mussammat Gopi, lodged a caveat, contending *inter alia* that the will was not genuine, that Mussammat Gulab Kunwar had only a life interest in the **[163]** property, which devolved on one Dhanrupmal, cousin of Sobhagmal, the deceased husband of the testatrix Mussammat Gulab Kunwar, that the caveator had purchased the property situated at Beowar, and subject to the document of which probate was applied for, at a Court sale in execution of a decree passed against Dhanrupmal the next reversionary heir of Seth Sobhagmal, and lastly, that the document for which probate was asked was not a will, inasmuch as it contained provisions which were to take effect during the lifetime of the executrix Musammat Gulab Kunwar.

"The District Court rejected on the 20th May 1898, the application for probate, on the ground that the document was not a will, for the reason given in the caveat.

"An appeal was filed in this Court against the order of the District Judge, and was dismissed by Colonel Yate, Officiating Chief Commissioner, on the same grounds that influenced the Court below, namely, that the document for which the probate was applied did not come within the definition of a will.

"Against the order of this Court, which is dated the 27th of September 1898, the plaintiffs have applied for a reference under s. 17 of the Ajmere Courts' Regulation, to their Lordships of the Honourable High Court at Allahabad. The case is accordingly submitted for the

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* Miscellaneous No. 166 of 1899.

(1) (1846) 8 Q. B. 714=15 L. J. (N.S.) Common Law, 217.

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High Court's consideration, together with a copy of all the important documents connected with it."

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the applicants.

Babu *Jogindro Nath Chaudhri*, for the opposite party.

JUDGMENT.

STRACHEY, C. J., (BANERJI, J., concurring).—Our answer to this reference is that such portions, if any, of the document propounded, as the Court below, after taking evidence, may hold to be a legal declaration of the intentions of Mussammat Gulab Kunwar with respect to her property which she desired to be carried into effect after her death, amount, in our opinion, to a will, within the meaning of s. 3 of the Probate and Administration Act of 1881, notwithstanding that the same document may contain other provisions which she desired should be carried into effect during her life-time.

[164] We may refer the Court of the Chief Commissioner to the case of *Doe d. Elizabeth Cross* v. *Arthur Cross* (1) the effect of which is stated in Jarman on Wills (5th ed., vol. 1, p. 25). It was there held that "there was no objection to one part of an instrument operating *in præsenti* as a deed and another *in futuro* as a will."

The costs will be disposed of in accordance with s. 20 of the Ajmere Courts' Regulation of 1877. Let the case be returned.

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22 A. 164=20 A.W.N. (1900) 3.

MISCELLANEOUS CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

RAMPAL SINGH (*Defendant*) *v.* MURRAY AND CO. (*Plaintiffs*).*

[22nd December, 1899.]

Act No. IX of 1872 (Indian Contract Act), ss. 148, 151, 152—Contract—Bailment—Liability of bailee—Liability of guest at hotel in respect of furniture used by him.

The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently used to recover the value of such furniture from the defendant. *Held* that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to ss. 151 and 152 of the Indian Contract Act, 1872. *Shields* v. *Wilkinson*. (2) referred to.

THE facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

The respondents were not represented.

ORDER.

STRACHEY, C. J.—This is a reference to the Court by the Local Government under Rule 17 of the Kumaon Rules, 1894, made under s. 6 of

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* Miscellaneous No. 246 of 1899.

(1) (1846) 8 Q. B. 714=15 L. J. N.S. Common Law, 217. (2) 9 A. 398.

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the Scheduled Districts Act, 1874. The suit out of which it arises was brought in the Court of the Assistant Commissioner of Naini Tal by the proprietors of the Grand Hotel, Naini Tal, against Raja Rampal Singh. The plaintiffs claimed by their plaint to recover Rs. 580 as due by the defendant **[165]** for board and lodging, and incidental expenses incurred during his and the late Rani's residence at the Grand Hotel, Naini Tal. They filed an account, from which it appeared that they claimed Rs. 164 for board and lodging and the balance of Rs. 416 as incidental expenses for the value of certain hotel furniture. The defendant in his written statement admitted liability for the Rs. 164, but denied liability for the balance. From the written statement and from the issues framed by the Assistant Commissioner the following facts appear to have been undisputed. The defendant's wife while staying at the plaintiff's hotel was seized with cholera and died, the defendant not being then at Naini Tal. There was no evidence to show how she caught the disease or whether the source of infection was within the hotel or outside it. Three days after her death, the furniture of the rooms occupied by her during her illness was destroyed by the plaintiffs in order to prevent the risk of infection to the residents of the hotel. The defendant did not in his written statement deny that the destruction of the furniture was necessary for that purpose. The only grounds upon which he denied liability were that his wife had contracted the disease after her admission to the hotel, that it should be inferred that she contracted it in consequence of "something wrong in the culinary 'process' of the hotel, and that it was not in accordance with the usage of hotels in Naini Tal to claim value for destruction of property necessitated by death from any epidemic originating in the hotel itself." No special contract varying the ordinary relation of inn-keeper and the guest in respect of the goods was alleged. The only issue framed by the Assistant Commissioner, which need be referred to, was as follows:—"Is the defendant liable for the value of hotel property destroyed owing to defendant's wife having died of cholera in the hotel; and if so to what extent?" There was no issue of fact and no evidence was given by either side. The Assistant Commissioner gave judgment upon the pleadings. He decreed the claim on the grounds that the defendant had adduced "no authorities in support of his somewhat extraordinary contention that he is not liable," and that "plaintiffs have probably suffered in pocket as it is from the scare which a death from cholera in their hotel would doubtless cause; it would be unfair **[166]** in the extreme to saddle them with the cost of new furniture."

Against this decision the defendant appealed to the Court of the Deputy Commissioner of Naini Tal. The Deputy Commissioner held that inasmuch as the defendant and his wife knew, when the latter was admitted to the hotel, "that an incident of such illness as cholera is that articles used by the patient must be destroyed," there was an implied contract by the defendant "to make good any damage caused by the illness of his wife." He accordingly dismissed the appeal. A further appeal by the defendant to the Court of the Commissioner of the Kumaon Division was rejected summarily. The Local Government has referred the decree of the Commissioner to this Court for our report and opinion. The question upon which our opinion is asked is "as to the liability or otherwise of the Raja to pay the cost of the articles belonging to the hotel which were destroyed to prevent the danger of infection in consequence of the death of Rani Rampal Singh from cholera."

At the hearing of the reference the learned advocate who appeared for

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the defendant stated that his client did not contest his liability, should the Court hold that the wife, if she had survived, would herself have been liable to such a claim. The question therefore is whether, in the absence of express agreement, a guest at a hotel is liable to compensate the owner for the loss of hotel furniture used by the guest while suffering from an infectious disease and destroyed by the owner in order to prevent infection, there being no evidence of negligence on the part of the guest either in the contracting of the disease or in the use of the furniture during its continuance, and it being admitted that the destruction of the furniture was necessary. There appears to be no reported case in point. To decide the question it is necessary first to see what is the true legal relation between the guest and the hotel-keeper in respect of the furniture used by the former. It is clearly the relation of bailor and bailee as defined by s. 148 of the Indian Contract Act, IX of 1872. The bailment is one of hire; the guest hires not only the rooms which he occupies, but the furniture which they contain. The nature and extent of his liability are shown by s. 152 of the Act **[167]** which provides that "the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in s. 151." And s. 151 provides that "in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." So that the guest is not responsible for the loss, destruction or deterioration of the furniture hired by him if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own. Ordinary prudence is the test. In the present case the plaintiff has never alleged or suggested that the defendant's wife did not exercise ordinary prudence in taking care of the furniture, nor is there any evidence that she did not. In the absence of evidence either way, does the burden of proving the exercise of ordinary prudence rest on the hirer, or is it for the owner of the goods to show that ordinary prudence was not exercised? The question of burden of proof in cases of injury to goods delivered under a bailment of hiring was considered by this Court in *Shields* v. *Wilkinson* (1). If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence; otherwise I think that the owner must give some evidence of negligence. Such goods as those in question here, that is, bed-room furniture and articles in the patient's personal use, could not have been used by a person suffering from cholera without being so infected as to require destruction: such damage is a practically irresistible consequence of such use, no matter what degree of prudence is exercised. That being so it was for the plaintiffs to give some evidence that the defendant's wife did not take as much care of the goods as a person of ordinary prudence would have taken of her own goods under similar circumstsnces, and no such evidence having been given, the defendant is not liable. There is no ground for the Deputy Commissioner's assumption, that because the defendant and his wife may be supposed to have **[168]** known that in the event of infectious disease the articles used by the patient would have to be destroyed, there was an implied contract by

(1) 9 A. 398.

them to make good the loss irrespective of any neligence ; in other words to insure the owner against such loss. The *prima facie* inference would rather be that in forming with the owner the relation of bailor and bailee, they intended the usual legal consequences to follow, including the ordinary restricted liability of a bailee for hire. If the owner denied any further protection than this, if he wished to throw upon the hirer the entire risk of accidental or irresistible destruction of the goods, he could not do so by the special contract which s. 152 allows, but in the absence of any special contract and of any want of ordinary prudence making the hirer responsible, he must be taken to have accepted the risk as an incident of his business. If the goods had remained with him he would have had to bear any loss which ordinary prudence could not have prevented, and his having entrusted them to a hirer, who exercises an equal degree of prudence, is no reason for putting him in a better position, or for exacting from the hirer a greater amount of care than the owner himself would probably have take.

I think that the Commissioner ought to have allowed the defendant's appeal and dismissed the suit so far as the claim to recover the value of the furniture was concerned. This is our answer to the reference.

BANERJI, J.—I am of the same opinion.

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APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

BANKE LAL AND OTHERS (*Plaintiffs*) *v.* JAGAT NARAIN (*Defendant*).
BANKE LAL AND OTHERS (*Plaintiffs*) *v.* DAMODAR DAS AND ANOTHER (*Defendants*).* [16th January, 1900.]

Execution of decree —Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code, ss. 311, 312.

Certain immovable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under s. 311 of the Code of Civil Procedure, the sale was set aside. After the sale had been thus set aside **[169]** the same property was again sold in execution of another decree. Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by Strachey, C.J., that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held* further (by Strachey, C. J., and Banerji, J.) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale.

Dagdu v. *Panchamsing Gangaram* (1), *Konapa* v. *Janardan* (2), *Adhur Chunder Banerjee* v. *Aghore Nath Aroo* (3) and *Ram Chunder Sadhu Khan* v. *Samir Ghazi*(4), distinguished. *Nawab Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (5), referred to by Strachey, C. J.

[R., 24 A 218 (223) ; 24 A. 467 (470) ; 7 A.L.J 893 = 7 Ind. Cas. 409 (410).]

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* First Appeals, Nos. 115 and 116 of 1898, from decrees of Babu Madho Das, Subordinate Judge of Bareilly, dated the 30th March 1898.

(1) 17 B. 375.
(2) 11 B.H.C.R. 193.
(3) 2 C.W.N. 589.
(4) 20 C. 25.
(5) 15 I.A. 12.

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THE facts of this case are fully stated in the judgment of the Chief Justice.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellants.

Mr. *D. N. Banerji* and Pandit *Moti Lal*, for the rspondents.

JUDGMENT.

STRACHEY, C. J.—These two first appeals are connected appeals in connected suits, the same persons being plaintiffs and appellants in both. They are also connected with second appeals Nos. 405 and 633 of 1897, in which the same persons are plaintiffs. Each case raises the question of the rights of the plaintiffs under a purchase at an execution sale of certain zemindari property as against other purchasers who claim to have respectively bought at other sales certain portions of that property. It will be convenient to consider separately the two first appeals, as to which one judgment will suffice, as it did in the Court below.

The litigation arises out of the failure of the firm of Lachmi Narain of Bareilly. Several suits were brought against the firm by creditors, who obtained decrees. One of the decree-holders was one Kalka Prasad He put in execution his decree against Ram Sarup and Piare Lal, the representatives of the debtor **[170]** Lachmi Narain, and on the 20th November, 1885, there were sold in execution of the decree the rights and interests of the judgment-debtors in a village called Saidpur, or Saidpur Hawkins, and those rights and interests were purchased by the plaintiffs. One of the questions raised by the appeals is as to the exact extent of the interest acquired by the plaintiffs by that purchase, and whether it included the portions claimed by the defendants. At all events, it included the twenty biswas share of the judgment-debtors in mauza Saidpur. Objections were raised to the sale by the judgment-debtors on the ground of irregularity in publishing or conducting it under s. 311 of the Code of Civil Procedure. The Court executing the decree allowed the objections and set aside the sale on the ground that the notification of sale was so vague in its description of the property to be sold as to be misleading to intending purchasers. That order was passed on the 5th May, 1886. Under the Code as it then stood no appeal lay from the order of the executing Court, but under the decisions of this and other High Courts, a regular suit lay at the instance of the auction purchasers to set aside the order and to have the sale confirmed. Before, however, anything was done to question that order, certain portions of the village Saidpur were, on the 20th September, 1886, sold in execution of other decrees passed against the same judgment-debtors. One of these was a decree of Kunwar Harcharan Lal. In execution of that decree two pieces of property were sold. One portion, described as "Hawkins Kothi, with inclosure and land," was purchased by Damodar Das, the respondent in F. A. No. 116. Another, described "as Begam Bagh, with masonry inclosure and kothi therein, and land," with other details not necessary to state, was purchased by Jagat Narain, the respondent in F. A. No. 115. On the 4th December, 1886, both sales were confirmed under s. 312 of the Code, and in February, 1887, the purchasers obtained possession. It is under these sales that the defendants-respondents resist the claim of the plaintiffs-appellants to possession of these plots by virtue of the sale of the 20th November, 1885. That sale, it will be remembered, had been set aside on the 5th May, 1886. On the 20th September, 1886, that is, on the very day of the purchases by the defendants, the plaintiffs brought a suit to set aside the **[171]** order of the 5th May, 1886, and for confirmation of their

sale of the 20th November, 1885. It has not been contended that by reason of that suit the defendants' purchases are effected by the doctrine of *lis pendens*. That contention could not have been successfully raised ; first, because there is no evidence to show that at the time of the sale of the 20th September, 1886, the suit instituted on that date had already been filed ; and, secondly. because, even assuming the institution of the suit to have come first, it clearly had not become "contentious" within the construction placed by this Court and other High Courts upon s. 52 of the Transfer of Property Act, 1882, at the time of the sale on the same day. The only persons whom the plaintiffs made parties defendants to that suit were the judgment-debtors whose property had been sold. They never made the present defendants parties to that suit, although the Court pointed out the advisability of their so doing if they claimed those portions of the property which the defendants had purchased on the 20th September, 1886. The defendants to that suit, the judgment-debtors, filed written statements confessing judgment. Nevertheless on the 7th March, 1887, the Court of first instance dismissed the suit on the ground that the plaintiffs persistently refused to specifically answer the Court's inquiry as to the particulars of the property which they claimed to have purchased on the 20th November, 1885, and more especially whether they claimed that that sale included the kothis and gardens subsequently purchased by the defendants. From that decision the plaintiffs appealed to the High Court, which, on the 14th May, 1888, reversed the first Court's decree and allowed the claim. The judgment and decree of the High Court in the first place awarded the plaintiffs "possession of the property in suit, to wit, mauza Saidpur together with the groves." Secondly, it "declared that the auction-sale in favour of the appellants dated the 20th November, 1885, was a good auction-sale, and that the property as aforesaid sold thereat was purchased by them." In September, 1888, the plaintiffs obtained formal possession of mauza Saidpur in execution of the High Court's decree. They were resisted in obtaining possession of the plots which the defendants had purchased ; and hence these suits, the first against Jagat Narain for possession of Begam Bagh (F. A. **[172]** No. 115), the second against Damodar for possession of Hawkins Kothi (F. A. No. 116).

The case of the plaintiffs is that these properties passed to them under their prior purchase of the 20th November, 1885, which they say was confirmed by the High Court with the effect that the confirmation related back to the date of the sale, and therefore their purchase of the 20th November, 1885, must be given priority over the defendants' purchase of September, 1886. The case of the defendants is, first, that Hawkins Kothi and Begam Bagh were not in fact included in the execution sale to the plaintiffs of November, 1885, and, secondly, that that sale was never validly confirmed as regards them, and is not entitled to priority over the sale under which they purchased.

The Court of first instance decided in favour of the defendants and dismissed the suits.

The first question to be considered in these appeals is whether the execution sale of the 20th November, 1885, in fact included Hawkins Kothi and Begam Bagh. The sale notification describes the property as "mauza Saidpur Hawkins." It describes the judgment-debtors' interest as "20 biswas with gardens belonging to Ram Sarup and Piare Lal." Hawkins Kothi is a piece of land surrounded by a wall, and including a kothi or house, certain out-houses, and certain lands cultivated by

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tenants. Begam Bagh is another inclosure consisting mainly of a garden, but also apparently including a kothi. There is no doubt that both Hawkins Kothi and Begam Bagh are included within the area of the village Saidpur. Everything which can be described as gardens is expressly included in the sale notification. I think there can be no doubt that, apart from buildings, all land and especially all land cultivated by tenants, included within the area of the zamindari would *prima facie* pass by a conveyance or execution sale of the Zamindari. The only question I think is as to the kothis and the out-houses attached to them. As to these I have no doubt whatever that it was fully intended that they should be sold with the rest of Saidpur. They are specifically mentioned in the application for execution and in the warrant of attachment. I do not agree with the view of the Subordinate Judge that the kothis were not actually attached. He bases that view on the **[173]** Amin's report in which the Amin stated that he had attached "the zamindari property." But the report itself expressly refers to a list appended to it, which specifically includes in the attached property the kothis and gardens, and I think that shows clearly that those properties were in fact attached, and that in the report the Amin used the expression "zamindari property" merely as a compendious description of everything detailed in the appended list. The executing Court when it set aside the sale at the same time stated its opinion to be that the kothis and gardens were included in the property sold, though it held that that did not appear with sufficient clearness from the description of the property, and that the absence of specific details was misleading. Now in the entire absence of evidence to the contrary, I think that a kothi or other building situate within the zamindari area is included in and passes with the zamindari. No doubt the contrary may be shown by evidence, that is to say, evidence of the circumstances connected with the acquisition, construction, or user of the buildings, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In the present case there is no such evidence. The village Saidpur was purchased by Lachmi Narain in 1861. There is in evidence an account book of the firm showing that at the same time there was purchased a kothi or kothis separately valued. It is impossible to say from this document whether the singular word "kothi" or the plural "kothis" is designated. Further, there is nothing to show, if the document referred to one kothi, which, if either, of the kothis concerned in this suit is referred to. There is no evidence showing for what purpose or in what manner either the kothi in Hawkins Kothi or the kothi in Begam Bagh was used at any time up to the sale of the 20th November, 1885. Therefore in the absence of any evidence to the contrary I hold that the kothis and the out-houses as well as the gardens and cultivatory holdings, passed with the rest of the zamindari of mauza Saidpur by the sale of the 20th November, 1885.

The next question relates to the validity of that sale, and as to this defendants raise two contentions. First, they say that at the **[174]** date of their purchase of the 20th September, 1886, the plaintiffs' purchase having been set aside, they, the defendants, took Hawkins Kothi and Begam Bagh absolutely and not subject to any rights then existing in the plaintiffs. Secondly, they contend that, so far as they are concerned, the sale of the 20th November, 1885, must be deemed to be a sale which was never confirmed, inasmuch as the confirming decree of May, 1888, was

passed in a suit to which they were not parties, and by means of collusion between the plaintiffs and the judgment-debtors who were the sole defendants.

In reference to the first of these contentions the plaintiffs seek to establish an analogy between the decree of 1888 and an ordinary order confirming a sale under s. 312 of the Code. It has been held in several cases that an auction purchaser at an execution sale has prior to confirmation under s. 312, an inchoate or equitable title which becomes absolute on confirmation, that any subsequent purchaser, even if the subsequent purchase is first confirmed, takes subject to this inchoate title of the first purchaser, and that on confirmation the title to the property, as between different auction purchasers under different sales, relates back to the date of the sale. In support of this contention the plaintiffs rely on *Dagdu* v. *Panchamsing Gangaram* (1), *Konapa* v. *Janardan* (2) and a case reported in two Calcutta Weekly Notes, p. 589. When these cases are looked at there is one obvious matter in which they are distinguishable from the present. In all of them at the time of the second purchase the first had not been set aside but was in force. All of them proceed on the principle that at the time of the second purchase there existed in the first purchaser under a subsisting sale an inchoate title, which only awaited confirmation of the sale to become a complete title. In each of these cases the second purchaser bought subject to that inchoate title which only awaited confirmation. In the present case at the time of the second sale to the defendants the sale to the plaintiffs had been set aside for many months. If that sale was set aside, and was not subsisting at the date of the defendants' purchase, how can it be said that at that date any inchoate title in the plaintiffs existed? The inchoate title depends on the sale, **[175]** and can exist only as long as the sale is in force. If on the 20th September, 1886, the sale had gone and the inchoate title of the plaintiffs under it had therefore gone, the defendants did not purchase subject to it. Can it be said that the inchoate title still existed, although the sale giving rise to it had been set aside, merely because there was a possibility of a suit being brought by the auction purchasers for reversal of the order setting aside the sale and for confirmation of the sale itself? I am disposed to agree that the confirmation constituted by the decree would relate back to the date of the sale and make the sale valid *ab initio quoad* the judgment-debtors. But can it do so in such a manner as to defeat intermediate purchasers who have purchased *bona fide* at a time when the sale was set aside, and under valid decrees, and in valid auction sales of their own? No case, it is admitted, has carried the doctrine of inchoate title so far as this. The plaintiffs rely on the analogy of the case of *Ram Chunder Sadhu Khan* v. *Samir Gazi* (3), and in particular on the passage at p. 28, where it is said :—"The effect of the subsequent dismissal of the suit to set aside the sale was the same as if it had been dismissed in the first instance, and as if the first sale had never been set aside." The learned Judges give no reasons for that opinion; but I think it sufficient to say of that case that the circumstances of it were in several particulars different from the present, and that it was decided under the provisions of the Bengal Rent Act VIII of 1869. If we are to go by analogy, I think a more instructive analogy is to be found in the judgment of their Lordships of the Privy Council in the case of *Nawab Zain-ul-abdin Khan* v.

(1) 17 B. 375. (2) 11 B.H.C.R. 193. (3) 20 C. 25.

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Muhammad Asghar Ali Khan (1), where it was laid down that the title of a *bona fide* purchaser in execution of a decree which at that time was valid and in force is not effected by the circumstance that the decree is afterwards set aside on appeal as erroneous. I have not arrived at this conclusion without some doubt, because unquestionably there are difficulties in any view of the conflicting rights of these two auction purchasers. It is possible, for instance, that questions of some difficulty might arise if the competition were between an auction purchaser buying after the previous sale had been set aside, and the prior auction purchaser, who, after the [176] second sale, obtained on appeal a reversal of the order setting his sale aside. As to which of the two auction purchasers would in that case be entitled to priority, I need express no opinion, though I acknowledge that in favour of the prior auction purchaser it might plausibly be contended that to deny him priority would have the effect of rendering nugatory the right of appeal now given to him by s. 588 (16) of the Code. That difficulty I prefer to deal with when it arises. On the other side, however, I think there are still greater difficulties, and in particular the difficulty and objection resulting from the long period of uncertainty and suspense in which it would be impossible practically to say whether property might safely be sold in execution of a decree. The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order: the suit might conceivably be a protracted one and go through the whole course of appeal possible in India, and ultimately to the Privy Council; and the question would arise whether the titles of auction purchasers and transferees from those purchasers, and even further transferees again in the period between the setting aside of the order and the institution of the suit should for the whole of that protracted period be subject to every sort of uncertainty. But the greatest difficulty to my mind is in holding that there remains an inchoate title when the sale has been set aside and when all that remains to the plaintiff is the possibility of bringing a suit to have the reversal of the sale itself set aside. These defendants were *bona fide* purchasers of these plots at a time when I cannot hold that the plaintiffs had any title to them whatever, and for that reason I think that the defendants' purchase is entitled to priority and that the suit must fail.

That would be sufficient to dispose of these suits, but that I understand that my brother Banerji has some doubts on the matters which I have so far discussed; and I do not pretend to be entirely free from doubt myself. Therefore it is necessary now to consider the second ground on which the defendants contend that even if Hawkins Kothi and Begam Bagh were included in the sale of November, 1885, the plaintiffs have not validly [177] acquired these properties. That second ground is that by reason of the collusive nature of the proceedings terminating with the High Court's decree of May 1888, the sale of the 20th November 1885, must be deemed never to have been confirmed *quoad* these defendants and the order of the 5th May, 1886, setting aside the sale remains standing *quoad* them. There can be no doubt that an auction purchase in execution of decree must be confirmed if it is to pass a complete title. It must be confirmed either by an order under s. 312 or by a decree in a regular suit brought for the purpose. The question is whether the High Court's decree of 1888 was prevented from having been a valid confirmation by reason of collusion as alleged. The conclusion

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at which I have arrived is that the proceedings in that suit were collusive proceedings between the plaintiffs and the then defendants. The High Court's decree was passed solely on the ground of the confession of judgment by the then defendants in the Court of first instance. In dealing with the question of collusion it must of course be remembered that direct evidence on such a point can seldom be expected. One has to look at all the circumstances and consider what is the most probable and common sense inference to be drawn from the circumstances as a whole. Now what are the circumstances here? There was a sale to the plaintiffs in November 1885 of mauza Saidpur at which only 6,000 * rupees were realized. We find the judgment-debtors objecting to that sale and getting it set aside in May 1886. From that moment the plaintiffs did absolutely nothing to impugn the order until the 20th September, 1886, which by a curious coincidence happened to be the very day when, in execution of another decree, these properties were sold to and purchased by the defendants. On that day they made an unsuccessful attempt to get the sale postponed, and having failed they purchased secretly, in the name of one Kishen Lal, the village Saidpur, which, on the same day, was sold in execution of a decree of Lalta Prasad and Gobind Prasad. On the same day they also bring their suit for confirmation of the sale of the 20th November, 1885, and against whom do they direct it? They carefully confine the suit to the judgment-debtors, who had no remaining interest whatever in the property: and I use the word "carefully" advisedly, because the circumstance of the defendants' purchases **[178]** was pressed upon the plaintiffs' attention by the Court, which insisted in vain on an answer to the question whether they claimed Hawkins Kothi and Begam Bagh, in which event the Court considered that the present defendants ought to be made parties to the suit. They refused to say whether they sought to affect the interests of these persons or not. These persons had a real interest in opposing the suit. The judgment-debtors, who had succeeded in obtaining the order of the 5th May 1886, filed written statements confessing judgment. Why did they do that, if they did not wish actively to assist the plaintiffs in getting the first sale restored with the minimum of opposition? If they had no defence to make to the suit, or thought they were not interested in opposing it, and if that is why they made no resistence it would have been sufficient for them to have simply let judgment go by default. One of the plaintiffs was examined as a witness in this case—the plaintiff Banke Lal. He was called by the defendants. He was cross-examined by his own counsel. There was an issue as to the collusive nature of the proceedings in the former suit. If there had been in fact no collusion in that former suit I think it would have been a natural course to have taken such a favourable opportunity of obtaining a specific denial by Banke Lal, that in the former suit there had been collusion in obtaining the confession of judgment. No such question was put, and the plaintiff's counsel confined himself to asking whether it was true that the former defendants had been induced to confess judgment by a bribe of Rs. 3,000. From all these circumstances the conclusion which I draw—of course, like most other conclusions of facts, it is only based on a balance of probabilities—is that the parties to that former suit agreed together to set up by a suit which was really a sham suit intended not to be resisted but facilitated, the sale of the 20th November 1885, in order to defeat the present defendants of whose

* In 20 A.W.N. (1900) 31 (35), for 6,000 we have 16,000, Ed.

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purchases the plaintiffs and the judgment-debtors were of course fully aware. I agree with the Court below in not being satisfied with the evidence by which it was attempted to show an actual bribing of the then defendants. Apart from that, however, and although the bribe has not been established, I think there is sufficient ground for coming to the conclusion that the confirmation of the plaintiffs' sale was obtained [179] by collusion between the plaintiffs and the judgment-debtors. I would therefore dismiss both appeals and suits on the grounds, first that the defendants' purchases are, under the circumstances, entitled to priority over the plaintiffs' purchase; secondly, that, as regards the defendants, the confirmation of the plaintiffs' sale by a decree to which the defendants were not parties, and which was obtained by collusion between the plaintiffs and the judgment-debtors, cannot operate as a valid confirmation of the sale of the 20th November, 1885. For these reasons I am of opinion that both these appeals should be dismissed with costs in both Courts.

BANERJI, J.—I also am of opinion that the decrees of the Court below should be affirmed, although I am unable to agree with most of the reasons by which the judgment of that Court is supported. In the two suits out of which these appeals arise there are three questions to be considered; (1) whether the property now in suit was comprised in the auction-sale of the 20th November, 1885; (2) whether the defendants have priority over the plaintiffs by reason of their having purchased the said property after the sale of the 20th November 1885, had been set aside, and of the said sale having been confirmed by proceedings to which the defendants were not parties; (3) whether the decree of this Court of the 14th May, 1888, affirming the said sale, was obtained by means of collusion and fraud.

Holding the view which I do on the third question, I do not deem it necessary to decide the other questions. Upon those questions I must confess my mind is not free from doubt. I prefer therefore to rest my judgment on the conclusion at which I have arrived with reference to the third question. If the decree of this Court, which is the real basis of the plaintiffs' title, was fraudulently and collusively obtained, the sale at which the plaintiffs purchased never became absolute, and even if it be assumed that the property in suit was included in that sale, the plaintiffs have acquired no priority over the defendants. I am clearly of opinion that there was collusion between the plaintiffs and their debtors in the previous suit. The decree passed in that suit was based on a confession of judgment filed by the debtors. In my opinion that confession of judgment was the result of a concert [180] between the parties to that suit, the object of which was to defeat the intermediate purchasers, the defendants. The oral evidence adduced to prove the existence of a concert has been disbelieved by the Court below, and I must say that I see no sufficient reasons for disagreeing with that Court as to its estimate of that evidence. But fraud and collusion are from their very nature not ordinarily capable of being proved by direct evidence. A party imputing fraud to a transaction is no doubt bound to establish it, but he can do so, and is only able to do so in the great majority of cases, by means of circumstantial evidence only.

Now let us see what were the circumstances in this case. The sale of the 20th November 1885 was set aside on the objection of the judgment-debtors on the 5th May 1886. For several months after that date the plaintiffs took no steps to obtain the reversal of the order setting aside the

sale. It was only when they had found that other creditors of the judgment-debtors had caused some of the property of the judgment-debtors to be advertised for sale, and, when the actual date fixed for the sale, namely, the 20th September 1886, had arrived, that they brought their suit to have the order of the 5th May 1886, set aside, and the sale of the 20th November 1885, confirmed. The very fact of their having made this delay in the institution of their suit raises doubts as to the *bona fides* of the suit, and these doubts are strengthened by the fact that a large portion of the property sold on the 20th November 1885, was subsequently purchased by these plaintiffs themselves on the 20th September 1886, benami in the name of one Kishen Lal. The evidence to which the Court below has referred leaves no room for doubt that the purchase by Kishen Lal was in reality a purchase by the plaintiffs. It appears that the plaintiffs made some attempt on the 20th September 1886, to avert a sale, but they failed in that attempt because the Court refused to grant their prayer for the postponement of the sale. After the sale had taken place and the defendants had purchased the property now in dispute, what did the plaintiffs do? Although the Court repeatedly called upon them to declare in distinct terms whether their suit embraced the property purchased by the defendants, namely, Hawkins Kothi, **[181]** and Begam Bagh, they gave no direct answer to the Court's inquiry, and although they were aware that their judgment-debtors had ceased to have any interest in that property, they preferred to continue their suit against their judgment-debtors alone, and did not accept the suggestion of the Court that the auction-purchasers should be added as parties. The next thing we find is that on the 20th November 1886, that is, two days before the date fixed for the hearing of the case, the defendants appeared in Court and filed a petition, confessing judgment. We know that the defendants to that suit, namely, the judgment-debtors, had strenuously contested the validity of the auction sale of the 20th November 1885, and had actually got that sale set aside on the ground of irregularity and inadequacy of price. We find that at the subsequent sale which took place on the 20th September 1886, the property sold yielded a price which was more than double of that realized at the first sale, and yet we find that the judgment-debtors, who evidently benefited by the second sale, which enabled them to discharge a large portion of their debts, appear in Court and do an act which would facilitate the passing of a decree in favour of the plaintiffs. What could be their motive in confessing judgment on the 20th November 1886? It is difficult to conceive that they had any other motive than that of enabling the plaintiffs to obtain a decree and thereby to defeat the interests of the defendants. As I have said, the judgment-debtors had a substantial interest in opposing the plaintiffs' suit and in obtaining an affirmance of the order setting aside the sale of the 20th November 1885; but when, in spite of that interest, they admitted the justness of the plaintiffs' claim, it is difficult to draw any other inference than what I have stated above. As their property had passed into the hands of purchasers, it was not difficult to induce them to join the plaintiffs in colluding with them and perpetrating a fraud on the defendants, the second purchasers. Having regard to these considerations, I think the Court below rightly held that the confession of judgment, which was the only foundation of the decree of this Court of the 14th May 1888, was filed collusively and fraudulently, and that that decree had not the effect of affirming as against the defendants the prior sale of the 20th **[182]** November, 1885. That

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being so, the plaintiffs have not acquired by virtue of that decree any priority as against the defendants, and the plaintiffs' suit has been rightly dismissed.

Appeal dismissed.

22 A. 168 = 20 A.W.N. (1900) 31.

22 A. 182 = 20 A.W.N. (1900) 37.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt. Chief Justice, and Mr. Justice Banerji.

RAGHUBAR DAYAL (*Defendant*) *v.* BANKE LAL AND OTHERS (*Plaintiffs*).* [16th January, 1900].

Execution of decree—Procedure—Act No. XII of 1881 (*N W.P. Rent Act*), *ss.* 170, 171, 172—*Civil Procedure Code, ss.* 41-*A*, 285, 295—*Civil and Revenue Courts*.

Held, that the procedure prescribed by s. 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court.

Hence, where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was *held* that the purchaser at the sale held in execution of the decree of the Court of Revenue, took a good title as against the purchaser at the sale (1), held in execution of the decree of the Civil Court. *Onkar Singh* v. *Bhub Singh* *Aulia Bibi* v. *Abu Jafar* (2) and *Madho Prakash Singh* v. *Murli Manohar* (3) referred to.

[R., 8 Ind. Cas 372 (373) = 13 O.C. 291; 13 O.C. 119 (120).]

THE facts of this case are fully stated in the judgment of the Chief Justice.

The Hon'ble Mr. *Conlan*, Mr. *E. Chamier* and Munshi *Gobind Prasad*, for the appellant.

Messrs. *D. N. Banerji* and *A. E. Ryves*, and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

STRACHEY, C. J.—This appeal is connected with first appeals Nos. 115 and 116 of 1898, and second appeal No. 405 of 1897, in which we have just given judgments. The plaintiffs-respondents here are the persons who were plaintiffs in those cases. They claim by virtue of the same execution-sale of the 20th November, 1885, of mauza Saidpur that we have discussed in our previous judgments. The defendant-appellant purchased certain property included in Saidpur in execution of a Revenue Court's decree obtained by himself against the same judgment-[183] debtors for a share of the profits village Saidpur, under s. 93 (*h*) of the N.-W.P. Rent Act, 1881. His purchase took place on the 3rd November, 1885. It has been suggested during the hearing of this appeal that that purchase was set aside and remained set aside at the date of the plaintiffs' subsequent purchase of the 20th November 1885. No such suggestion appears to have been made in either of the Courts below, where the whole case proceeded on the assumption that the purchase of the

* Second Appeal No. 633 of 1897, from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 27th March, 1897, reversing the decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 27th November, 1896.

(1) 16 A. 496. (2) 21 A. 405. (3) 5 A. 406.

defendant was in force on the 20th November 1885, when the plaintiffs purchased. We must proceed upon that view here. The defendant obtained possession in July 1886. The plaintiffs' purchase of the 20th November 1885 was set aside on the 5th May 1886, but was ultimately confirmed in a suit brought by them for the purpose against their judgment-debtors only, by an appellate decree of this Court in May 1888, under circumstances which are fully stated in our judgments in the first appeals. In the present suit the plaintiffs' claim is for possession of three properties, known respectively as the Sagbari garden, Nauda Bagh, and Safri Bagh. The suit was decreed on appeal by the lower appellate Court, and from that decision the defendant now appeals.

The first question discussed in this appeal was as to the effect of a judgment of the District Judge of Bareilly, passed on the 24th January, 1890. That was a suit brought by the plaintiffs for mesne profits of the village Saidpur. The present defendant-appellant was made a defendant to that suit under s. 32 of the Code of Civil Procedure, inasmuch as he alleged that part of the mesne profits claimed were profits of the property which he had purchased on the 3rd of November 1885, and he contended that inasmuch as he had purchased that property the plaintiffs had no right to any profits arising from it from the date of that sale. It is conceded that the decree of the District Judge decided between the present plaintiffs and the present defendant that the land did not pass to the present defendant under the sale of the 3rd November 1885. If anything passed it was the trees and such rights over the land as were necessary for the defendant's enjoyment of the trees. I think therefore that the lower appellate Court was right in decreeing the present claim so far as the **[184]** land is concerned. That was finally decided between the parties by the decree of the 24th January, 1890. There remains the right of the defendant in respect of the trees. As to this the matter was not, in my opinion, determined by the decree of the 24th January 1890, and remains open. That was a suit for mesne profits arising out of the land, and there was no real issue as to the ownership of the trees. Now, confining the case to the trees, the defendant's purchase was prior in date to that of the plaintiffs. The lower appellate Court has nevertheless held that the plaintiffs' purchase was entitled to priority on two grounds. The first ground is that, having regard to s. 285 of the Code of Civil Procedure, the Revenue Court had no jurisdiction to sell the property on the 3rd November 1885, as it was already under attachment by a Civil Court in execution of Kalka Prasad's decree, under which the plaintiffs ultimately purchased. The second ground is that the defendant's purchase was invalid by reason of s. 171 of the Rent Act, as it was not shown that the judgment-creditor, before applying for execution against the immoveable property, had failed to obtain satisfaction of the decree by execution against the person or moveable property of the debtor.

I propose to consider first the second of these grounds. I think that the decision of the lower appellate Court is wrong. The immoveable property against which execution was applied for was not a mahal or a share of a mahal. S. 172 of the Rent Act therefore governed the execution. That section makes applicable, amongst other provisions, the provisions of s. 170 relating to moveable property, and s. 170 provides that "no irregularity in publishing or conducting a sale of any moveable property under an execution shall vitiate such sale." By reason of s. 172, it follows that the irregularity under s. 171 would not vitiate the sale of this immoveable property. The non-compliance with the provisions

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of s. 171 was not, I think, more than an irregularity. Apart from the objection under s. 285 of the Code, the Revenue Court had undoubted jurisdiction in the matter. As the sale of the 3rd November 1885, was not vitiated by the irregularity, the first ground upon which the lower appellate Court has given priority to the plaintiffs' subsequent purchase in my opinion fails.

[185] The second point is the point relating to s. 285 of the Code. That section provides that "where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached." There has been much discussion on the question whether the word "decrees" in this section would include a decree of a Revenue Court. It was contended on behalf of the defendant that the expression, having regard to the definition of "decree" in s. 2, must be read as limited to a decree of a Civil Court, and reliance was placed on the decision of this Court in *Onkar Singh* v. *Bhap Singh* (1) and *Aulia Bibi* v. *Abu Jafar* (2). Those decisions must be read with the decision of the Full Bench of this Court in *Madho Prakash Singh* v. *Murli Manohar* (3). The two later cases relate, one of them to injunctions under s. 492 of the Code against the sale of property under a Revenue Court decree, the other to the attachment and sale of a Revenue Court decree under s. 273. They had nothing to do with any question of the procedure by which Revenue Courts are governed. The Full Bench decision dealt with that question, and established that the Revenue Courts are bound in their procedure by the provisions of the Code of Civil Procedure in matters as to which the Rent Act is silent. S. 285 is a section prescribing certain procedure in the execution of decrees; and having regard to the observations of the majority in the Full Bench case, I think that s. 285 would govern the procedure of Revenue Courts, at all events to this extent, that if property is attached in execution of decrees of more Revenue Courts than one, the provisions of the section would have to be complied with by those Courts, just as the Civil Courts would be bound if the property were attached in execution of decrees of more Civil Courts than one. But here the property was attached in execution of a decree of a Revenue **[186]** Court, and also of a decree of a Civil Court, and the question is whether the procedure of the section can be applied as between those two Courts as if they were Courts of the same character. When the procedure of s. 285 is followed, and assets realized by sale in execution, then the different decree-holders obtain a rateable distribution of the assets under s. 295, and s. 295 makes it necessary that prior to the realization they should have applied for execution to the Court by which such assets are held. For the purpose of obtaining the benefit of the section, and to enable an application for execution to be made to the Court holding the assets, it is necessary for holders of decrees passed by other Courts to obtain the transfer of those decrees for execution from those Courts to the Court which is to realize the property. Such applications for transfer for that purpose are made under s. 223. Now so far as I know there is no case in which these sections have been

(1) 16 A. 496. (2) 21 A. 405. (3) 5 A. 406.

applied indiscriminately as between Civil Courts and Revenue Courts, that is to say, no case has been pointed out to us in which s. 285 has been applied when property has been attached in execution of a Civil Court decree and also of a Revenue Court decree. Similarly, no case has been pointed out to us in which, for the purposes of s. 285 and s. 295 or otherwise, a Revenue Court decree has been transferred for execution to a Civil Court or *vice versâ*. The principle that, in matters as to which the Rent Act is silent, the Revenue Courts are to be governed by the Code of Civil Procedure must, I think, be applied subject to the broad line of demarcation between the functions of the Civil and Revenue Courts which the Legislature has drawn, and we must not so apply it as to confound the functions of these widely different kinds of Courts, or to make one class of Court encroach upon the province of the other. Now when the provisions of the Code and those of the Rent Act relating to execution of decrees are compared, very great differences are noticeable. It is only necessary to mention a few. Under s. 170 of the Rent Act no irregularity in publishing or conducting a sale under an execution is to vitiate the sale and by s. 172 that applies to immoveable as well as to moveable property. Then there is s. 171, to which I have already referred, and which makes **[187]** it necessary for a judgment-creditor to attempt to obtain satisfaction against the person or moveable property of the judgment-debtor before he can apply for execution against any immoveable property. There are also provisions (see the sections beginning with s. 178) greatly differing from those of the Code as to claims made by third parties to property which has been attached and whose sale is contemplated. Many other differences might be mentioned. Now if s. 285 of the Code is to be applied to cases where property is attached in execution of both Civil and Revenue Court decrees, how are we to deal with differences of this kind? Suppose, first, that it is the Civil Court which has to undertake the execution. It must presumably deal with any objections made to the attachment under the Revenue Court's decree, for that attachment is not affected by the fact that another Court conducts the sale. If, for instance, the judgment-debtor, under the Rent Court's decree, objects to the attachment on the ground that it is in violation of s. 171 of the Rent Act, is the Civil Court to give effect to that objection? If yes, it becomes *pro tanto* a Revenue Court, it has to apply a procedure which the Rent Act shows the Legislature intended should be applicable to Revenue Courts alone. If no, the judgment-debtor loses the right which the Rent Act gives him, and the execution is validated so far as the Revenue Court's decree is concerned, merely because a Civil Court decree also happens to have been passed. On the other hand, suppose that the Court conducting the execution is a Revenue Court. In dealing with objections or claims, is it to ignore the procedure prescribed by Chapter VII of the Rent Act, and to adopt in its place the different procedure of the Code? Considerations of this kind lead me to the conclusion that it was not intended to apply sections like s. 285 of the Code as between a Revenue Court on the one hand, and a Civil Court on the other. If so, then there was nothing that on the 3rd November 1885, prevented the Revenue Court from selling the property, that is to say, the trees, to the defendant-appellant. In that view the title passed to the defendant under that sale, and, so far as regards the trees, the plaintiffs took nothing by their subsequent purchase of the 20th November 1885, even assuming that sale to have been **[188]** validly confirmed by the High Court's decree of May 1888. The suit therefore should have been dismissed as regards the

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trees, and decreed as regards the land of the three properties which I have mentioned. I think that the proper decree to pass now is that the appeal should be dismissed as regards the land, and that it should be allowed as regards the trees, and that the parties should pay and receive costs in proportion to their failure and success.

BANERJI, J.—I concur in the order proposed by the learned Chief Justice. The plaintiffs' suit embraced two claims, first, a claim in regard to the land covered by the trees in the three groves in question; and, secondly, a claim in regard to the trees. As for the land, it is conceded by the learned council for the appellant that the decree of the 24th January 1890, operates as *res judicata*. As regards the trees, I am unable to accept the contention of Mr. Conlan, that the judgment in the suit in which the said decree was passed has the effect of *res judicata* in respect of the trees also. That judgment was passed in a suit for mesne profits arising out of the land only. The question of the ownership of the trees was not a question directly and substantially in issue in that suit. Therefore any opinion which the Court may have expressed in that suit in regard to the title to the trees cannot operate as *res judicata* and the question as to the ownership of the trees was a question which the Courts below were bound to determine in this case. The purchase by the defendant being in point of time prior to the purchase by the plaintiffs, the defendant would have priority of title, unless that title could be defeated on any ground. The lower appellate Court holds that the Court of Revenue was not competent to sell the groves, because there existed on the groves a prior attachment by a Civil Court, and it relies for its conclusion on s. 285 of the Code of Civil Procedure. I agree with the learned Chief Justice in thinking that the Court below has erroneously held that s. 285 precluded the Revenue Court from selling the property in question. Having regard to the ruling of the Full Bench in *Madho Prakash Singh* v. *Murli Manohar* (1) and the provisions of s. 4-A of the Code of Civil Procedure, it is beyond doubt that in regard to matters of procedure as to which the Rent Act [189] does not contain specific provisions the Courts of Revenue are to apply the procedure of the Code of Civil Procedure. This means that as regards cases pending in Courts of Revenue the procedure should, where the Code of Civil Procedure applies, be that prescribed by that Code. But it does not follow that where the procedure of the Code of Civil Procedure applies to Courts of Revenue, those Courts should, for all purposes, be deemed to be on the same footing as ordinary Civil Courts. The Courts of Revenue are Courts of exclusive jurisdiction competent to try suits of a specific class. As regards such suits the jurisdiction of Civil Courts is excluded by the provisions of ss. 93 and 95 of the Rent Act. The Legislature could not certainly have contemplated that while Civil Court should have no jurisdiction to try suits and applications of the descriptions specified in those sections, they should be competent to determine questions relating to execution arising out of such suits and applications. Where, according to the Full Bench ruling of this Court, a Court of Revenue is to apply the provisions of the Code of Civil Procedure, that procedure is applicable to proceedings pending in the Court of Revenue. In this view s. 285 of the Code of Civil Procedure would so far govern proceedings in Courts of Revenue that where the same property is attached by more Courts of Revenue than one, the property is to be realized by the Court indicated by

(1) 5 A. 406.

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that section, namely, where a difference of grade exists between the different Courts of Revenue, by the Court of the highest grade, and where no difference exists between such Courts, by the Court which first attached the property. But I am unable to hold that where the same property has been attached both by a Civil Court and by a Court of Revenue the procedure of s. 285 would apply. That section was enacted to put an end to the difficulties which used to arise under s. 271 of Act VIII of 1859, and the object of the section is, that where several Civil Courts attach the same property, it shall be realized by one Court only, the remedy of the different judgment-creditors who obtained the several attachments being that provided by s. 295. Now in order to enable a decree-holder to obtain a rateable distribution under that section he would have to apply to the Court which is to realize the assets for execution of **[190]** his decree. Certainly the holder of a decree of a Revenue Court cannot apply to a Civil Court for the execution of his decree, and I am unable to hold that by virtue of s. 223 of the Code a decree of a Court of Revenue can be transferred to a Civil Court for execution. Having regard to the policy of the Rent Act, it cannot be conceived that it was ever intended that a decree of a Court of Revenue should be executed by a Civil Court. In my long experience I have never seen any instance of a decree of a Revenue Court having been transferred to a Civil Court for execution, or a decree of a Civil Court transferred to a Court of Revenue. Of course the fact of such transfers never having taken place, does not necessarily lead to the conclusion that the power to make the transfer does not exist; but, as I have said above, I am of opinion that it was never contemplated by the Legislature that a Civil Court should execute a decree of a Court of Revenue. This affords a sufficient answer to the contention that s. 285 applies to a Court of Revenue in the sense that where property has been attached by a Civil Court and by a Court of Revenue, the Court in pursuance of whose order the attachment was first made, should realize the property, whether that Court was a Civil Court or a Court of Revenue. I agree with the learned Chief Justice in holding that the Court below was wrong in its conclusion that by reason of s. 285 the Court of Revenue was not competent to sell the property in question on the 3rd November 1885. The mere fact of a previous attachment existing over the property did not preclude the sale of it in pursuance of another attachment by a Court of a different class. The only other ground on which the learned Judge of the lower appellate Court has held the defendant's purchase to be void is that, under s. 171 of the Rent Act, the defendant was bound to show that he could not get satisfaction of the decree obtained by him by execution against the moveable property of his debtors before he could sell their immoveable property. On this point I am in full accord with the opinion expressed by the learned Chief Justice. In this view the question of collusion and fraud in respect of the decree of this Court, dated the 14th May 1888, does not arise.

Decree modified.

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[191] PRIVY COUNCIL.

PRESENT :

The Lord Chancellor, Lords Hobhouse, Morris, Davey and Robertson and Sir R. Couch.

[*On appeal from the High Court for the North-Western Provinces.*]

ROSHAN SINGH (*Plaintiff*) *v.* BALWANT SINGH (*Defendant*).

[8th and 28th November, 1899.]

Hindu law—Right of illegitimate son to maintenance only.

In the regenerate classes of Hindus, a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate;—a right personal to him and not inherited by his offspring. *Chucturya Run Murdun Syn* v. *Sahub Purhulad Syn* (1) referred to and followed:—

An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent.

The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest or charge within the meaning of s. 91 of the Transfer of Property Act, 1884, to entitle him to redeem.

The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the Mitakshara in Chap. 1, ss. 11 and 12, was more consistent with a personal right of the illegitimate son.

[R., 1 Ind. Cas. 690=12 O.C. 37 (39).]

APPEAL from a decree (2) (18th February 1896) of the High Court reversing a decree (31st March 1894) of the Subordinate Judge of Aligarh.

The plaintiff-appellant, suing in 1893, as a pauper, claimed to be declared entitled to redeem a mortgage of forty-three villages, part of the Husain talukh in the Aligarh district, and comprised within the zemindari formerly possessed by Narain Singh, who made the mortgage on the 30th August 1838, and died in October 1844. The plaintiff's deceased father, Bhoj Singh, was the illegitimate son of Indarjit Singh, who was grandson of Mittar Singh. Narain Singh, who had inherited the ancestral estate, was another grandson of the same.

The mortgagee was Pitamber Singh, who died in November 1845, leaving a minor son. The present successor in title to them was Balwant Singh, now the defendant-respondent.

The mortgagor left no son; his two widows, Mohar Kunwar and Sengar Kunwar, succeeded to the estate. They sued, but failed [192] to get possession of the mortgaged property. In 1868 Bhoj Singh sued a predecessor of the present respondent for the same, but he was found by two Courts in concurrence to be an illegitimate son, and his suit was dismissed. As to this in the present suit the High Court, on the judgment now appealed from, referring to this dismissal, and the reason for it, observed that the question whether this question of his legitimacy or illegitimacy was a cause already adjudged had been held so to be by the Subordinate Judge, and had not been challenged before them.

(1) 7 M.I.A. 18.

(2) 18 A. 253.

The plaint alleged that Sanwant Singh, father of Indarjit, and grandfather of Bhoj Singh, had received a malikana allowance of Rs. 457 paid by the head of the family, and that the plaintiff, son of Bhoj Singh, was the sole surviving heir of Narain Singh; but that if it were found that the plaintiff's father, Bhoj, was of illegitimate birth, still the Husain estate had been liable for his maintenance, and that for this reason "they had acquired a right to redeem the property mortgaged."

The defendant in his written statement pleaded that it had been established in the suit of 1868 that the plaintiff's father was not of legitimate birth, and that the ancestors of the plaintiff had never been allowed to have any villages, or malikana, out of the family estate. Among other issues the following were fixed: whether the plaintiff's predecessors had received, and the plaintiff was entitled to, maintenance from the family estate, and whether the latter was entitled to redeem the mortgage of 1838. These were also the questions which the appellant sought to raise on this appeal. The Subordinate Judge decreed the claim to redeem, and redemption upon payment of Rs. 51,000. His view was that the plaintiff had a right to redeem, notwithstanding the fact that his father was of illegitimate birth. He found that Bhoj Singh, and his father and grandfather before him, had received maintenance out of the family property in the shape of a malikana allowance of Rs. 457 per annum to which the plaintiff as the legitimate son of his illegitimate father was clearly entitled in lieu of his "charge for maintenance" upon the Husain estate; and that he was in consequence a person who had an interest in the right to redeem mortgaged property, and hence was entitled to redeem the mortgage in suit under [193] s. 91 of the Transfer of Property Act (Act No. IV of 1882).

On an appeal heard by a Division Bench (BANERJI and AIKMAN, JJ.) the Judges reversed the above decision. They said in their judgment* :—

"Assuming that the plaintiff is entitled to maintenance from the Husain "estate, that right to obtain maintenance cannot, in the absence of a con- "tract or of a decree of Court making the maintenance a lien on the es- "tate, be regarded as a charge on the estate within the meaning of ss. 91 "and 100 of Act No. IV of 1882, as was held in *Kunwar Sham Singh* v. "*Raja Balwant Singh and others*, F. A., No. 295 of 1893, decided "by this Court on the 11th June 1895. It is urged before us that "although the plaintiff may not have a chargo on the property in "question, he has an interest in it, inasmuch as his father, Bhoj "Singh, was entitled to a malikana allowance in lieu of his mainte- "nance. There is nothing before us to show that if Bhoj Singh was "entitled to maintenance or to a malikana allowance in lieu of main- "tenance, that allowance was one which was not limited to the term of "his life, but was heritable by his son. According to Hindu law, an "illegitimate son of a person belonging to one of the three regenerate "classes is entitled, if docile, to obtain maintenance from his father. No "authority has been shown to us for holding that this is anything but a "personal right. Therefore, even if it be assumed that Bhoj Singh was "granted a malikana allowance in lieu of his maintenance, it would not "follow that that allowance would pass to his son. The Subordinate "Judge was clearly in error in holding that the plaintiff was entitled to "the malikana allowance which Bhoj Singh is said to have enjoyed. "Consequently the plaintiff has no right to redeem the mortgage in "question. This is sufficient to dispose of this suit. The plaintiff having

*Reported in full, 18 A. 253.

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"no right of redemption, his suit should have been dismissed. We allow "the appeal and dismiss the plaintiff's suit, with costs here and in the "Court below."

Sir *W. H. Rattigan*, Q. C. and Mr. *C. W. Arathoon*, for the appellant, argued that the result at which the Subordinate judge's judgment had arrived was correct, and that the reasons given by [194] the High Court for reversing it were insufficient. The appellant was a descendant in a family in which there were two branches; the succession in the senior line of Raja Narain Singh the head of the family, who in 1838 mortgaged part of the ancestral estate, and the other branch to which the plaintiff belonged. The father of the latter was of illegitimate birth. There was evidence that the members of the family in the plaintiff's branch had for three generations received malikana allowance; and the Court of first instance had found this as a fact. It was a just inference, and it was now submitted, that a substantial portion of the ancestral estate had been applied by way of maintenance for the collateral members of the family. The appellant relying on his being entitled to maintenance in succession to his father, claimed to have an interest in, or charge upon, the mortgaged property within the meaning of s. 91 of the Transfer of Property Act, 1882, and in virtue of such interest, to be entitled to redeem the mortgage of 1838. There was not, it was contended, any break in consequence of the illegitimate birth of the plaintiff's father Bhoj Singh; and against the continuance of the right to maintenance that illegitimacy was no bar.

As averred in the plaint, and found by the first Court, Indarjit Singh, father of Bhoj, and grandfather of the plaintiff, in succession to Sanwant, had received the malikana allowance. Referring to the effect of the illegitimacy of Bhoj, according to the Hindu Law, an illegitimate son was not in any sense "quasinullius filius," although he did not share, and had no coparcenary right, in joint family estate. Such a son had a recognized, though lower, status in the family of his father, and he had a right to maintenance out of the family estate. The general principle might be thus stated,—that disqualification to share in the family estate on account of illegitimacy did not involve a disqualification to be maintained out of that estate. There was, it was submitted, no reason why the illegitimacy of Bhoj should involve his incapacity to transmit the right to malikana not withheld in this family from the younger branch. The Hindu law was liberal in the matter of assigning maintenance to those who were regarded as members of the family, and the right might attach to a junior line within certain limits. As an authority to show that offspring [195] not of legitimate birth might be regarded, as belonging to a family, *Pandaiya Telaver* v. *Puli Telaver* (1) was cited: there the judgment gave effect to such propositions. In regard to the consequences of illegitimacy as to disqualifying to inherit reference was made to the Mitakshara, Chapter I, s. XI, paragraphs 30, 31, 33; R. C. Mitra, Tagore Law Lectures 1895, 1896, lecture 11, where the texts were given as to maintenance, and to the judgment at page 369 of I. L. R., 6 Allahabad Series.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the respondent, argued that the judgment of the High Court was right. By the Hindu Law the right of Bhoj Singh to maintenance was a personal right only attaching to him as the illegitimate son of Indarjit; and no right over the family inheritance could have been claimed by him. This applied to the claim

(1) 1 M. H.C.R. 478 (482).

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attempted to be made for his son that the latter had an interest in the family estate. That interest had not been founded upon a malikana agreed to be paid, or made the subject of a decree. Resting only on the right of Bhoj Singh to maintenance, the present claim could not be supported, because an illegitimate son could only claim maintenance from his father's estate and could neither claim it from his collateral relations, nor from the estate of the family to which his father belonged. The right of the illegitimate son attaching to him personally was not transmissible from him to his son by inheritance. Reference was made to the Mitakshara, Chapter I, s. XI, paragraphs 30 and 59; *Chuoturiya Run Murdun Syn* v. *Sahub Purhulad Syn* (1). *Har Gobind Kuari* v. *Dharam Singh* (2) was also referred to show the personal nature of the right to maintenance.

Sir *W. H. Rattigan*, Q. C. replied.

The judgment of the Board was as follows :—

JUDGMENT.

The defendant in the original suit, now respondent, is in possession of the Husain Taluk by virtue of a mortgage effected in the year 1838 by the Talukdar Narain Singh. The plaintiff seeks to redeem the property. The Subordinate Judge decreed redemption on payment of Rs. 51,000 and interest to date of [196] payment. The High Court reversed that decree and dismissed the suit.

The plaintiff is the son of Bhoj Singh who was son of Indarjit and first cousin once removed of Narain, the common ancestor of the two being Mittar Singh the grandfather of Narain and the great-grandfather of Bhoj. The plaintiff first claimed title as a co-sharer in the estate; but he failed in that claim because his father Bhoj was not the legitimate son of Indarjit. The plaintiff still claims to redeem on the ground that he is entitled to maintenance out of the estate; which, as he contends, is a charge or interest carrying with it the right to redeem within the terms of the Transfer of Property Act, 1882. This position he seeks to establish in two ways. First, he alleges a title by contract with the widows and heirs of Narain. Secondly, he contends that Bhoj, though excluded from inheritance, was entitled to maintenance from the estate, and that Bhoj's title has descended to himself.

The contract with the widows is contained in a declaration by them dated 20th August 1850. It appears that Bhoj had sued to recover the whole estate from them, that his suit had been dismissed by the Sudder Ameen, and that he had appealed to the Sudder Dewani Adawlut. The operative part of the declaration is as follows :—

"Now through fear of ruining the ancestral estate he came on the
" right path, and of his own free will and accord came to us and so we are
" also pleased with him. We therefore declare in writing that we shall
" continue to pay Rs. 457 from the malikana dues to the said Kuar with-
" out objection after taking possession of the said villages under the settle-
" ment proceeding, as the same was paid for maintenance to the forefathers
" of the said Kuar by the Rajah, masnad-nashin of this family."

Four days later Bhoj executed a deed of relinquishment in which he withdrew his appeal and stated :—"In fact the appellant has no right
" except to the malikana dues of village Allahdinpur which was formerly
" granted to his grandfather Sanwant Singh by Raja Narain Singh."

(1) 7 M.I.A. 18.
(2) 6 A. 329.

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From those documents the Subordinate Judge deduces the conclusion that the widows of Narain, in whom a widow's estate [197] was then vested, granted, or agreed to continue, a malikana allowance, which was charged on the estate in favour of Bhoj and on his death descended to the plaintiff. But there is no such agreement. What virtue there might be in the word 'malikana,' or in the thing signified, we need not discuss; for the widows do not profess to vest or to recognise any malikana right in Bhoj. There is nothing in the record to show any malikana right in anybody but the widows except the indirect assertion of Bhoj himself that malikana dues over one of the 43 villages for which he was suing had been granted to his grandfather. The malikana dues of the estate belonged to the widows subject to the mortgage by Narain. They were not in possession. All they undertake is that when they get possession they will, out of the malikana dues so recovered, pay Rs. 457 a year to Bhoj, as the same was paid to his forefathers. In point of fact the agreement has been wholly ineffectual, because the widows, who have now been dead for many years, never got possession at all. But if they had, they only agreed to make a money payment to Bhoj personally, and they did nothing to create a heritable interest in him or any charge on the inheritance.

The more general question of law raised by the plaintiff relates to the position of the offspring of an illegitimate son. The family belongs to one of the twice-born classes. Among them an illegitimate son takes no part of the inheritance; but he is entitled to maintenance from the estate of his father. This law is found in ss. 11 and 12 of Chap. I of the Mitakshara. In para. 3 of s. 12 it is thus stated:—"It follows that the son begotten by "a man of a regenerate tribe on a female slave does not obtain a share . . . "but if he be docile he receives a simple maintenance." There is no reason to think that this effect of illegitimacy differed according to the particular mode of it; and the more general statement applying to illegitimacy generally which their Lordships have just made is embodied in the judgment of this Board in *Chuoturya Run Murdun Syn* v. *Sahib Purhulad Syn* (1).

The Subordinate Judge, whose opinion has been supported at this Bar in an able argument by Sir Wm. Rattigan, reasons thus. [198] He states the rule that illegitimate sons of a Hindu are entitled to maintenance out of their father's estate. He then continues:—"Bhoj Singh "was entitled to maintenance out of the estate held by Narain Singh, "not because of his relationship with Narain Singh but because he "was a son of Indarjit Singh, who in his turn had a share in the estate. "I have therefore no doubt that as the estate was joint family property "of the descendants of Mittar Singh, among whom Bhoj Singh, was one, "the latter as such member, though of illegitimate descent, was entitled "to be maintained out of the estate."

It seems to their Lordships that this reasoning leaves the difficulty of the plaintiff's case wholly untouched. Conceding that Bhoj could claim maintenance as against Narain, the question is whether he could transmit that claim to his son. Indarjit, we are told, had a share in the family estate. Bhoj then had a right to maintenance out of Indarjit's estate including that share. But Bhoj had no share in the family estate out of which the plaintiff could be maintained; therefore the plaintiff's right to be maintained out of his father's estate does not place him in the same

(1) 7 M.I.A. 18 (50, 53).

relation to the family estate as Bhoj derived from his right in respect of Indarjit's estate.

On this point the High Court, speaking of Bhoj's right, say :—"No authority has been shown to us for holding that this is anything but a personal right." Neither has any been shown to their Lordships. Sir Wm. Rattigan cited a case from Madras High Court Reports Vol. I, p. 478, *Pandaiya Telaver and another* v. *Puli Telaver and others*, which, he contended, was a direct authority in his favour. But the question there was whether an illegitimate daughter entitled to maintenance out of her father's estate was so far a member of his family as to make a marriage with her a lawful marriage; and the Court held that she was. Whether right or wrong, that decision has no bearing on the question whether a right to be maintained, vested in one who cannot inherit, is itself a heritable right. The plaintiff's proposition does not appear to follow from the expression in the Mitakshara which says that the illegitimate son "if he be docile," receives a "simple maintenance." On the contrary that passage is more consistent with a purely personal right; and **[199]** there is no authority either of texts or of decisions to contravene the obvious meaning.

The plaintiff would also, before he could succeed, have to show that a claim for maintenance, not founded on contract or decree, is an interest in or charge upon the property within the meaning of the Transfer of Property Act. The High Court think it is not. The point has been much discussed at the Bar, but no authority has been produced either way. As the principle on which their Lordships have expressed their concurrence with the High Court goes to the root of the plaintiff's title to maintain this suit, it is not necessary for them to decide the second point. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors for the appellant :—Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent :—Messrs. *Pyke and Parrot.*

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Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

ZAMIR HASAN AND ANOTHER (*Decree-holders*) *v.* SUNDAR AND ANOTHER (*Judgment-debtors.*)* [19th December, 1899.]

Execution of decree—Limitation—Act No. XV *of* 1877 *(Indian Limitation Act), ss.* 7 *and* 8—*Minority.*

S. 8 of the Indian Limitation Act, 1877, applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. *Seshan* v. *Rajagopala* (1) and *Govindram* v. *Tatia* (2), followed; *Hargobind* v. *Srikishen* (3) overruled.

A decree was passed in 1881 in favour of two decree holders. Subsequently one of the decree-holders died, and the names of his widow and his two minor sons and one minor daughter were entered as his representatives. In 1888 an application was made for execution by the widow on behalf of the minor sons, which was dismissed. In February 1894 the two sons of the deceased decree-holder

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* Second Appeal No. 312 of 1897 from an order of C. Rustomjee, Esq., District Judge of Moradabad, dated the 30th January 1897 reversing the order of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 28th July 1894.

(1) 13 M. 236. (2) 20 B. 383. (3) 4 A.W.N. (1884) 58.

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being still minors made another application for execution through one Aijaz Husain. *Held* that s. 7 of the Limitation Act applied, and that this application was not time-barred. *Lalit Mohun Misser* v. *Janoky Nath Ray* (1) and *Norendra Nath Pahari* v. *Bhupendro Narain Roy* (2) followed.

[Diss., 25 M. 26; 25 M. 431 (F.B.) = 12 M.L.J. 166; F., 27 A. 67 = 1 A.L.J. 407 = A.W.N. (1904) 163; 29 A. 279; 4 A.L.J. 145 = A.W.N (1907) 45; 28 C. 465 (469, 471) = 5 C.W.N 767; 7 C.L J. 308 (309); R., 34 B. 672 (675) = 12 Bom L.R. 682 (685) = 7 Ind. Cas. 939; 15 Ind. Cas 664; 1 N.L.R. 180 (181); 9 O.C. 269; 3 O. C. 316 (320)]

[200] THIS was an appeal from an order passed in execution of a decree. The original decree was passed on the 12th December, 1881. There were two decree-holders, Musammat Khatun, Daulat and Amir Hasan. The latter died, and his widow Musammat Rukkaya and his two sons and one daughter, all three minors, had their names entered in lieu of Amir Hasan's. An application for execution was filed by Musammat Rukkaya on behalf of the minors on the 31st August, 1888, but that application was dismissed on the 25th September, 1888. The next application for execution was filed on the 19th of February, 1894, by one Aijaz Husain on behalf of the two sons of Amir Hasan who at that time were still minors. The judgment-debtors objected, but the Court of first instance (Subordinate Judge of Moradabad) disallowed their objections. On appeal to the District Judge that Court allowed the judgment-debtor's objections, holding that execution of the decree was barred by limitation. The applicants appealed to the High Court. The appeal was laid before a Full Bench in pursuance of a recommendation made by Blair and Burkitt, JJ., in view of the existence of various conflicting rulings on the point in issue, by their order of the 14th November 1899.

Pandit *Baldeo Ram Dave* (with Pandit *Sundar Lal*), for the appellant.

The decree is a joint one in favor of both the decree-holders. An application, if made by one of them or his representatives, will take effect in favor of both the decree-holder, [Article 179 of Act No. XV of 1877, Explanation II]. Applications for execution of the decree were, from time to time, made within the period of limitation prescribed by law by one of the decree-holders or by the legal representatives of the other decree-holder, who were of age at the time. The last of such applications was made by them on the 9th November, 1888. This application kept the decree alive up to that date in favor of all the decree-holders. For this proposition, I rely upon *Shib Chander Das* v. *Ram Chunder Poddar* (3); *Doya Moyee Dabee* v. *Nilmoney Chuckerbutty* (4); *Pounampilath* v. *Pounampilath* (5); *Nanda Rai* v. *Raghunandan Singh* (6) and *Wasi Imam* v. *Poonit Singh* (7).

[201] Although the present application for execution of the decree was made over five years after the 9th November 1888, but as the appellants were minors at the time from which the period of limitation was to be reckoned, that is on the 9th November 1888, and are still minors, they can avail themselves of the provisions of s. 7 of the Indian Limitation Act, 1877. There can be no doubt, that the appellants are persons "entitled to make an application" for execution of this decree within the meaning of that section [see s. 231 of the Code of Civil Procedure, 1882]. Article 179 of the second schedule to the Indian Limitation Act provides several points of time from which the period of three years shall begin to run. I contend that for purposes of the Limitation Act 1877, the period which begins from each point is a separate period, and if a person entitled

(1) 20 C. 714 (2) 23 C. 374. (3) 16 W.R. 29. (4) 25 W.R. 70.
(5) 3 M. 79. (6) 7 A. 282. (7) 20 C. 696.

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is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by virtue of s. 7 of the Act. In support of my contention I rely upon *Har Gobind* v. *Srikissen* (1); *Lachman Prasad* v. *Bhagwan Singh* (2); *Lolit Mohun Misser* v. *Janoky Nath Roy* (3) and *Norendra Nath Pahari* v. *Bhupendro Narain Roy* (4).

The judgment of this Court in *Har Gobind* v. *Srikissen* (1) was reconsidered upon review, and relying upon s. 8 of the Indian Limitation Act, 1877, it was set aside by this Court. But s. 8 of the Limitation Act applies to cases prior to the institution of a suit. The words in the section are "joint creditors or claimants." It does not apply to "decree-holders." Further, that section is applicable to cases where payment to one of the joint creditors or claimants *per se* discharges the debtor. In case of payment to one of the joint decree-holders, it is not the act of the joint decree-holder, but the act of the Court executing the decree, that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge **[202]** [see ss. 231, 257 and 258 of the Code of Civil Procedure, 1882.] This was the view of the law taken by the Bombay High Court in *Govind Ram* v. *Tatia* (5) and by the Madras High Court in *Sheshan* v. *Raja Gopala* (6).

Munshi *Gokul Prasad* (with whom Pandit *Tej Bahadur Sapru*) for the respondents.

If the other decree-holders could take out execution and give a valid discharge, then the decree is certainly barred against the present appellants, *vide* s. 8 of Act XV of 1877, which provides only for cases where *all* the decree-holders rest under disability, which is not the case here. The decree in this case having been passed jointly in favour of more persons than one, any one could take out execution and give a valid discharge. The decree was based apparently upon a contract, and a contract can be discharged by any one of the joint promisees without the consent of the others. *Har Gobind* v. *Srikissen* (1), *Ramautar* v. *Ajudhia Singh* (7), *The Collector of Shahjahanpur* v. *Surjan Singh* (8), *Surju Prasad Singh* v. *Khwahish Ali* (9), *Banarsi Das* v. *Maharani Kuar* (10), and Act No. XV of 1877, sch. II, art. 179, Expl. (1). But the Madras case goes still further. It lays down that to a case like the present neither s. 7 nor s. 8 would apply. S. 8 of Act XV of 1877 would not apply, inasmuch as it does not contemplate the case of execution-creditors at all, and secondly because in view of s. 258, Act XIV of 1882, it is the act of the Court that is intended to operate as a valid discharge. S. 7 does not apply, inasmuch as what is necessary under that section is that either there ought to be one single decree-holder who is a minor, or there ought to be more who are all of them minors, for, otherwise a decree may be barred against the major decree-holders and yet under s. 231, Civil Procedure Code, a minor decree-holder may seek execution of the entire decree, thus indirectly benefiting the other decree-holders against whom the decree may have become barred. *Seshan* v. *Rajagopala* (6). See also

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(1) 3 A.W.N. (1883) 63 = 4 A.W.N. (1884) 58.
(2) 6 A.W.N. (1886) 49.
(3) 20 C. 714.
(4) R. 23 C. 374.
(5) 20 B. 383.
(6) 13 M. 236.
(7) 1 A. 231.
(8) 4 A. 72.
(9) 4 A. 512.
(10) 5 A. 27.

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Mitra on Limitation and *Vigneswara* [203] v. *Bapayya* (1) So in this case s. 8 does not apply any more than s. 7. The case of *Govindram* v. *Tatia* (2), decides that s. 8 of Act XV of 1877 does not apply to execution-creditors, but it differs from the Madras case in so far as it holds that s. 7 does apply where one of several decree-holders is a minor. As to *Norendra Nath Pahari* v. *Bhupendra Narain Roy* (3), *Lolit Mohun Misser* v. *Janoky Nath Roy* (4) and *Mon Mohun Buksee* v. *Gunga Soondery Dabee* (5) it is submitted that these were cases in which there was only one decree-holder and he was a minor, so that these cases are quite distinguishable from the present.

JUDGMENT.

STRACHEY, C. J.—The lower appellate Court has reversed the decision of the Court of first instance and held the application of these minors barred by limitation on the authority of *Hargobind* v. *Srikishen* (6). That decision applied the provisions of s. 8 of the Limitation Act to a case of joint decree-holders. The application of s. 8 to such a case has since been more fully considered by the Madras High Court in *Seshan* v. *Rajagopala* (7), and by the Bombay High Court in *Gobindram* v. *Tatia* (2). These Courts have held that s. 8 of the Limitation Act applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. The Madras High Court in the earlier case pointed out that the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. They added:—"Having regard to ss. 258 and 231, we are of opinion that it is not the act of the joint decree-holders, but the act of the Court executing the decree, that is intended to operate as a valid discharge." I agree with the views expressed in the Madras and Bombay cases, and I think that the decision in *Hargobind* v. *Srikishen* is based on a wrong view of s. 8 and ought to be overruled.

The other questions which have been discussed on this appeal relate to the construction to be placed on s. 7 of the Limitation Act. The applicants for execution in this case are still [204] minors. In 1888 an application was made for execution by their mother, the widow of one of the decree-holders. That application was within time under art. 179 of sch. ii of the Act. By reason of the 1st explanation to art. 179, that application being made by a representative of one of the joint decree-holders, took effect in favour of all. Under the fourth head of the third column of art. 179, that application became a fresh point for reckoning the period of limitation. At the time when that application was made these present applicants were minors. Their application now in question was not made till February 1894. The question is, whether they are entitled to the benefit of s. 7. There are still other persons jointly interested with them in the decree who are adults and who could not apply on their own behalf by reason of limitation. It has been contended on the authority of *Seshan* v. *Rajagopala* that s. 7 would not apply where some only, and not all, of the judgment-creditors are affected by a legal disability. On this point I agree with the Bombay High Court in *Gobindram* v. *Tatia* that no such restriction can properly be placed on s. 7. Apart from that I think that the present application is protected by the terms of the section. Two cases decided by the Calcutta High Court and precisely in point have

(1) 16 M. 436. (2) 20 B. 383. (3) 23 C. 374. (4) 20 C. 714.
(5) 9 C. 181. (6) 4 A.W.N. (1884) 58. (7) 13 M. 236.

been cited to us. The first of these is *Lolit Mohun Misser* v. *Janoky Nath Roy* (1); and the second is *Norendra Nath Pahari* v. *Bhupendra Narain Roy* (2); I see no reason to dissent from those decisions. The result is that this appeal must be allowed and the decision of the first Court be restored, and the execution will proceed. The appellant will have his costs, including fees on the higher scale.

BLAIR, J.—I entirely concur in the order proposed and for the reasons given by the learned Chief Justice.

BURKIT, J.—I am of the same opinion, and for the same reasons.

Appeal decreed.

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22 A. 205 (F B.)=20 A.W.N. (1900) 10

[205] FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

MURLIDHAR AND OTHERS (*Defendants*) *v.* PEM RAJ AND OTHERS (*Plaintiffs*).* [20th December, 1899.]

Act XII of 1881 (*N. W. P. Rent Act*), *s.* 7—*Ex-proprietary tenant—Ex-proprietary rights arising on sale of part only of vendor's proprietary rights.*

Held that in order that the provisions of s. 7 of the North-Western Provinces Rent Act, 1881, may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. *Bhawani Prasad* v. *Ghulam Muhammad* (3) approved.

Held also that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sir land, and agrees to relinquish his ex-proprietary rights in respect of the sir land, the vendee, in the event of such possession not being delivered or ex-proprietary rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. *Bhikham Singh* v. *Har Prasad* (4) approved.

[F., 32 A. 383 (387)= 7 A.L J. 330=5 Ind. Cas. 557; 16 Ind. Cas. 42; R., 33 A. 695 (700)=8 A.L.J. 826=11 Ind. Cas. 17; 10 O.C. 243; 109 P.L.R. 1909.]

THE facts of this case are as follows:—Murlidhar and others, being owners of a ten biswa share in the zamindari of a village called Gumanpur, sold to Pem Raj and others, on the 22nd September 1893, four biswas out of the said share. By the same transaction the vendors also purported to convey to the vendees 58 bighas 13 biswas of sir land. The sir land thus dealt with by the conveyance was a portion of 226 bighas 14 biswas of sir land appertaining to the whole village, and was slightly in excess of what would have been the sir of the vendors proportionate to the four biswa share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and that the vendors should relinquish such ex-proprietary rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,000, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and for the agreement to relinquish the ex-proprietary rights. The sale-deed further provided that in the event of the vendees failing to deliver possession of the sir land to the purchasers, or of their not relinquishing their ex-proprietary rights, the vendees would be entitled to a refund of

* Second Appeal No. 885 of 1896 from a decree of Rai Pyare Lal, District Judge of Mainpuri, dated the 5th August 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 15th June 1895.

(1) 20 C. 714. (2) 23 C. 374. (3) 18 A. 121. (4) 19 A. 35.

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[206] the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the present suit was brought for recovery of possession, and in the alternative for a refund of Rs. 1,500 with interest. The Court of first instance (Subordinate Judge of Mainpuri) made a decree in favour of the plaintiffs for the refund of the amount stated above. On appeal the lower appellate Court (Officiating District Judge of Mainpuri) affirmed the decree of the first Court. The defendants appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

The object of that part of the contract between the parties which related to the sir land was to compel the defendants not to exercise the right conferred on them by s. 7 of Act No. XII of 1881, and thus to defeat the object with which the provisions of that section were enacted. The contract is therefore void under s. 23 of Act No. IX of 1872, and is not enforceable at law—Leake on Contracts, page 677, *Kashi Prasad* v. *Kedar Nath Sahu* (1), *Bhikham Singh* v. *Har Prasad* (2) and the judgment of this Court in an unreported case (Second Appeal No. 890 of 1896, decided on the 5th May 1899).

The losing or parting with the proprietary rights of a person in a mahal so as to create ex-proprietary rights need not be a loss of or parting with his entire rights in the mahal. If it were not so, a man might sell all his rights in a mahal save and expect one square inch of land therein. This would then prevent the acquisition of the rights of an ex-proprietary tenancy, which s. 7 of Act No. XII of 1881 intended to confer, and the retention of which in the hands of the ex-proprietor is so carefully provided for in s. 9 of the Act—*Gulab Rai* v. *Indar Singh* (3). The object of these sections is to make some provision for improvident proprietors who are compelled by circumstances to sell or part with their lands. A proprietor may sell any part of his rights in a mahal or in the sir lands in the mahal—*Sital Prasad* v. *Amtul Bibi* (4), *Payag Singh* v. *Nurul Hasan Khan* (5), [207] *Ghansham Das* v. *Sheomangal Singh* (6). In such a case ex-proprietary rights accrue to the vendor—*Bhawani Prasad* v. *Ghulam Muhammad* (7). The Board of Revenue in these Provinces was at first inclined to take this view—*Shaikh Seraj-ud-din* v. *Mohsin Ali* (8)—It has, however now expressed a different view—*Khushali* v. *Bhika* (9). The adoption of this interpretation would altogether defeat the object with which s. 7 of Act No. XII of 1881 was enacted, and would be inconsistent with the policy which underlies the enactment of s. 174-A of this Act or ss. 50, 125, and 190 of Act No. XIX of 1873. A construction which defeats the object of the law should not be adopted. In the present case the contract being void, the suit is not maintainable.

Munshi *Kalindi Prasad* (with Munshi *Gokal Prasad*), for the respondents.

The interpretation put upon s. 7 of the Rent Act No. XII of 1881, in *Bhawani Prasad* v. *Ghulam Muhammad* (7), deserves reconsideration. A person must part with all his proprietary rights in a mahal before he can acquire ex-proprietary rights in the land held by him as sir. I rely upon the wording of the section itself. The word 'his' in the first paragraph of the section is very expressive. In the absence of any limitation

(1) 20 A. 219. (2) 19 A. 35. (3) 6 A. 54.
(4) 7 A. 633. (5) 10 A. W. N. (1890) 5. (6) 11 A.W.N. (1891) 150.
(7) 18 A. 121. (8) (1879) 1. L. R. R. and R. 111.
(9) (1888) Sel. Dec. B. of R. p. 8.

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the words 'his proprietary rights' ought to be construed in their largest sense—*Jarao Bai* v. *Kifayat Ali Khan* (1). Inthat case it was observed that "s. 7 of Act No. XII of 1881 must refer to a case where the zamindar loses or parts with *all* his propriètary rights." Further on in the same case it was observed that "the words 'his proprietary rights' as used in s. 7 must refer to the losing or parting with all his proprietary rights." S. 7 of the Rent Act is intended to provide a protection against absolute ruin for a zamindar who has lost all that he had and has nothing left to subsist on. But if the view taken in *Bhawani Prasad* v. *Ghulam Muhammad* (2) be correct, it might happen that a person while retaining the greatest part of his property for himself might part with the [208] minutest fraction of it with this result, that he would acquire exproprietary rights in the proportionate share of his sir land. Is he indigent enough to entitle him to the grace allowed by law? What would be the value of such grace? I submit that the interpretation put upon s. 7 by the Board of Revenue in *Khushali* v. *Bhika* (3) is correct and based upon sound reasonin.

JUDGMENT.

BANERJI, J.—The appellants, who were defendants in the Court of first instance, held a ten-bis was share in the zamindari of the village Gumanpur. They sold four biswas out of the said 10 biswas to the plaintiffs on the 22nd September 1893. By that sale-deed the defendants purported to convey to the plaintiffs not only a 4-biswas share of the zamindari, but also 58 bighas 13 biswas of sir land. This quantity of sir land is a portion of 226 bighas 14 biswas of sir land apertaining to the whole village, and is slightly in excess of what would be the sir of the defendants proportionately to the 4-biswas share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and the vendors should relinquish such exproprietary rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,000, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and the agreement to relinquish exproprietary rights. The sale-deed further provided that in the event of the vendors failng to deliver possession of the sir land to the purchasers, or of their not relinquishing their exproprietary rights, the vendees would be entitled to a refund of the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the present suit was brought for recovery of possession, and, in the alternative, for a refund of Rs. 1,500 with interest. The Court of first instance made a decree in favour of the plaintiffs for the refund of the amount stated above. That decision has been affirmed by the lower appellate Court. The defendants have preferred this appeal on the ground that the agreement upon which the plaintiffs have based their claim is contrary to law and is therefore void. It was held in *Bhikham Singh* v. *Har Prasad* (4) that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory [209] possession of the sir land and agrees to relinquish his exproprietary rights in respect of the sir land, the vendee, in the event of such possession not being delivered or exproprietary rights not

(1) 13 A.W.N. (1893) 177.
(2) 18 A. 121.
(3) (1888) Sel. Dec. B. of R. 8.
(4) 19 A. 35.

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being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. To this view I still adhere. The only other question which has to be considered in this case, therefore, is whether, by selling a part of their proprietary rights in the village in question, the defendants could acquire exproprietary rights in respect of their sir land under s. 7 of Act No. XII of 1881. The decision of that question depends upon the construction to be placed on the provisions of s. 7. Does that section contemplate that exproprietary rights would accrue in favour of a person losing or parting with his proprietary rights only when he loses or parts with all his proprietary rights or that he would acquire such rights even when he parts with or loses a portion of his proprietary rights? This question was answered by a Division Bench of this Court in the case of *Bhawani Prasad* v. *Ghulam Muhammad* (1). In that case it was held that in order that the provisions of s. 7 may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. With that decision I am fully in accord. The language of s. 7 is no doubt not so clear as it should have been; but having regard to the policy of that section any construction other than that placed on it in the ruling referred to above would evidently defeat the object of the section and enable a proprietor to divest himself of his sir lands by excluding from sale an infinitesimal portion of his proprietary rights. The reasons for holding that the section does not contemplate the transfer or loss of all proprietary rights are fully stated in that judgment, and I have nothing to add to those reasons. There is, it is true, a ruling of the Board of Revenue, reported in the Selected Decisions of the Board of Revenue for 1888-1891, at page 8, in which a contrary view was held, but I am unable to follow the conclusions arrived at in that ruling. According to well-known rules of construction it is our duty to place on the section such a construction as would effectuate the intention of the Legislature, **[210]** provided that the language of the section can admit of the construction. I hold that the language of s. 7 is sufficiently wide to justify us in construing it in the manner in which it was construed in *Bhawani Prasad* v. *Ghulam Muhammad* (1). If the words "proprietary rights" in s. 7 may, as I hold they do, include a part of the proprietary rights, the subsequent words "land held by him as sir" can be equally held to include a proportionate part of the sir land. In this view as the agreement upon which the plaintiffs have based their claim would have the effect of defeating the law as I understand it, it is a void agreement and cannot be given effect to. The plaintiffs' suit should therefore have been dismissed. I would allow the appeal, set aside the decrees of the Courts below and dismiss the suit; but having regard to the conduct of the defendants and to the fact that the plea which has been taken in this Court was never raised in the Court below, I would make no order as to the costs of the litigation.

KNOX, J.—I follow my learned brother, but with extreme hesitation. If the question was *res integra* and if the precedent, *Bhawani Prasad* v. *Ghulam Muhammad* (1), did not stand as a reported decision of this Court, I should have been very much inclined to hold otherwise. The interpretation now placed seems to me to put such a strain upon the words of the section as they stand that I doubt whether they can bear it. We have had abundant evidence that the language of this particular Act is in many

(1) 18 A. 121.

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cases, to say the least of it, very inartistic, and it may be that the interpretation which we now put is one within the spirit and policy aimed at by the Legislature when they enacted this section.

AIKMAN, J.—The decision of this appeal turns upon the construction of the opening words of s. 7 of Act No. XII of 1881. These words are as follows:—"Every person who may hereafter lose or part with his proprietray rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting" at a rate of rent such as is specified in the section. The Board of Revenue for these provinces held that the right thus created did not arise until the person claiming it lost or parted with the whole of his proprietary rights [211] in the mahal. In the case of *Bhawani Prasad* v. *Ghulam Muhammad* (1) a Division Bench of this Court pointed out that if this was the meaning to be attributed to the words of the section, the object of the Legislature would be easily defeated. This is undoubtedly true. I think it is possible to construe the words "his proprietary rights" as meaning the whole or part of his proprietary rights; but there remains the passage in the section "shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting." The learned Judges who decided the case just referred to do not consider what meaning would have to be put on those words if an exproprietary right arises when a zamindar parts with a portion only of his proprietary rights. I scarcely think that the learned Judges would have held that if a zamindar parted with a mere portion of his proprietary rights he would thereby at once become an exproprietary tenant of the whole of the sir land which he had held in the mahal, and yet that is the apparent meaning of the words used by the Legislature. To carry out the view of the Division Bench to its logical conclusion, we should have to read the section as if it ran "shall have a right of occupancy in such portion of the land held by him as sir in such mahal as is proportionate to the proprietary interests he has lost or parted with." This seems to me to trench dangerously on legislation. But in view of the consideration that the construction put upon the section by the Board of Revenue would result—to use the words of the learned Judges who decided the case of *Bhawani Prasad* v. *Ghulam Muhammad* (1) in opening a door through which it would be possible for evasions of the law to become general in these provinces, I do not wish to depart from the principle *stare decisis*, and I concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the judgment and decree of the lower appellate Court are set aside, and the suit of the plaintiffs is dismissed, but without costs.

Appeal decreed.

(1) 18 A. 121.

1900

JAN. 4.

APPELLATE CIVIL.

22 A. 212 = 20 A.W.N. (1900) 27.

22 A. 212=20 A.W.N. (1900) 27.

[212] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

MEHRBANO (*Defendant*) *v.* NADIR ALI AND ANOTHER (*Plaintiffs*).*

[4th January, 1900.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 85—*Mortgage—Prior and subsequent mortgagees—Effect of non-compliance with s.* 85.

A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. *Held* that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janki Prasad* v. *Kishen Dat* (1), followed.

[D., 23 A. 25.]

THE facts of this case are as follows:—

Dilawar Ali owned $6\frac{3}{4}$ biswas of the village in suit. This share he hypothecated to Banwari Das by means of four deeds executed on different dates in the years 1874, 1875 and 1876. After the execution of at least two of these deeds Dilawar Ali mortgaged the same property to Narain Das. Banwari Das sued on his deeds before Act No. IV of 1882 came into force, and obtained a decree. He did not make Narain Das, the subsequent incumbrancer, a party to that suit. Narain Das sued in 1886, and obtained a decree. He did not make Banwari Das a party to his suit. Banwari Das, in execution of his decree, brought the mortgaged property to sale and purchased it himself. Narain Das sold his decree, but when the purchaser attempted to execute it by sale of the property, objection was taken by the representatives of Banwari Das, the first mortgagee.

The suit, out of which the present appeal arose, was brought by the representatives of Banwari Das for a declaration that the decree held by the defendant as purchaser from Narain Das could not be executed as against them. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit. On appeal the lower appellate Court (Additional Judge of Moradabad) reversed the decree of the Subordinate Judge and gave the **[213]** plaintiffs the declaration which they sought. The defendant thereupon appealed to the High Court.

Mr. *S. Amiruddin*, for the appellant.

The Hon'ble Mr. *Conlan* and Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BLAIR and BURKITT, JJ.—In this case the contending parties are practically the first and second mortgagees or their representatives. The first mortgagee, who is represented by the plaintiffs-respondents, sued upon his mortgages, obtained decrees for sale, and in execution purchased the mortgaged property. To his suit he did not make the puisne mortgagee a party, as he was bound to do under the provisions of s. 85 of the Transfer of Property Act. The puisne mortgagee, who is represented

* Second Appeal No. 605 of 1897, from a decree of H.W. Lyle, Esq., Additional District Judge of Moradabad, dated the 25th May 1897, reversing a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 2nd September 1896.

(1) 16 A. 478.

by the defendant-appellant, in his turn instituted a suit upon his mortgage: he did not make the latter a party to his suit. The puisne mortgagee obtained a decree for sale, and has now put up and advertised the mortgaged property for sale. Thereupon the plaintiffs, the representatives of the prior incumbrancer, have instituted this suit, in which they ask for a declaration that that property is not liable to be sold in execution of the decree held by the defendant puisne mortgagee. A decree has been given by the lower appellate Court in terms of the prayer for relief. The meaning of the decree under appeal we take to be that the defendant the puisne mortgagee cannot bring to sale the mortgaged property in execution of a decree in a suit to which the prior mortgagee was no party. If that is the meaning of the decree it is, in our opinion, a perfectly right decree. For our authority we refer to the case of *Janki Prasad* v. *Kishen Dat* (1). Broadly stated, the effect of the ruling in that case is that a mortgagee, who has obtained a decree for sale in a suit to which he did not make other mortgagees parties, cannot bring the mortgaged property to sale in execution of that decree. It is immaterial that in the case we have just cited the parties who were prevented from bringing the mortgaged property to sale were the first mortgagees, and that in this case the party sought to be prevented from bringing the mortgaged property to sale is the representative of the second mortgagee. Indeed, the case would [214] be, if anything, stronger against the second mortgagee than against the first mortgagee. In our opinion the defendant-appellant here is not entitled to bring this property to sale in execution of the decree for sale which she holds. It may be that in a properly constituted suit with a proper array of parties and in a suit in which she offers to redeem the prior mortgages the appellant may be entitled to bring the property to sale after such redemption. As to that matter, however, it is unnecessary for us to express any opinion. We think that the decree of the Court below as interpreted above is a correct decree. We dismiss this appeal with costs.

Appeal dismissed.

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22 A. 214 = 20 A.W.N. (1900) 22.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

BARKAT-UN-NISSA (*Applicant*) *v.* ABDUL AZIZ (*Opposite Party*).*
[10th January, 1900].

Civil Procedure Code*, s. 505—*Criminal Procedure Code*, s. 145—*Order of Magistrate for maintenance of possession no bar to the appointment of a receiver by a Civil Court.

The fact that there exists in respect of any immoveable property an order of a Magistrate passed under s. 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by s. 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property.

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr. *Conlan*, Mr. *W. K. Porter* and Maulvi *Ghulam Mujtaba*, for the appellant.

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* First Appeal No. 77 of 1899 from an order of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 29th July 1899.

(1) 16 A. 478 (482, 483).

1900
JAN. 10.

APPELLATE CIVIL.

22 A. 214 = 20 A.W.N. (1900) 22.

Mr. *S. Amir-ud-din*, for the respondent.

ORDER.

KNOX and BLAIR, JJ.—This is an appeal from an order passed by the Subordinate Judge of Moradabad on the 29th July 1899, refusing to appoint a receiver to certain property, the subject of a suit before him. The ground on which the learned Subordinate Judge bases his refusal is that in suits like this one before him, there is no rule for the appointment of a receiver, and injunctions only are deemed sufficient. He adds that there is no reasonable cause for the appointment of a receiver. Now as to the circumstances of the case. The respondent Maulvi Abdul Aziz is a **[215]** person who in a prior suit had claimed a declaration from this Court that one Nurul Haq, munsarim of certain waqf property—the property now in suit—had been dismissed from his office of munsarim, that he, Maulvi Abdul Aziz, had been appointed as manager in Nurul Haq's place, and that being so, the mutawalli, Musammat Barkat-un-nissa, had no right to remove him, the said Abdul Aziz, from the managership. The suit brought by Maulvi Abdul Aziz against Musammat Barkat-un-nissa and others was fought up to this Court with the result that the declaration that Maulvi Abdul Aziz asked for was refused and his suit dismissed. This order was passed on the 10th May 1889. Upon this the appellant before us instituted a suit for the ejectment of Maulvi Abdul Aziz, and after institution applied to the Subordinate Judge for the appointment of a receiver under s. 503 of the Code of Civil Procedure. The order refusing the appointment practically gives no reasons for the refusal, and it is not therefore easy to say with authority what it is that weighed upon the Subordinate Judge's mind. The matter has, in another form, been already before this Court, as the appellant asked for an appointment of an *ad interim* receiver pending the hearing of the present appeal. It was then held that the powers of a Civil Court trying an action for ejectment were not in any degree controlled by reason of a Magistrate making an order maintaining possession on behalf of one of the litigants under s. 145 of the Code of Criminal Procedure. The reference here made is to an order passed by a Magistrate in 1896, whereby the Magistrate, acting under the provisions of s. 145 of the Code of Criminal Procedure, decided that Maulvi Abdul Aziz was in possession and issued an order declaring him to be entitled to possession until "evicted therefrom in due course of law." If this was the fact which weighed with the Subordinate Judge we can only repeat in clear terms what was said on the 18th November 1899, namely, that the Code of Civil Procedure and the powers of Civil Courts under that Code are in no way fettered by any order that may be passed by a Magistrate under s. 145 of the Code of Criminal Procedure. The Magistrate's order under s. 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be **[216]** necessary for the protection of the property. In the present case we consider it absolutely necessary for the preservation and better custody and management of the property that neither of the contending parties should be in possession of it until the dispute between them has been fully determined, and that the property should remain in the custody of a person independent of both parties,—a person moreover whose position will be that of an officer of the Court appointed by and answerable to the Court for all acts done by him during the period of his receivership. We accordingly allow the appeal, set aside the order of the learned

Subordinate Judge, and send this case back to him to be dealt with in the light of our instructions and in accordance with the provisions of s. 505 of the Code of Civil Procedure. The appellant will get her costs. We think it expedient to add that our order is not to be interpreted as an order setting aside the order of the Magistrate. The appointment of a receiver should be made with the least possible delay, and in order that the Magistrate may be aware of the purview of the order of this Court we direct that a copy be sent to him for his information.

Appeal decreed.

1900 JAN. 10. APPELLATE CIVIL.

22 A. 214 = 20 A.W.N. (1900) 22.

22 A. 216 = 20 A.W.N. (1900) 28.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

ABDULLAH (*Applicant*) *v.* JITU (*Opposite Party*).*

[16th January, 1900.]

Criminal Procedure Code, ss. 87, 88, 89 —Absconding offender —Proclamation and attachment—Sale of attached property—Title of purchaser.

Where property was attached and sold as property of a proclaimed offender under ss. 87 and 88 of the Code of Criminal Procedure, it was *held* that although the proclamation was irregular, yet, the property having vested in third parties strangers to the proceedings in which the proclamation was made, the sale could not be set aside.

[F., 12 Cr. L.J. 142 = 9 Ind. Cas. 826 = 8 P.R. 1911 = 104 P.L.R. 1911 = 13 P.W.R. 1911 (Cr.) ; R., 8 Cr. L.J. 260 = 9 P.R. 1908 = 29 P.W.R. 1908 (Cr.)]

THIS was a reference under s. 438 of the Code of Criminal Procedure, made by the Sessions Judge of Allahabad. The facts out of which the reference † arose are as follows.

A charge was brought in May 1898 against the applicant Abdullah and two other persons. The applicant did not then [217] appear, and the case was tried out against the two others, who were fined Re. 1 each under s. 426, of the Indian Penal Code. As regards the applicant, the Magistrate who tried the case recorded his opinion that further proceedings need not be taken against him, as the matter was a trivial one. Notwithstanding this the complainant subsequently applied for process against the applicant, which was granted. As the applicant failed to appear, proceedings to enforce his attendance were adopted, and finally his property was attached, and some houses belonging to him were sold. The applicant then appeared, and asked that the proceedings against him might be stopped, and, in another application, that the proceedings for attachment and sale of his property might be set aside. In both applications applicant contended that he was protected by law. In the first application he contended that the Magistrate's remarks in his judgment, dated the 14th June 1898, virtually amounted to an acquittal, and that he could not be tried. On this point the Sessions Judge was of opinion that the order of the Magistrate was not an order of acquittal, and that there was no bar to the applicant's being tried. The Sessions Judge did not in respect of the proclamation proceedings find that any irregularities occurred in the attachment proceedings, except that at the time of attachment the Government did not take possession of the houses, as it should have done under

* Criminal Revision No. 813 of 1899.

† For a verbatim reprint of the order of reference, see 20 A. W. N. (1900) 28. Ed.

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REVISIONAL CRIMINAL.

22 A. 216 = 20 A.W.N. (1900) 28.

s. 88 of the Code of Criminal Procedure, but it left them in applicant's possession, and that even after sale they were apparently still in his possession. He was, however, of opinion that the case was one in which it would be appropriate to stop all proceedings and to cancel the attachments and sales, and to return the sale money to the purchasers. "The charge against him" said the Judge "is a very trivial one and resulted in the case of his two fellow-accused in a fine of one rupee each only. For such an offence it appears to me unnecessary to resort to extreme processes of law which entail attachment and sale of houses, &c., &c., and also to revive the charge after so long." The Government Pleader after taking instructions from the District Magistrate agreed that the matter was not one which ought to be pursued any further. The complainant, however, opposed this course, urging that the applicant was a man of extremely bad antecedents, having several previous convictions against him, and **[218]** that in respect of the very matter in question he was at the time bound over to keep the peace and had purposely avoided the process of the Court until such time as his bond should have expired. Under these circumstances, the Sessions Judge referred the case to the High Court for orders.

Mr. *R. K. Sorabji*, for the applicant.

Maulvi *Muhammad Ishaq*, for the opposite party.

ORDER.

BLAIR, J.—Three persons were sent before a Magistrate to answer a charge under s. 426 of the Indian Penal Code. Two of them presented themselves, the third was absent. The case was heard against the two who were present. Upon their being convicted, the Court showed its appreciation of the magnitude of their offence by inflicting on each of them a fine of Re. 1. That amount was ordered to be given to the prosecutor, and the Magistrate says that it would more than recoup him for any damage suffered. The Magistrate also says that in his opinion the matter was so trivial that it was not desirable to waste time in pursuing the charge against the absent man. A few days after that determination of the case against the two, a fresh complaint was lodged against the third man by the prosecutor, and the Magistrate rightly held that such a complaint was not barred by any rule of law. The Magistrate entertained the complaint and issued his warrant for the arrest of the person charged. After some search had been made the Magistrate found that the person for whom the warrant had been issued was absconding or concealing himself to evade process, and thereupon on the 12th September, drew up a proclamation calling upon the person charged to appear at the Court House at Allahabad within thirty days of the date of proclamation. It is not clear whether there ever was complete publication as required by law of that proclamation. The provisions of sub-sections (*b*) and (*c*) appear to have been complied with upon the 17th September. There is nothing to show whether the provisions of sub-section (*a*) were ever complied with at all. There was no endorsement or statement in writing made by the Court validating the proclamation. It is therefore obviously not a proclamation according to law. It did not specify a place and a time for the appearance of the absent man within thirty days or more from the date of the publication.

[219] Apparently some form intended to amount to an attachment was gone through, but apparently the property, whatever it was, was allowed to remain in the possession of its original owner. A sale took place of what are described as houses. Purchasers were found and, I suppose, the

purchase-money was paid. Whether the possession of the property ever passed into other hands than that of the original owner is not clear. Now these matters were brought to the attention of the District Judge in an application for revision made by the absent man, and the Judge refers to this Court a statement of the facts coupled with a recommendation that further proceedings before the Magistrate should be put a stop to, and the attachment and sale be cancelled. and the sale money returned to the purchasers. It has been objected to the Judge's recommendation that the applicant in revision before him had and has his remedy under s. 89 of the Code of Criminal Procedure, which enables the subject of such a proclamation as this to prove within two years that he had not absconded to avoid the warrant, and that he had not sufficient notice of the proclamation to enable him to attend within the time specified therein. It seems to me that s. 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation. The fact, however, remains that a sale has taken place; that the purchasers have acquired some sort of title, and I am not aware that this Court in exercising its revisional power has ever passed an order affecting the title of persons (outsiders) to the legal proceedings in which the order is made. I therefore direct that the proceedings before the Magistrate go no further, and must decline to make the order desired in respect of the order of attachment and sale of the property. It will be for the parties to seek elsewhere their legal remedies.

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22 A. 220 = 20 A.W.N. (1900) 30.

[220] APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHIAM LAL (*Plaintiff*) *v.* CHHAKI LAL AND OTHERS (*Defendants*).*

[30th January, 1900.]

Act No. IX of 1872 (*Indian Contract Act*), *s.* 23 — *Agreement opposed to public policy— Contract relating to purchase of land within his circle by a patwari—Act No.* XIX *of* 1873 (*N.W. P. Land Revenue Act*), *s.* 257.

Held, that a contract entered into by a patwari for the purchase for his benefit of land situated within his circle is a contract which is opposed to public policy, even though it may not be rendered void by the rules framed by the Board of Revenue for the guidance of patwaris.

[F., 27 A. 73 = 1 A.L.J. 412 = A.W.N. (1904) 167; R., 8 N.L.R. 82 (83) = 15 Ind. Cas. 933; 96 P.R. 1902 = 17 P.L.R. 1903.]

THIS was a suit for declaration of proprietary rights in and for possession of certain zamindari property brought under the following circumstances. The plaintiff was at one time patwari of a village called Birari, and, whilst occupying that position, had purchased, in the years 1878 and 1882, certain property within his circle; but, inasmuch as such a transaction was forbidden by the Rules of the Board of Revenue, he had made the purchase in the name of Udai Ram, his uncle. The plaintiff alleged that during Udai Ram's lifetime the profits of the property were regularly paid to him; but that after Udai Ram's death the defendants, who were his representatives, denied the plaintiff's title and refused

* Second Appeal No. 572 of 1897, from a decree of F. W. Wells, Esq., District Judge of Agra, dated the 26th June, 1897, reversing a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 31st March 1897.

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JAN. 30.

APPELLATE CIVIL.

22 A. 220=
20 A.W.N.
(1900) 30.

to hand over the profits. Hence this suit. The Court of first instance (Subordinate Judge of Agra) gave the plaintiff a decree. The defendants appealed. The lower appellate Court (District Judge of Agra) decreed the appeal and dismissed the suit on the findings, first, that the transaction in question was absolutely forbidden by the Rules of the Board of Revenue, which had the force of law, and, secondly, that the transaction was opposed to public policy. The plaintiff appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondent.

JUDGMENT.

BLAIR and BURKITT, JJ.—It is unnecessary for us to set forth the facts of this case, which will be found in the judgment of the [221] Court below. The lower appellate Court is wrong in saying that the partwaris' rules in force in 1878 and 1882, issued by the Board of Revenue with the sanction of the Government, had the force of law. In that matter the learned District Judge is clearly mistaken. Under s. 257 of Act XIX of 1873, the only rules which, after publication in the *N.W.P. Gazette*, acquire the force of law, are the rules mentioned in cl. (*a*) and (*b*) of that section, and they are rules to be made by the Local Government itself. If the rules as to patwaris be assumed to have been made under cl. (*c*) of that section, they clearly have not the force of law, and practically would be no more than departmental rules made by the Board of Revenue with the sanction of the Local Government. In this matter, therefore, the Court below was wrong.

But though, in our opinion, the Court below was wrong in that matter, it does not follow that its decision must be set aside. The learned Judge has held practically that the contract relating to purchase of land within his circle, made by the patwari for his benefit, is opposed to public policy. In our opinion that finding is correct. The learned Judge very properly puts it that "it is the duty of a patwari to keep impartially the accounts of zamindars and tenants or between zamindars with conflicting interests;" and further that "no patwari can do his duty properly if he has a direct interest in property in his circle." We think that these remarks are well founded. They show how the interest of a patwari, who has acquired a proprietary title to land within his circle, conflicts with his duty as a patwari bound impartially to record matters of most vital importance to both zamindars and tenants. In the present case the plaintiff admits that having contrary to the rules purchased land in his circle, he, with the object of concealing that purchase from his superiors, took the conveyance in the name of another person. The representatives of that other person are the defendants to this suit. Their predecessor in title was, according to the plaintiff, an active party to this transaction, which transaction we regard as being entered into for purposes opposed to public policy. For the above reasons, we concur in the decree of the lower appellate Court dismissing the plaintiff's suit, and we dismiss this appeal with costs.

Appeal dismissed.

22 A. 222=20 A.W.N. (1900) 24.

[222] APPELLATE CIVIL.

Before Mr. Justice Burkitt.

KAMLAPAT AND ANOTHER (*Defendants*) *v.* BALDEO AND OTHERS (*Plaintiffs*).* [5th February, 1900.]

Execution of decree—Suit under s. 231 of the Civil Procedure Code—Suit decreed—Appeal by decree-holders—Death of one of two joint decree-holders—Abatement of appeal.

A suit was instituted against two joint decree-holders under s. 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of first instance, but decreed by the lower appellate Court The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period.

Held, that the appeal abated. *Ghamandi Lal* v. *Amir Begam* (1) referred to.

[**Overruled**, 25 A. 27=22 A.W.N. (1902) 171 ; 10 Ind. Cas. 27 ; **F.**, 4 Ind. Cas. 385 ; **R.**, 5 C.L.J. 393=11 C.W.N. 504 ; **D.**, 23 A. 22.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BURKITT, J.—In this case the plaintiffs, now respondents, instituted a suit against the defendants, now appellants, to have it declared that certain property attached by the defendants in execution of a money decree against the father of the plaintiffs belonged to the plaintiffs, and was not liable to be taken in execution of the decree against their father. The suit was dismissed by the Court of first instance, but was decreed on appeal by the Subordinate Judge. From that decree the unsuccessful defendants (the decree-holders Kamlapat and Musammat Anandi,) preferred a second appeal to this Court.

That appeal came on for hearing before me sitting alone, and having heard the parties I referred an issue to the lower appellate Court under s. 566 of the Code of Civil Procedure. The Subordinate Judge in reply returned the issue without any finding. He reported that Kamlapat, one of the appellants, had died, and that therefore he was unable to proceed to the trial of the issue remitted to him. The fact of Kamlapat's death was not known when the appeal originally came on before me for hearing.

[223] Under the above circumstances it is contended for the respondents that the appeal has now abated, and I have to decide whether that contention is well founded or not.

It is not denied that more than six months have elapsed since the death of Kamlapat, and admittedly no application either by the co-appellant, Musammat Anandi, or by any one on behalf of the representativesof the deceased appellant, to have his representative brought on the record, has been

* Second Appeal No. 70 of 1899, from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 18th October 1898, reversing a decree of Babu Chajju Mal, Munsif of Mainpuri, dated the 19th May 1897.

(1) 14 A.W.N. (1894) 22.

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FEB. 5.
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22 A. 222=20 A.W.N. (1900) 24.

made. So *prima facie* it would appear that the appeal must be held to have abated. It is contended, however, that the right to proceed with the appeal has survived to the co-appellant, Musammat Anandi, and that I should act as provided in s. 362 of the Code of Civil Procedure. The argument is that as the money decree passed in favour of Kamlapat and Musammat Anandi was a joint decree, Musammat Anandi is, under s. 23/ of the Code of Civil Procedure, entitled to sue out execution of the entire decree for the benefit of all the joint decree-holders and of the representatives in interest of any deceased joint decree-holder, and that the right to proceed with the appeal in the absence of any representative of her co-appellant has therefore survived to her. The reply to this argument is that the proceedings now before me are not proceedings in execution of a decree, but are appellate proceedings in a suit to which s. 231 has no application. What I have to decide is not whether Musammat Anandi alone could prosecute execution proceedings under s. 231, but whether the right to appeal from the Subordinate Judge's decree in a suit in which she and her deceased co-appellant, Kamlapat, were unsuccessful defendants survives to her within the meaning of s. 362 of the Code. In my opinion that question must be answered in the negative. In the case of *Ghamandi Lal* v. *Amir Begam* (1), it was distinctly laid down that a Court hearing an appeal should have before it all persons whose interests might be affected by the decree in appeal. Now here there were two persons, Kamlapat and Musammat Anandi, both equally interested to procure a reversal of the decree of the Subordinate Judge by which their suit was dismissed. One of those persons died more than six months ago after they had appealed to this Court against the **[224]** decree of the Subordinate Judge. No application has been made to bring his representative on the record. It has not been shown or even alleged that the deceased Kamlapat left no legal representative, or that the surviving appellant, Musammat Anandi, is such representative. It is most unlikely that she could be Kamlapat's legal representative. On this state of facts there are no materials on which I can find that the right to prosecute the appeal survived to Musammat Anandi alone. I must therefore hold that the appeal has abated. I accordingly dismiss it with costs.

Appeal dismissed.

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22 A. 224=20 A.W.N. (1900) 52.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

GOBARDHAN DAS (*Defendant*) *v.* JAI KISHEN DAS (*Plaintiff*).*
[8th February, 1900.]

Act No. IX of 1872 (*Indian Contract Act*), *ss.* 15, 16, 19—*Contract—Undue influence—Coercion—Civil Procedure Code, ss.* 522, 526—*Award—Validity of award—Award purporting to be a considered award of the arbitrators, but really an agreement between the parties to the submission.*

Under s. 16 of the Indian Contract Act, 1872, as it stood before it was amended by Act No. VI of 1899, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract

* First Appeal No. 76 of 1898 from a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 25th November 1897.

(1) 14 A.W.N. (1894), 22.

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should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind; but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract. *Jones* v. *Merionethshire Building Society* (1), referred to.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was *held* that this would not prevent the award being a valid and binding award between the parties.

[F., 4 Ind. Cas. 359 (361)=3 S.L.R. 149; R., 11 C.L.J. 131=5 Ind. Cas. 98; 82 P.R. 1904; 1 S.L.R. 47; 1 S.L.R. 160 (163)]

THE facts of this case are fully stated in the judgment of STRACHEY, C.J.

Babu *Jogindro Nath Chaudhri* and Munshi *Jwala Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

JUDGMENT.

[225] STRACHEY, C. J.—This is an appeal from a decree passed in accordance with an award which was ordered to be filed under s. 526 of the Code of Civil Procedure. Having regard to the construction which has been placed upon the last paragraph of s. 522, with which s. 526 must be read, the only ground upon which such an appeal will lie is that there has been no award in law or in fact on which a decree could legally be passed. The only grounds upon which the award was contested in the Court below and in this Court are—(1) that by reason of coercion or undue influence exercised on the mind of the appellant there was no valid submission to arbitration; and (2) that there was no award in the sense of a judicial determination by the arbitrators of the matters submitted, but the arbitrators merely accepted a settlement of those matters by other persons, and mechanically signed an award which was put before them for their signature.

Now as regards the first point, no question of coercion properly so-called arises in this case. Coercion is defined in s. 15 of the Indian Contract Act. It is clear that coercion as thus defined implies a committing or threatening to commit some act which is contrary to law. No such act is alleged to have been committed or threatened in the present case. Therefore coercion may be put out of the question altogether. The question of undue influence requires further consideration. We must apply the definition of undue influence contained in s. 16 of the Contract Act, as it stood before its amendment by s. 2 of Act No. VI of 1899. The only part of s. 16 which has been suggested as applicable here is the second clause, which provides that undue influence is said to be employed "when a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion." If the appellant's consent to the submission was caused by undue influence as thus defined, the contract was voidable at his option under s. 19. Now the circumstances under which the submission was entered into were these. There had been certain dealings between the appellants, Gobardhan Das and one Gopal Das, the son of the plaintiff-respondent Jai Kishen Das. Gopal Das was a young man of **[226]** twenty-two. The appellant

(1) L. R. (1892) 1 Ch. 173.

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was his cousin. It appears that the appellant got Gopal Das to execute a deed of sale of Gopal Das' share in certain ancestral property. There were two deeds, one was taken in the name of Gobind Das, a relative of the appellant, and after that there was a further deed executed by Gobind Das in the appellant's favour. On the 26th November, 1896, a complaint was filed before a Magistrate by Gopal Das against Gobardhan Das, in which he charged the appellants with offences of criminal breach of trust and cheating under the Indian Penal Code in connection with the execution of the deeds, and on the following day, the 27th, the Court directed that the case should be sent to the police for investigation. While it was still under investigation the submission now in question was executed on the 4th December, 1896. The submission is signed by Jai Kishen Das and the appellant Gobardhan Das. It recites a dispute between the executants; it states that "the parties are ready to have recourse to the Civil and Criminal Courts," and that therefore, at the request of some of the relatives of the parties, in order to settle the matter, they appoint certain persons as arbitrators, and declare that they will accept whatever award the arbitrators may honestly make with respect to the dispute relating to the sale deeds. On the next day, that is, the 5th December, the complainant Gopal Das presented an application to the Magistrate, in which, referring to his complaint, he stated that he could not adduce evidence in the case, and, as the police had not as yet taken any proceedings, he prayed that the case might be struck off and his original application returned without any further inquiry. The only order then made was that the application should be sent to the police. Matters remained in that position at the time when the award was made on the 24th December, 1896, and ultimately, on the 7th January, 1897, the Magistrate made an order to the effect that the complainant did not desire to proceed further with the case, and virtually shelving the complaint altogether. The award and the decree thereon were in the respondent's favour.

Now dealing first with the submission of the 4th December, we have to see whether there is sufficient evidence to justify the conclusion that the appellant's consent to it was obtained by undue [227] influence employed for the purpose. Returning to s. 16, the question is—Does the evidence show that the appellant, while his mind was enfeebled by mental distress, was so treated as to make him consent to that to which but for such treatment he would not have consented? The appellant has given evidence himself as to the circumstances in which his consent was given. All he says on that point is this:—"I executed the arbitration agreement, having been influenced by the criminal case. If I had not affixed my signature, those persons would have got me punished. It was through this fear that I executed the deed of agreement." That is all he says. I have no doubt that the reason why he executed the submission was his fear of the criminal proceedings. A complaint was pending which had been made only a few days before. The submission itself refers to criminal proceedings. Having regard to these facts and to the further circumstances of Gopal Das' application practically abandoning the complaint on the very day after the execution of the submission, there can be no doubt that there was an implied agreement between the parties that if the appellant agreed to the submission the prosecution should be dropped, and that this, so far as the appellant was concerned, was the main object of the submission. As I have said, I have no doubt that at the time when he executed the submission he

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was to some extent, at all events, in fear of the criminal proceedings, but he does not say a word to suggest the conclusion that the plaintiff or any one else took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent. It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. In the case of *Jones* v. *Merionethshire Building Society* (1), Bowen, L. J., appeared inclined to the view that, given an agreement in consideration of a promise not to prosecute, it was a necessary or at least a reasonable inference of fact that undue influence or pressure must have been exercised and must have operated towards obtaining the agreement. See page 186 of the report. But the other **[228]** Lords Justices concurred with Mr. Justice Vaughan Williams in the Court below in holding that there was practically no evidence of pressure or undue influence, although undoubtedly there was fear and undoubtedly an agreement not to prosecute. In India we must apply the definition of undue influence contained in the Contract Act, s. 16, and taking the statements of the appellant as they stand, it appears to me that there is no sufficient evidence of the facts required by the second clause of that section. That disposes of the objection to the award so far as the submission is concerned.

Now with regard to the award itself, both the arbitrators have given their evidence and they describe what they did. Their procedure was certainly singular in one respect. One Gulab Das, the father-in-law of the appellant, appears to have interested himself in the matter and he told Ballabh Das, one of the arbitrators, that the arbitrators need not trouble themselves as he would bring the award and have it signed. He and other relatives of the parties seem to have come to a settlement of the matters in dispute. They drafted an award, and Gulab Das and others, including the appellant, took a fair copy of the award to the arbitrators for signature. The arbitrators signed the award, and at the end both parties signed it also, and stated that they accepted the award. The arbitrators further state that at the same time the award was read out and that the appellant heard it read. They say that they held no meetings and gave no consideration to the matter because they thought that the dispute had been amicably settled with the consent of the parties in accordance with the draft award, and that in substance they adopted the draft, and gave their award in accordance with the settlement agreed to by both parties. If the award really represented a settlement agreed to by the parties, I see no objection to the draft being adopted and the award being made by the arbitrators in accordance with the settlement, any more than I see any objection to a Court passing a decree in accordance with an agreement arrived at by the litigants. The only peculiarity here is that the award on the face of it professes to be, not the adoption of a settlement arrived at by the parties, but the result of a judicial consideration by the arbitrators themselves of the issues which they formulate, on the **[229]** statements of the parties and on the depositions of certain witnesses; whereas it is clear that they took no evidence and did not hold any sittings at all. But they signed the award, and the conclusion which they thus signed was accepted by the parties, who of course knew perfectly well how the settlement had been arrived at, and the award drawn up.

(1) L. R. (1892) 1 Ch. 173.

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But it is said that in that agreement for the settlement again undue influence was exercised, so that even if there was no objection to the submission, still there was no valid agreement upon which the arbitrators could make their award, and that the arbitrators therefore could not make their award in accordance with the so-called settlement, but ought to have decided the dispute irrespective of it altogether. Having read the evidence the conclusion at which I have arrived is that there is no satisfactory proof of the exercise of undue influence in obtaining the signature of the appellant to the award. It is clear that the appellant told the arbitrators at the time that he accepted the award. He himself asked the arbitrators to sign the award after hearing it read. His statement that he signed a blank paper is clearly untrue. No doubt he states in his evidence:—"People said to me that they would get the criminal case struck off if I affixed my signature to the arbitration award. It was for this reason that I affixed my signature to it. By the word 'people' I mean the following persons:—Har Kishen Das and Barjiwan Das." That is all the evidence by which he seeks to establish his plea of undue influence in the obtaining of his signature to the award. Harkishen Das is a relative of his own, related to him quite as closely as to the respondent Jai Kishen. There is nothing to show that Barjiwan Das had any special connection with Jai Kishen rather than with the appellant. I think that there is nothing to show the exercise of undue influence in the settlement upon which the award was made or in the signing of the award, and, that being so, the arbitrators were competent to give the award in the way they did give it with the knowledge and consent of the parties. The award was valid, and consequently no appeal from the decree founded on it can be maintained.

I think it desirable to state that I might have taken a very different view of the submission and the award if the objection [230] had been taken in either the Court below or in this Court that the submission was void as being in part for an unlawful consideration, or for an object opposed to public policy within the meaning of s. 23 of the Contract Act. It might very well have been contended that the submission had for its object the stifling of a prosecution for offences not compoundable under the provisions of the Code of Criminal Procedure, and if any such objection had been made, the judgments of the Court of Appeal in *Jones* v. *Merionethshire Building Society* (1), of Mr. Justice Stirling in *Lound* v. *Grimwade* (2) and of the Madras High Court in *Srirengachariar* v. *Ramasami Ayyangar* (3), would have required serious consideration. No such defence or issue has, however, been raised, and I do not think we should go out of our way to raise it for the appellant, when neither this Court nor the Court below has been asked to do so.

I think this appeal should be dismissed with costs.

BANERJI, J.—I also would dismiss the appeal. It was not the appellants' case in the Court below, nor is it his case in this Court, that the agreement of submission to arbitration is void on the ground that the object or the consideration of the agreement is unlawful, that object or consideration being the stifling of a criminal prosecution. No issue was joined on that point in the Court below, and no plea has been urged in the memorandum of appeal to this Court to that effect. It is not necessary, therefore, to consider that question in this appeal.

(1) L.R. (1892) Ch. 173. (2) L.R. 39 Ch. D. 605. (3) 18 M. 189.

The only ground upon which the validity of the submission was questioned was that of coercion, or undue influence. It is clear that there was no coercion, and on the evidence it cannot be held that there was undue influence within the meaning of s. 16 of the Contract Act. On this point I agree with the observations of the learned Chief Justice and have nothing to add.

As regards the award itself, the evidence shows that it embodies the result of a settlement come to by the parties to which both of them consented. They signed the award as indicating their acceptance of it, and it has not been proved that the appellant's consent to the settlement was procured by undue influence.

Appeal dismissed.

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22 A. 231=20 A.W.N. (1900) 79.

[231] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

IN THE MATTER OF THE PETITION OF DURGA PRASAD.*

[14th November, 1899.]

Civil Procedure Code, ss. 372, 582—Appeal—Devolution of interest pending appeal—Array of parties in appeal.

By virtue of the first portion of s. 582 of the Code of Civil Procedure, s. 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death marriage or insolvency. *In the matter of the petition of Sarat Chandra Singh* (1) followed. *Rajaram Bhagwat* v. *Jibai* (2) and *Ramji Morarji* v. *J. E. Ellis* (3) referred to. *The Collector of Muzaffarnagar* v. *Husaini Begam* (4) distinguished.

THIS was an application in a second appeal to substitute as respondent a person who alleged that he had during the pendency of the appeal purchased the decree in dispute from the successful plaintiff respondent. The facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal*, for the applicant.

Babu *Satish Chandar Banerji*, for the defendant appellant.

ORDER.

STRACHEY, C. J.—In this case an application is made that the name of the applicant may be placed on the record of an appeal pending in this Court in place of the original respondent.

The original respondent was the successful plaintiff in the suit. The applicant claims to be placed on the record as the assignee of the decree from the original respondent. It is not denied that he is such an assignee, and that the assignment was effected shortly after the institution of the appeal.

The application is opposed by the appellant on the ground that this Court has not the power at the stage of appeal to substitute for the original respondent the person who claims as assignee of the decree. That objection is based on certain observations made in a judgment of this Court in the *Collector of Muzaffarnagar* v. *Husaini Begam* (4).

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* Application in Second Appeal No. 712 of 1898, dated November 14th, 1899.

(1) 18. A. 285. (2) 9 B. 151. (3) 20 B. 167. (4) 18 A. 36.

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Now that judgment appears to me to be clearly distinguishable. In the first place, it appears from the last paragraph of the judgment that the observations which have been relied upon were *obiter*, as the application was dismissed solely on the ground that **[232]** the assignee, who was the only person apparently interested in maintaining or entitled to support the decree obtained by the original respondent, objected to being made a party. In the second place, the observations relied on were expressly limited to an expression of a doubt. In the third place (and this is the most important ground of distinction), the devolution of interest there did not take place pending an appeal, but between the passing of the decree in the Court below and the presentation of the appeal to this Court. It is not necessary for us to express any opinion one way or another as to whether, in a case of such devolution, we should follow the observations of the learned Judges in that case; but it is clear that their reasoning, especially in regard to the words "pending the suit" in s. 372 of the Code, had reference to the particular circumstances of that case, and especially to the fact that the devolution of the interest took place before any appeal was instituted, and not while any suit or appeal was actually pending. On the other hand, the decision of Mr. Justice Banerji in *In the matter of the petition of Sarat Chundra Singh* (1). is precisely in point. I entirely agree with the view expressed in that case.

It may be, as was pointed out in the earlier of the two cases I have mentioned, that by reason of the concluding words of s. 582 the word "suit" in Chapter XXI could be held to include an appeal in proceedings arising out of the death, marriage or insolvency of parties, and therefore would not include an appeal in such proceedings as s. 372 contemplates, which do not arise out of death, marriage or insolvency. But that does not make inapplicable to s. 372 as well as to other parts of the procedure of Courts of first instance the earlier part of s. 582; so that although in s. 372 the word "suit" may not include an appeal, the appellate Court nevertheless has in appeals as nearly as may be the same power as a Court of first instance has under s. 372 in a suit. Any other view would, I think, lead to obvious anomalies. To take the present case,—the assignee is given by s. 232 a power, subject to the discretion of the Court, to have the decree executed in the same manner and subject to the same conditions as the original respondent, and it **[233]** seems improbable that the assignee should have an express power of executing the decree and absolutely no power at all to defend that decree when attacked in appeal. I think it was to avoid that anomaly, among others, that the Legislature enacted the earlier part of s. 582. Other anomalies are pointed out by Mr. Justice Banerji in his judgment. If there is no way to enable this applicant to be brought upon the record as respondent to the appeal, the result is that the appeal will go on against the original respondent who no longer holds the decree attacked and has no longer any interest in defending it. Presumably the appeal would be dealt with *ex parte*, the only person interested in maintaining the decree having no opportunity to support it, and yet, the assignment having taken place during the pendency of the appeal, the applicant, though unable to support the decree, might nevertheless be held bound by its reversal. A similar anomaly would be the result if the assignor instead of having succeeded in the

(1) 18 A. 285.

Court below had lost, had appealed against the decree, and afterwards had assigned his rights. The view that the Court has the power in appeal to bring on the record the assignee of the original respondent is supported by decisions of the Bombay High Court in *Rajaram Bhagwat* v. *Jibai* (1), and *Ramji Morarji* v. *J. E. Ellis* (2). For these reasons I am of opinion that this application should be granted by adding the name of the applicant as respondent to the appeal along with the original respondent. The applicant will get costs of this application.

BANERJI, J.—I adhere to the view I expressed in *In the matter of the petition of Sarat Chandra Singh* (3), and hold that, by virtue of the first portion of s. 582, s. 372 applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. That view is supported by the rulings of the Bombay High Court to which the learned Chief Justice has referred. In the case of *The Collector of Muzaffarnagar* v. *Husaini Begam* (4), the question with which we have to deal in this case was not decided.

I agree in the order proposed by the learned Chief Justice.

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22 A. 234 = 20 A.W.N. (1900) 46.

[234] REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

ISURI PRASAD SINGH AND OTHERS (*Applicants*) *v.* UMRAO SINGH (*Opposite Parties*).* [8th February, 1900.]

Act No. XLV of 1860 (*Indian Penal Code*), *s.* 499—*Defamation—Statement made by an accused person in an application to a Court—Statement made in good faith for protection of the interests of the person making it.*

In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them. *Held* that this statement did not amount to defamation —not because of the application of any principles of English law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code —but because the statement fell within the ninth exception to s. 499 of the Indian Penal Code. *Queen-Empress* v. *Balkrishna Vithal* (5), *In re Nagarji Trikamji* (6), *Queen* v. *Pursoram Doss* (7), *Greene* v. *Delanney* (8) and *Abdul Hakim* v. *Tej Chundar Mukarji* (9) referred to.

[F., 13 Cr.L.J. 25 = 13 Ind. Cas. 217 = 5 S.L.R. 133; **R.**, 29 A. 685 = 4 A.L.J. 605 = A.W.N. (1907) 235 = 6 Cr.L.J. 197; 13 Cr.L.J. 275 (282) = 14 Ind. Cas. 659 = 23 M.L.J. 39 (50) = 11 M.L.T. 416 = 1912 M.W.N. 393 and 476 = 3 L.B.R. 262 (271); 17 C.L.J. 105 (116) = 17 C.W.N. 554 (563) = 18 Ind. Cas. 737 (741).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the applicants.

Babu *Satya Chandar Mukerji*, for the opposite parties.

JUDGMENT.

AIKMAN, J.—Proceedings had been instituted at the instance of one Balwant Singh against Isuri Prasad Singh and six other persons to have

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* Criminal Revisional No. 789 of 1899.

(1) 9 B. 151. (2) 20 B. 167. (3) 18 A. 285. (4) 18 A. 86,
(5) 17 B. 573. (6) 19 B. 340. (7) 3 W.R. Cr. R. 45.
(8) 14 W.R. Cr.R. 27. (9) 3 A. 815.

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them bound over to keep the peace. Whilst the case was pending in the Court of a Magistrate of the first class, a petition was presented to the District Magistrate by Isuri Prasad Singh and the others, asking that the case might be transferred to some other Court, and that a local inquiry might be made. In this petition it was alleged by the petitioners that one Umrao Singh had got Balwant Singh falsely to institute the proceedings against them in order to prejudice them in their defence to a civil suit which Umrao Singh had caused to be brought against them. Umrao Singh coming to know of this, [235] prosecuted the petitioners for defamation. They have been convicted under. s. 500, Indian Penal Code, and sentenced, Isur Prasad Singh to a fine of Rs. 10, and the others to a fine of Rs. 2 each. Both parties applied to the Sessions Judge—Umrao Singh asking that the case should be reported to this Court with the view of having the sentences enhanced, and the accused asking that the case should be reported with the view of having the convictions quashed.

The learned Judge has forwarded the case for the orders of this Court. He stated that, in his opinion, the convictions were right, and that it appears to him that they should either be set aside as bad in law, or that the sentence imposed on Isuri Prasad should be enhanced.

There is no doubt that the expressions used by the accused in their petition to the District Magistrate are in themselves defamatory. But the expressions complained of are undoubtedly pertinent to the case which was pending against the accused in the Criminal Court. According to English case-law the accused could not therefore be proceeded against, either civilly or criminally, for using those expressions.

There are decisions of the Bombay and Madras High Courts which, applying the principles of English law, hold that witnesses and counsel cannot be prosecuted for defamatory statements made by them as such. In one case, however, in the Bombay High Court, *Queen-Empress* v. *Balkrishna Vithal* (1), Telang, J., expressed an opinion that according to correct principles of construction the meaning of the words of the section of the Indian Penal Code, defining defamation, should not be limited so as to exclude therefrom any evidence given by a witness before a Court of Justice. And in a subsequent case *In re Nagarji Trikamji* (2), in which a pleader had been convicted of defamation for having, in defending his client, described the witnesses for the prosecution as "loafers," Jardine and Farran, JJ., said they were inclined to share the doubts expressed in the previous case by Telang, J., and acquitted the pleader, not on the ground of English law, but because they held that his case was covered by exception 9 to s. 499 of the Indian Penal Code. The case [236] of *Queen* v. *Pursoram Doss* (3) was somewhat similar to the present. In that case it was contended that a defendant in a criminal case was not tongue-tied, but might make use of any remarks, however defamatory *per se*, with perfect equanimity and protection from indictment or action. As to this plea Kemp, J., remarked:—"This may or may not be so, but the present case is governed by the provisions of the Indian Penal Code," and in this opinion Glover, J., concurred. In a criminal revision case (4) Phear, J., observed:—"If the facts which are the subject of the complaint fall within the limits of the definition in s. 499, construed, as the section ought to be, according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then in my judgment they amount to defamation quite irrespective of

(1) 17 B. 573. (2) 19 B. 340. (3) 3 W. R. Cr. R. 45. (4) 14 W. R. Cr. R. 27.

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what may be the English law on the subject;" and in this observation Jackson, J., concurred.

It may be true that the principles of public policy which, according to English law and some Indian decisions, ought to guard the statements of counsel and witnesses apply with equal force to the statements made by accused persons for their own protection. But, as was remarked in the case *Abdul Hakim* v. *Tej Chandar Mukarji* (1), when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which the determination of cases like the present should be regulated. The Indian Legislature might, had it chosen, have so framed s. 499 of the Indian Penal Code as to afford to parties, counsel, and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. This case therefore must, I hold, be decided according to the Indian Penal Code.

The words used in the petition being in themselves defamatory, the conviction under s. 500 of the Penal Code was right, unless it can be shown that the accused are protected by one or other of the exceptions to s. 499. The only **[237]** exception at all applicable to this case is the ninth, which enacts that it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it.

In this case it is clear that the imputation was made, for the protection of the interest of the accused. The question remains—Was it made in good faith? In the case *In re Nagarji Trikamji* (2) the Judges remark at p. 349 of the judgment:—"In considering whether there was good faith, *i. e.*, under s. 52, due care and attention of the person making the imputation must be taken into consideration." This I understand to mean that in considering the amount of care and attention required to establish good faith, regard must be had to the position in which the person making the imputation stands at the time he makes it. In the present case the Magistrate says in his judgment "the accused ought to have ascertained whether the facts mentioned by them in the aforesaid petition were true: and it was necessary for them to prove in this case that those facts were true, but they have failed to do so." This I hold to be an incorrect view of the law, inasmuch as, considering the position in which the accused stood, it is requiring from them an undue amount of care and attention to call upon them to substantiate all that they deemed it necessary to say for the protection of their interests. The accused may have been quite mistaken in thinking that Umrao Singh had caused Balwant Singh to institute the proceedings against them. But I think the evidence adduced by them as to the enmity borne against them by Umrao Singh, the connection between him and Balwant Singh, and other circumstances, is sufficient to show that it was not unreasonable for them to entertain the belief that Umrao Singh was the real instigator of the proceedings. I am of opinion that the accused are protected by the ninth exception. I quash the convictions and direct that the fines, if paid, be refunded.

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(1) 3 A. 815.

(2) 19 B. 340.

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22 A. 238=20 A.W.N. (1900) 49.

[238] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice and Mr. Justice Banerji.

BIMAL JATI (*Plaintiff*) *v.* BIRANJA KUAR AND OTHERS (*Defendants*).* [10th February, 1900.]

22 A. 238= 20 A.W.N. (1900) 49.

Mortgage—Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No. IV of 1882 (*Transfer of Property Act*), *s* 60.

A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness.

Held, that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *prima facie*, a good covenant and enforceable by the mortgagee. *Biggs* v. *Hoddinott* (1). *Santley* v. *Wilde* (2), and *Orby* v. *Trigg* (3), referred to.

[F., 4 Ind. Cas 610 (611)=3 S.L R. 130; R., 24 M. 449 (459); 7 Bom. L.R. 722 (781, 782; 10 C.L.J. 626 (628)=14 C.W.N. 295=4 Ind. Cas. 743; 2 L.B.R. 108; D., 6 Ind. Cas. 707 (709)]

THE facts of this case are as follows. Madho Saran Singh and Bishan Saran Singh mortgaged to the plaintiff, Goshain Bimal Jati, a 9-anna 3-pie share of mauza Rampur. In the mortgage-deed it was recited that the mortgagors had previously sold to the mortgagee a 4-anna share in the same village at a certain specified price; and the mortgagors, after setting forth the terms of the mortgage, proceeded to covenant that "if we, the executants, stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale consideration at which we have sold the 4-anna share, and if we transfer it to any other person such transfer made by us shall be deemed invalid and wrong as against the conditions set forth in this instrument." Notwithstanding the above covenant, the mortgagors sold the share in question by a deed-of-sale dated the 17th July, 1897, to Ram Nandan Pande and others. The mortgagee accordingly sued upon the said covenant, alleging that it gave him a right of pre-emption over the mortgaged property. **[239]** The Court (Subordinate Judge of Azamgarh) found (1) that the covenant relied on did not give to the mortgagee any right of pre-emption, (2) that the covenant was void for uncertainty within the meaning of s. 29 of the Indian Contract Act, 1872, and (3) that the covenant was also void for want of consideration under s. 25 of the same Act. The Court accordingly dismissed the suit. The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *A. H. C. Hamilton*, Pandit *Sundar Lal*, and Munshi *Haribans Sahai*, for the respondents.

JUDGMENT.

STRACHEY, C. J.—This is a suit by the mortgagee under a mortgage for fifteen years, executed on the 12th November 1889, to enforce against

* First Appeal No. 105 of 1898, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February 1898.

(1) (1899) 2 Ch. 307. (2) (1899) 2 Ch. 474. (3) (1722) 9 Mod. 2.

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the mortgagor and his vendee of the mortgaged property, a covenant for pre-emption, alleged to be contained in the mortgage-deed. Certain lessees from the mortgagor were also made defendants. The Court below has dismissed the suit upon two grounds—first, that the covenant in question does not give any right of pre-emption to the mortgagee and is unenforceable at law, because, in the opinion of the Court, it is void for uncertainty; secondly, that the covenant was without consideration. Against this decision the plaintiff has appealed to this Court.

Now the deed of mortgage recites that the mortgagors have already sold to the mortgagee a 4-anna share in the village of Rampur. The mortgage is a mortgage of another 9 annas 3 pie share in the same village. The covenant in question is as follows:—"If we the executants stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale-consideration at which we have sold the 4 annas share; and if we transfer it to any other person, such transfer made by us shall be deemed invalid and wrong, as against the conditions set forth in this instrument." Although the word "pre-emption" is not used, and although it is not expressly stated that before transferring to any other person, the property must be offered to the mortgagee at the price specified, I think there cannot be any doubt that that is the substantial meaning of the covenant. It cannot possibly **[240]** mean that if the property were offered to the plaintiff at that price and were refused by him, the mortgagor could not transfer it to any other person. If that view is correct, then the covenant means that the plaintiff is to have an option of purchase at the price specified, and that any transfer to a third person, without first offering it to the plaintiff, is to be deemed invalid as against him. That is pre-emption and nothing else, and the Court was wrong in holding that the covenant was not one for pre-emption. I think also that the Court is wrong in holding that the agreement was void for uncertainty. It has, I think, a perfectly definite meaning, and that is the meaning which I have just stated. I think also that the Court was wrong in holding that the agreement was without consideration. There is one single and entire consideration for the mortgage-deed. The consideration for the mortgage, and for all the mortgagor's covenants, is the loan,—the advance made by the mortgagee. It follows that both the preliminary grounds upon which the Court below dismissed the suit, are wrong.

The defendant, however, seeks to uphold the decision upon two other grounds. The first is, that the stipulation of the covenant was for a collateral advantage to the mortgagee, and was therefore void according to the English authorities relating to the principle that a mortgagee is not entitled to the benefit of any stipulation contained in the instrument of mortgage for any collateral advantage, or to anything more than the security for payment of his principal, interest and costs. The answer to that contention is first, that no such doctrine is to be found in the Transfer of Property Act, 1882, which in this country governs the relations of mortgagor and mortgagee; and, secondly, that the latest English authorities show that the rule about collateral advantage is no longer recognised in England in the sense and to the extent supposed in some of the earlier cases, and that provided two conditions are secured, a mortgagee may at the time of the advance and as a term of it stipulate for a collateral advantage. The two conditions are, first, that the bargain is not an unconscionable bargain, and not the result of improper pressure, unfair dealing, or undue influence; secondly, that the right of redemption is not taken

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away or fettered. That is in substance [241] the effect of the two latest cases on the subject decided by the Court of Appeal, *Biggs* v. *Hodgkinott* (1) and *Santley* v. *Wilde* (2).

Now as to the first of these two conditions, the Court below has not considered whether the bargain here was unconscionable or oppressive. It has simply dismissed the suit upon the two other grounds which I have mentioned. Whether a bargain is open to objection in reference to the first condition cannot be decided upon any general rule, but depends upon the evidence as to the particular circumstances of the bargain itself. But it is said that the stipulation here is void with reference to the second condition, that is to say, as a fetter or clog on the right of redemption. Now the condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs. As pointed out by Mr. Justice Shephard, that is the effect of s. 60 of the Transfer of Property Act, which provides for the right of redemption, but which is not prefaced with any such words as "in the absence of a contract to the contrary." But so long as the bargain places no obstacle in the way of the mortgagor getting back his property upon payment of the mortgage money, it is not open to objection as a fetter on the right of redemption. Then is this covenant for pre-emption open to objection on this ground? It does not, it appears to me, in the least stand in the way of the mortgagor getting back the property, if and when he pays the mortgage-money. There is no provision whatever requiring the mortgagor to transfer the property to the mortgagee if he does not wish to do so. There is nothing which, assuming the mortgage-money to be paid, gives the mortgagee any further right or interest in the property. In Fisher on Mortgages, 4th edition, s. 1150, it is expressly stated that "the Court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct"—*Orby* v. *Trigg* (3). The only special feature here is, that the covenant for pre-emption [242] includes a stipulation for the price which the mortgagee is to pay in the event of the sale being made to him. The price is to be calculated with reference to the price for which the 4 annas share was previously sold. Does that particular feature in the covenant bring it within the condition invalidating bargains as fettering a right of redemption? I do not think it does. If that particular provision could be shown to be fraudulent or oppressive in the sense already stated, the matter would be different; but so far that has not been shown. I think therefore that as the suit has been wrongly dismissed upon a preliminary point, the appeal must be allowed, the decree of the Court below set aside, and the case remanded to that Court under s. 562 of the Code of Civil Procedure for disposal on the merits, with reference to the other issues in the case. The appellant will get his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I agree that the grounds upon which the Court below has dismissed the suit cannot be sustained. The covenant upon which the plaintiff relies is not a covenant which imposes an absolute bar upon the mortgagor's right to transfer the mortgaged property to any person other than the mortgagee, but simply gives the mortgagee a preferential

(1) (1899) 2 Ch. 307. (2) (1899) 2 Ch. 474. (3) (1722) 9 Mod. 2.

right to purchase the property at the price specified in the covenant, in the event of the mortgagor electing to sell the property. This, as pointed out by the learned Chief Justice, is nothing more than a covenant conferring on the mortgagee a right of pre-emption. It is not a covenant which is void for vagueness or uncertainty, nor is it a covenant without consideration. The amount advanced under the mortgage-deed is the consideration for all the covenants contained in that deed. The learned advocate for the respondent seeks to support the decree of the Court below on the ground that the covenant in question is not legally enforceable, inasmuch as it fetters the right of redemption of the mortgagor. I am unable to accept this contention. The recent authorities in England, to which the learned Chief Justice has referred, lay down this, that a provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced, but that a covenant **[243]** conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. The covenant in the mortgage-deed which is in question in this case does not affect the right of the mortgagor to redeem the mortgaged property upon payment of the amount due upon the mortgage. It no doubt confers a collateral advantage upon the mortgagee, but the mortgagee cannot be deprived of that advantage unless, as has been stated above, the covenant can be repudiated on the ground of its being oppressive or unfair. The question whether the covenant in this case is objectionable on the ground last mentioned, was not considered in the Court below, and it is a question which that Court may have to consider when the case goes back to it, but I agree in holding that the said covenant does not fetter the mortgagor's right of redemption, and is not open to objection on that ground. I agree in the order proposed by the learned Chief Justice.

Appeal decreed and cause remanded.

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22 A. 243 = 20 A.W.N. (1900) 51.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

SHEO NARAIN (*Plaintiff*) *v.* CHUNNI LAL AND OTHERS (*Defendants*)* [12th February, 1900.]

Civil Procedure Code, s. 244—Execution of decree—Representative of party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.

Held, that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of s. 244 of the Code of Civil Procedure. *Madho Das* v. *Ramji Patak* (1) referred to.

THE suit out of which this appeal arose was a suit for sale on a mortgage of the 5th June, 1885. The mortgage sued upon was executed

* First Appeal No. 160 of 1898, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 29th March 1898.

(1) 16 A. 286.

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22 A. 243 = 20 A.W.N. (1900) 51.

pending a suit by the respondents on an earlier mortgage over the same property taken by the respondents in 1882. The respondents in that suit obtained a decree for sale on the 30th September 1885. In his plaint in the present suit the plaintiff stated that the respondents "are impleaded as defendants on account of their decree of the 30th September 1885, [244] and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by s. 244 of the Code of Civil Procedure. On this question the Court of first instance framed two issues. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by s. 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by s. 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree. The plaintiff thereupon appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

STRACHEY, C.J.—The only question in this appeal is whether the Court below has rightly made the plaintiff's decree conditional on the payment by him to the respondents of the amount due under their decree of the 30th September, 1885. The plaintiff sued on a mortgage of the 5th June, 1885. The respondents were prior mortgagees under a mortgage of 1882. At the time when the mortgage to the plaintiff was executed a suit on the respondents' mortgage was pending. The respondents obtained a decree on their prior mortgage on the 30th September, 1885. In paragraph 8 of the plaint in the present suit for sale the plaintiff states that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885, and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their [245] demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by s. 244 of the Code of Civil Procedure. The issues framed by the Court below as between the plaintiff and the respondents were issues 10 and 13. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by s. 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the

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plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by s. 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree

Now whether this view is correct depends on, first, whether the plaintiff was a representative of a party to the decree of the 30th September, 1885, within the meaning of s. 244 ; and, secondly, whether he is attempting to raise in this suit any question which under s. 244 can only be determined by order of the Court executing that decree and must not be raised by separate suit.

As to the first of these questions, the plaintiff took his mortgage of the 5th June, 1885, during the pendency of the suit in which the decree of the 30th September was passed. He therefore took it subject to the decree, and the decree was binding on him so far as the property comprised in his mortgage was concerned. In the case of *Madho Das* v. *Ramji Patak* (1), an opinion was expressed that a purchaser *pendente lite* from a defendant-mortgagor should be treated as a representative of the defendant in execution of decree within the meaning of s. 244, the reason being that such a purchaser is bound by the decree and should therefore be allowed to make any objection in the execution department which the parties to the decree or any one else bound by it would be competent to make. And it does **[246]** seem reasonable that no distinction should be made so far as the competency to make objections in execution is concerned between one person who is bound by the decree and another. A purchaser from the defendant-mortgagor *pendente lite* is just as much bound by the decree as a purchaser from the judgment-debtor after the decree, and I can see no reason why he should be in an inferior position so far as s. 244 is concerned. If that is a correct view as regards a purchaser *pendente lite* in a suit on a mortgage, I think that it must be equally true of a mortgagee who takes a mortgage during the pendency of such a suit. The remarks in the case of *Madho Das* v. *Ramji Patak*, to which I have referred, were no doubt made *obiter*. The decree against the judgment-debtor was a simple money decree, creating no charge on specific property, to which of course different considerations apply. I think, however, that the observations are sound and reasonable, and that a mortgagee taking *pendente lite*, like the present plaintiff, ought to be regarded as a representative of the mortgagor-defendant in the sense that, being bound by the decree afterwards passed, he is competent, under s. 244 of the Code, to raise in the execution of that decree any of the questions mentioned in that section.

The only remaining question is whether such a point is raised in the present suit and ought to have been raised before the Court executing the decree of the 30th September, 1885. The question raised—and the only question raised in the present suit—is whether that decree has been fully satisfied or not. If it has been fully satisfied, then admittedly the present respondents cannot stand in the plaintiff's way. If it has not been fully satisfied, then the plaintiff could only get a decree in the present suit conditional on his payment of whatever is due under that decree. Under cl. (*c*) of s. 244, that question being one of the discharge or satisfaction of the decree, could only have been determined by order of the Court executing the decree, and therefore could not be determined by a

(1) 16 A. 286.

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separate suit. Proceedings in execution of that decree were taken from time to time, and the present plaintiff could then have raised precisely the contentions which he raises now as to the manner in which under the decrees the proceeds of the property sold should have been [247] appropriated. I do not say that the plaintiff cannot even now raise these contentions before the Court executing the decree. We do not now decide any question as to whether that decree has or has not been satisfied. All that we decide is that the plaintiff cannot, in the present suit, raise the contention of its being satisfied, and of the incorrectness of the defendants' account which he has sought to raise. The result is that the decision of the Court below was right as regards these respondents, and that the appeal of the plaintiff as regards them must be dismissed with costs. We extend the time for payment of the sum of Rs. 29,534 until the 9th August of this year.

BANERJI, J.—I also would dismiss the appeal. The question raised between the parties to this appeal was whether or not the amount of the decree obtained by the respondents on the 30th September, 1885, on their prior mortgage of the 26th April, 1882, has been discharged. A further question arises whether the above question can be determined in this suit by reason of the provisions of s. 244 of the Code of Civil Procedure. The application of that section depends on, first, whether the appellant is a representative of a party to the suit within the meaning of that section; and, secondly, whether the question now raised is one of the questions which can be determined by a Court executing the decree under s. 244. That the question raised in this suit is a question on which the application for execution of the respondents can be opposed admits of no doubt. The appellant alleges that if a proper account be taken of payments made in respect of the decree of the 30th September, 1885, in accordance with the terms of that decree nothing is due upon the decree. That is clearly a question relating to the discharge or satisfaction of the decree, and can be determined under s. 244 of the Code, provided that the appellant fulfils the condition of being a representative of a party within the meaning of that section. I agree in holding that being a transferee *pendente lite*, and being thus a person who is bound by the decree, he must be deemed to be the representative of the judgment-debtor to the decree, namely, the mortgagor. This was the view held in the case of *Madho Das* v. *Ramji Patak* (1) and to that view I still adhere. The [248] question, therefore, of the discharge or otherwise of the respondent's mortgage is not a question which could be determined in this suit. This is sufficient for the disposal of the appeal, and it is not necessary to decide whether or not, as a matter of fact, the amount of the respondent's mortgage has been fully satisfied. I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

(1) 16 A. 286.

22 A. 248 (F.B.)=20 A.W.N. (1900) 64.

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FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Banerji, and Mr. Justice Aikman.

FULL BENCH.

MATHURA SINGH (*Plaintiff*) *v.* BHAWANI SINGH AND OTHERS (*Defendants*).* [1st and 2nd March, 1900.]

22 A. 248 F.B.)= 20 A.W.N. (1900) 64.

Act No. XV of 1877 (*Indian Limitation Act*), *s.* 14—*Limitation*—"*Other cause of a like nature*" *to defect of jurisdiction*—*Error in procedure.*

In cases in which s. 14 of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of s. 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff.

Hence, where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is, from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amendment.—*Chunder Madhub Chuckerbutty* v. *Ram Koomar Chowdry* (1), *Brij Mohan Das* v. *Mannu Bibi* (2), *Deo Prosad Sing* v. *Pertab Kairee* (3), *Bishambhur Haldar* v. *Bonomali Haldar* (4), *Ram Subhag Das* v. *Gobind Prasad* (5), *Jema* v. *Ahmad Ali Khan* (6), *Mullick Kefail Hossein* v. *Sheo Pershad Singh* (7), *Bai Jamna* v. *Bai Ichha* (8), *Narasimma* v. *Muttayan* (9), *Tirtha* [249] *Sami* v. *Seshagiri Pai*(10), *Subbarau Nayudu* v. *Yagana Pantulu* (11), *Venkiti Nayak* v. *Murugappa Chetty* (12), and *Assan* v. *Pathumma* (13), referred to.

[**Diss.**, 35 C. 728=12 C.W.N. 473; **F.**, 14 Ind. Cas. 437 (438)=6 L.B.R. 43 (44); 4 O.C. 281 (283); **R.**, 24 M. 361; 9 Ind. Cas. 680 (681)=8 P.R. 1911=77 P.L.R. 1911=78 P.W.R. 1911; **Doubted**, 13 Ind. Cas. 260=5 S.L.R. 181 (182); **D.**, 29 B. 219=7 Bom.L.R. 90.]

THE suit out of which this appeal has arisen was originally brought by three plaintiffs, Tilakdhari, Mathura Singh and Chotu Singh, for contribution on the basis of a registered agreement, dated the 19th March 1887. The suit was filed on the 14th March 1893. On the 21st December 1893, the suit was dismissed for misjoinder of parties and causes of action; but on appeal to the High Court the case was remanded to the lower Court with directions to return the plaint for amendment. The lower Court returned the plaint for amendment on the 19th of September 1896. The suit was then continued by Tilakdhari, the names of the other plaintiffs being struck out. On the 23rd September 1896, the other two plaintiffs, Mathura Singh and Chotu Singh, filed separate suits. Mathura Singh's suit was dismissed as barred by limitation, and he appealed to the High Court, urging that the whole period from the 14th March 1893, to the 23rd, or, at least, the 19th September 1896, ought to be excluded in his favour from the computation of the period of limitation.

* First Appeal No. 166 of 1898, from a decree of Maulvi Syed Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 30th March 1898.

(1) B.L.R. Sup. Vol. 553=6 W.R. C.R. 184. (2) 19 A. 348.
(3) 10 C. 86. (4) 26 C. 414. (5) 2 A. 622.
(6) 12 A. 207. (7) 23 C. 821. (8) 10 B. 604.
(9) 13 M. 451. (10) 17 M. 299. (11) 19 M. 90.
(12) 20 M. 48. (13) 22 M. 494.

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Munshi *Gobind Prasad*, for the appellant, drew attention to the alteration of the wording of the sections bearing upon this point in the various Limitation Acts which had been passed by the Indian Legislature. In Act No. XIV of 1859, s. 14, the words were "from defect of jurisdiction or other cause shall have been unable to decide upon it." S. 15 of Act No. IX of 1871, read "from defect of jurisdiction or other cause of a like nature is unable to try it," while s. 14 of the present Limitation Act (XV of 1877), reads "is unable to entertain it." From these changes it is to be inferred that the Legislature intended to give a plaintiff relief where some cause, such as defect of jurisdiction, prevented the Court *in limine* from considering the case on its merits.

Where there was no want of good faith on the part of a plaintiff and it was not shown that he had not been prosecuting his suit with due diligence, the authorities showed that the cause of a like nature to defect of jurisdiction need not necessarily be a cause **[250]** wholly independent of the plaintiff. The following authorities were cited :—*Chunder Madhub Chuckerbutty* v. *Ram Koomar Chowdry* (1), *Ram Subhag Das* v. *Gobind Prasad* (2), *Deo Prosad Sing* v. *Pertab Kairee* (3), *Jema* v. *Ahmad Ali Khan* (4), *Narasimma* v. *Muttayan* (5), *Tirtha Sami* v. *Seshagiri Pai* (6), *Putali Mehiti* v. *Tulja* (7), *Bai Jamna* v. *Bai Ichha* (8), *Subbarau Nayudu* v. *Yagana Pantulu* (9), *Venkiti Nayak* v. *Murugappa Chetti* (10), *Assan* v. *Pathumma* (11), *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (12), *Bishambhur Haldar* v. *Bonomali Haldar* (13), *Brij Mohan Das* v. *Mannu Bibi* (14) and *Salima Bibi* v. *Sheikh Muhammad* (15).

Mr. *S. Sinha*, for the respondents, argued that the plaintiff in the present case had not been acting with due diligence or in good faith. As showing the absence of good faith he referred to the fact that the plaintiff, at a very early stage in the proceedings, had notice that the plea of misjoinder had been raised ; and also that he need not have waited until the plaint was returned. The suit was not prosecuted with due diligence. In addition to the rulings which had been referred to on behalf of the appellants, counsel for the respondents also referred to *Luchmun Pershad* v. *Nimhoo Pershad* (16), *Rajendro Kishore Singh* v. *Bulaky Mahton* (17) and *Krishnaji Lakshman* v. *Vithal Ravji Renge* (18).

JUDGMENT.

STRACHEY, C. J.—The only question in this case which has been referred to the Full Bench is whether the suit is barred by limitation, or whether it is protected from being barred by the provisions of s. 14 of the Indian Limitation Act, 1877. The suit was a suit for contribution based on a registered agreement executed on the 19th March 1887. The plaintiff sues, alleging that he and the defendants were liable under a decree held by the Maharaja of Dumraon, that certain zamindari property **[251]** of his was sold in excess of his liability under the decree, and that under the agreement he is entitled to recover that excess from the other executants, that is, the defendants. The suit was instituted on the 23rd September, 1896. It is admittedly barred by limitation unless the plaintiff is entitled to exclude the time during which he was

(1) B.L.R. Sup. Vol. 553=6 W.R. C.R. 184. (2) 2 A. 622.
(3) 10 C. 86. (4) 12 A. 207. (5) 13 M. 451.
(6) 17 M. 299. (7) 3 B. 223. (8) 10 B. 604.
(9) 19 M. 90. (10) 20 M. 48. (11) 22 M. 494.
(12) 23 C. 821. (13) 26 C. 414. (14) 19 A. 348.
(15) 18 A. 131. (16) 17 W.R. C.R. 266. (17) 7 C. 367.
(18) 12 B. 625.

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prosecuting a former suit. The Court below has held that he is not entitled to exclude that time, and has therefore dismissed the suit. From that decision the plaintiff has appealed to this Court, and he relies on the first paragraph of s. 14, which is as follows :—" In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." The plaintiff seeks to exclude from the period of limitation the time occupied by a suit which he brought together with two other plaintiffs. That suit was brought on the 14th March 1893. It was a suit founded on the same agreement, for the same relief, and against the same defendants, as the present suit. Each of the plaintiffs claimed contribution as here, alleging that his property had been sold to an extent in excess of his liability under the Maharaja's decree. That suit was dismissed by the Court of first instance on the ground of misjoinder of plaintiffs and causes of action. On appeal by the plaintiffs this Court, on the 2nd June 1896, held that the first Court was right as regards misjoinder, as the plaintiffs were in all respects separate: their respective properties which had been sold in execution were separately held, and had been separately sold; and under the agreement the sales gave to each a separate cause of action. But this Court held that the first Court, instead of dismissing the suit, ought, under s. 53 of the Code of Civil Procedure, to have returned the plaint for amendment by striking out the names of all the plaintiffs except one, who should be allowed to continue the suit alone. Accordingly this Court remanded the case under s. 562 with a direction to the first Court to return the plaint for amendment in [252] the manner stated. The case was therefore returned to the first Court, and on the 14th September 1896, the plaintiffs applied to that Court to make certain amendments in the plaint, or in the ealternative to return the plaint, as directed by the High Court, for amendment in the manner which the High Court had suggested. On the 19th September 1896 the Court ordered that the plaint should be returned for amendment within five days, and thereupon the names of the present plaintiff and one of his co-plaintiffs were struck out from the plaint, and that suit was continued by the plaintiff Tilakdhari, alone. On the 23rd September 1896 the present suit was filed. If s. 14 of the Limitation Act is applicable, I think that the plaintiff must be held to have been prosecuting the former suit within the meaning of that section from the date of its institution, the 14th March 1893, until the 19th September 1896, when the Court returned the plaint for amendment, and enabled him to be struck out of that suit, and so to file the present. In that view, if the section is applicable, this suit would be within time by one day. The question is whether s. 14 applies. Up to a certain point, I think that there is no difficulty. I think that there is no reason to doubt that the plaintiff prosecuted the former suit with due diligence and in good faith. It has been attempted to show want of due diligence and good faith, but the attempt has, I think failed, and I need say no more as to that. In the next place, I think that the present suit is undoubtedly founded, so far as the present plaintiff is concerned, on the same cause of action as the former suit. In the third place, I think that by reason of the misjoinder in the former suit the Court was " unable to entertain " that suit, by which

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I mean was unable to consider the questions involved in that suit. It was unable to entertain it by reason of ss. 26, 31 and 45 of the Code of Civil Procedure, which show that plaintiffs cannot join in respect of distinct causes of action against the same defendants. In such a case either the plaint must be rejected, if not amended so as to remove the defect (and here from the nature of the case no amendment could have remedied the defect, so as to make that suit maintainable by all the then plaintiffs), or else the suit must be dismissed. In any event the Court could not have dealt with that suit upon the merits. In the fourth place, it [253] cannot be said that the Court was unable to entertain the former suit from defect of jurisdiction. But the question is—was the Court unable to entertain the suit from "other cause of a like nature" to defect of jurisdiction? Before dealing with these words it is necessary to bear in mind the essential object of s. 14 and the principle which underlies it. The principle is, broadly speaking, the protection against the bar of limitation of a man honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial. That is the principle; and I think it is clearly applicable, not only to cases in which a man brings his suit in the wrong Court, that is, a Court having no jurisdiction to entertain it, but also where he brings his suit in the right Court, but is nevertheless prevented from getting a trial on the merits by something, which, though not a defect of jurisdiction, is analogous to that defect. Now the corresponding words in s. 14 of the Limitation Act of 1859 were "or other cause." In s. 15 of the Limitation Act of 1871 the words were first introduced in their present form "or other cause of a like nature." I think it is quite clear that in making this change the Legislature was adopting the view of the majority of the Full Bench of the Calcutta High Court in *Chunder Madhub Chuckerbutty* v. *Ram Coomar Chowdry* (1). The majority of the Court held that the words "other cause" in the Act of 1859 must be construed as meaning "other cause of a like nature." Their judgments give instances of what, in their opinion, would not be causes of like nature to defect of jurisdiction. For example, in the case before them they held that those words would not apply where the plaintiff had been non-suited on account of his neglect to state in his plaint the boundaries of the land which he claimed. Other instances which they gave were the failure of a plaintiff to appear or to produce his witnesses on the day fixed for the hearing, and his failure in a suit for damages for a wrongful act to specify the act of which he complained. Sir Barnes Peacock and Mr. Justice Trevor held in effect that "other cause of a like nature" meant a cause not including any neglect on the part of the plaintiff either in stating his case or in other respects. Again, they say that it means a cause "not [254] connected with the plaintiff's own negligence." It is important to see why they adopt that meaning. Their reason is, that in the case of any cause which included any neglect on the plaintiff's part, he could not be said to have prosecuted the suit *bona fide* and with due diligence as required by the earlier words of the section. They do not, that is, enter into an inquiry as to what causes are of a like nature to defect of jurisdiction in the abstract and apart from s. 14—an inquiry which would be difficult and perhaps impossible, and which would probably involve the laying down of propositions of dangerous generality. They seek for a test of likeness to defects of jurisdiction within the four corners of the section

(1) B. L. R. Sup. Vol. 553 = 6 W. R. C. R. 184.

itself, supplied by its own words, and having reference to its requirements. Mr. Justice Jackson, who agreed with Sir Barnes Peacock and Mr. Justice Trevor, used less guarded language. He said :—"It appears to me that the inability of the Court must be either from unavoidable circumstances over which no one has any control, or something incidental to the Court itself and quite unconnected with the acts of the parties." I think that an earlier passage in the same judgment shows that this is too sweeping. As Mr. Justice Jackson himself points out, a plaintiff's going to the wrong Court can hardly be described as an unavoidable cause over which no one has any control, or as quite unconnected with the acts of the parties. Still earlier in his judgment he says that it must be shown that the Court was unable to decide the case "from some cause quite unconnected with the default or negligence of the plaintiff." Now although he there adds the word "default" to the "negligence" spoken of by Sir Barnes Peacock, he goes on to give the same reason as the Chief Justice. He says :—"To hold otherwise would be inconsistent with the use of the words *bona fide* and with due diligence." I think therefore that by the word "default" also he must have meant some act of the plaintiff inconsistent with *bona fides* or with due diligence. The result may, I think, be stated as follows :—First, if the Court's inability to entertain the suit results from any cause connected with any want of good faith or due diligence on the plaintiff's part, that cause is not of a like nature to defect of jurisdiction. Secondly, if the Court's inability to entertain the suit results from a cause quite unconnected with any **[255]** want of good faith or due diligence on the plaintiff's part, that cause is of a like nature to defect of jurisdiction. There is a third proposition which, I think, is established by later cases, namely, that, given good faith and due diligence, a cause is not prevented from being of like nature to defect of jurisdiction merely because it was in the plaintiff's own power to avoid, or resulted from his own act or from a *bona fide* mistake of law or procedure. I think that is the result of the decision of the Full Bench in *Brij Mohan Das* v. *Mannu Bibi* (1), and of the Calcutta High Court *Deo Prosad Singh* v. *Pertab Kairee* (2), and the observations of the Division Bench in *Bishambhur Haldar* v. *Bonomali Haldar* (3). As pointed out in the first of the Calcutta cases just mentioned, the test cannot be whether the cause was one within the plaintiff's own power to avoid, because it is equally in the plaintiff's own power to avoid suing in a Court which for defect of jurisdiction is unable to entertain the suit. Two decisions of this Court have been discussed in the argument. The first is the case of *Ram Subhag Das* v. *Gobind Prasad* (4). There the former suit had failed by reason of misjoinder of plaintiffs and causes of action. In the second suit this Court held that the defect in the former suit was not a cause of like nature to defect of jurisdiction, apparently because it was "a defect for which the plaintiff must be held responsible." If that means a defect which the plaintiff could have avoided, I think that this proposition is too wide for the reasons given in the passage to which I have just referred in the judgment in *Deo Prosad Singh* v. *Pertab Kairee*. Not a word is said as to whether the plaintiff in the former suit acted without good faith or due diligence. The next case in this Court, *Jema* v. *Ahmad Ali Khan* (5), is, I think, clearly distinguishable. There the former suit was dismissed on the ground

(1) 19 A. 348. (2) 10 C. 86. (3) 26 C. 414 (416, 417).
(4) 2 A. 622. (5) 12 A. 207.

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that the debt sued for was due, not to the plaintiff alone, but to the plaintiff and a partner who had not joined in the suit. The judgment expressly says "it was not merely a case of procedure; it was a case of a plaintiff coming into Court and failing to prove a cause of action in himself against the defendant, and [256] thus failing to establish the defendant's liability to him, the plaintiff in the suit." Clearly the failure of the plaintiff to prove his cause of action and to establish the defendant's liability does not, in the first place, make the Court "unable to entertain the suit," because the suit is entertained and dismissed; and in the second place, is in no sense analogous to defect of jurisdiction in the Court. The dissent which the judgment in that case expresses from the decision in *Deo Prosad Singh* v. *Pertab Kairee* and its approval of the decision in *Ram Subhag Das* v. *Gobind Prasad* must, I think, be regarded as *obiter*. I shall only refer briefly to the principal cases decided by the other High Courts which were cited to us. I agree with the decision in *Deo Prasad Singh* v. *Partab Kairee* (1), which was a case of misjoinder of causes of action. In the case of *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (2), the abortive suit was instituted on distinct causes of action against different sets of defendants severally, and it was held that the inability of the Court to entertain that suit was due to a cause of like nature to defect of jurisdiction. It is curious that the judgment does not in any way consider whether the former suit was prosecuted in good faith and with due diligence, but it may be assumed that the Court found on those questions in the plaintiff's favour. The only Bombay case that seems to be in point is *Bai Jamna* v. *Bai Ichha* (3), where it was held that, assuming the Court to have been within the meaning of s. 14 unable to entertain the former suit, the cause was not of a like nature to defect of jurisdiction, as it was the plaintiff's own laches in not producing a registered certificate. That is substantially to the same effect as the view of Sir Barnes Peacock and Mr. Justice Trevor in the early Full Bench case in the Calcutta High Court. The view taken of the section by the Madras High Court appears to have fluctuated. In *Narasimma* v. *Muttayan* (4), the Court agreed with the decision in *Deo Prosad Singh* v. *Pertab Kairee*, but gave no reasons. In *Tirtha Sami* v. *Seshagiri Pai* (5), the Court disagreed with *Deo Prosad Singh* v. *Pertab Kairee*, but gave no reasons. In *Subbarau Nayudu* v. *Yagana Pantulu* (6), the former suit had failed by reason of the plaintiff having [25] acted in accordance with a rule made by the High Court which, by the time the suit came to be decided, was discovered to be *ultra vires*. In the subsequent suit it was held that the plaintiff was entitled to the benefit of the section because there had been no default, negligence or want of *bona fides* on his part, and the judgment of Mr. Justice Jackson in the early Calcutta Full Bench case was relied on. In *Venkiti Nayak* v. *Murugappa Chetti* (7), the Full Bench made what appears to me to be a rather startling extension of the principle laid down in the preceding case. They applied it to a case where the former suit had been dismissed because the plaintiff had joined certain matters without the leave required by s. 44 of the Code. They do not consider how it came about that the plaintiff did not obtain, and apparently did not even apply for, the leave which the Court was perfectly competent to have given under s. 44. They do not inquire whether

(1) 10 C. 86.
(2) 23 C. 821.
(3) 10 B. 604.
(4) 13 M. 451.
(5) 17 M. 299.
(6) 19 M. 90.
(7) 20 M. 48.

in that respect or otherwise in the former suit the plaintiff had acted with good faith or due diligence. That case seems to me to have given s. 14 of the Limitation Act a dangerously wide extension. The last Madras case is *Assan* v. *Pathumma* (1), a case, like the present, of misjoinder of plaintiffs and causes of action. The Court followed the previous Full Bench decision, as to which the judgment forcibly observes :—"When the provision thus applies to a proceeding which becomes abortive owing to an unauthorized joinder of matters, the joinder whereof the Court on application of the parties could have authorized, how can it consistently be held that the provision does not apply to a proceeding which fails on account of a misjoinder that the Court could not sanction and which is prohibited by the law absolutely ?" Elsewhere in their judgment, no doubt, the Court held that good faith and due diligence on the plaintiff's part were proved.

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I think that the result of the authorities taken as a whole, and the view which I take of the true principle, may be fairly summarized by saying that if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within [258] the meaning of s. 14 of the Act. I think that this view of the words "other cause of a like nature" corresponds most closely with the object of the Legislature in enacting the section as stated by me in the earlier part of this judgment. Now, applying this principle to the present case, the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action. There was on the plaintiff's part in that former suit no want of good faith or due diligence. That being so, it is immaterial that the plaintiff in framing that suit made a *bona fide* mistake of procedure. In think that in the present suit he is entitled under s. 14 to the exclusion of the whole of the period from the 14th March 1893 to the 19th September 1896, that consequently the present suit was within time, and that the Court below was wrong in dismissing it as barred by limitation. That is the answer I would give to this reference to the Full Bench.

BANERJI, J.—My answer to the reference is the same as that of the learned Chief Justice. The question which we have to determine is whether the period of the pendency of the former suit should, under s. 14 of the Limitation Act, be excluded in computing the period of limitation for the present suit. If that section applies, it is beyond question that the whole period from the commencement of the first suit to its termination including the period which intervened between the date of decision by the first Court and that of the institution of an appeal to this Court, should be excluded. The ruling of the Full Bench in *Ajoodhya Pershad* v. *Bisheshur Sahai* (2), is conclusive on this point. Now does s. 14 apply to this case ? Two essential conditions for the application of that section are that the first suit has been prosecuted with due diligence and that it has been prosecuted in good faith. Where negligence, or inaction, or bad faith is established against the plaintiff, he cannot avail himself of the benefit of the section. The mere fact of diligence and good faith on the part of the plaintiff being proved will not, however, make the section applicable unless the further condition is fulfilled that the Court in which the first suit was prosecuted was unable to entertain it by reason of defect of jurisdiction or other cause of a like nature. However diligent the plaintiff

(1) 22 M. 494.

(2) 6 N.W.P. H.C.R. (1874) 141.

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[259] may have been, and whatever may have been the amount of good faith with which he prosecuted the first suit, the cause which led to the failure of the first suit must have been a cause of the nature mentioned above and must have prevented the Court from entertaining the suit, that is, as the learned Chief Justice has remarked, from considering the questions involved in the suit. A cause like the absence of a right of action in the plaintiff will not make s. 14 applicable. That was the cause in *Jema* v. *Ahmad Ali Khan* (1). The ruling in that case therefore is not an authority against the appellant, though it must be admitted that there are expressions of opinion in the judgment in that case which are undoubtedly against him. In the present case no question of want of jurisdiction arises. The reason which prevented the Court from entertaining the first suit *qua* the present plaintiff was a misjoinder of plaintiffs and causes of action. Is such a misjoinder a cause of a like nature to defect of jurisdiction within the meaning of s. 14? This question was answered in the negative in the ruling of this Court in *Ram Subhag Das* v. *Gobind Prasad* (2), and that case is a direct authority against the plaintiff-appellant. The Calcutta Court, however, has held the contrary view in *Deo Prosad Singh* v. *Pertab Kairee* (3), and in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (4), and so has the Madras High Court in the recent case of *Assan* v. *Pathumma* (5). That case is on all fours with the present case. The rulings of the Madras High Court are, as pointed out by the learned Chief Justice, not consistent; but the tendency of that Court in recent cases has been in favour of the view taken in the case last mentioned. I agree with the rulings mentioned above, and am unable to concur with the view taken by this Court in *Ram Subhag Das* v. *Gobind Prasad*. The reason assigned by the learned Judges who decided that case for holding a misjoinder of causes of action not to be a cause of a similar nature to defect of jurisdiction is that it is a defect for which the plaintiff must be held responsible. But, as pointed out in *Deo Prosad Singh* v. *Pertab Kairee*, the plaintiff is equally responsible for filing a suit in the [260] wrong Court. The test therefore which was applied by this Court in the case of *Ram Subhag Das* v. *Gobind Prasad* is not the true test. It seems to me that s. 14 applies where the plaintiff has acted in good faith and with due diligence, but where he has made some *bona fide* mistake of law, procedure or fact, which has precluded the Court from considering the issues involved in the case, either by reason of absence of jurisdiction, or by reason of rules of procedure prescribed in the Code of Civil Procedure, or some other cause of a similar nature; the inability, however, of the Court to consider the case must not be due to wilful neglect or default on the part of the plaintiff. I do not think it is easy to lay down a hard-and-fast rule or to enumerate all the causes which should be regarded as of a like nature to absence of jurisdiction, but I am clearly of opinion that a cause like the one which precluded the Court from hearing the former suit of the plaintiff is a cause which comes within the purview of s. 14 of the Indian Limitation Act.

The learned counsel for the respondents attempted to establish that in the present instance the plaintiff did not act with due diligence or in good faith. As showing the absence of good faith he referred to the fact that in the suit which the plaintiff jointly with Tilakdhari Singh and

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(1) 12 A 207. (2) 2 A. 622. (3) 10 C. 86.
(4) 23 C. 821. (5) 22 M. 494.

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Chhotu Singh brought in the Shahabad Court a plea of misjoinder was raised. But it appears from the judgment in that case that the defendant's plea was to the effect that there was a non-joinder of plaintiffs, and that the Court was of opinion that there was a misjoinder of defendants. It cannot therefore be said that when the former suit was instituted in the Court below, the plaintiffs in that suit were not acting in good faith when they jointly filed their plaint. There was clearly no want of diligence on the part of the plaintiff, inasmuch as he was not in a position to bring a new suit until the plaint in the former suit was returned to the plaintiffs for amendment. For the above reasons I hold that the plaintiff's claim is not barred by limitation.

AIKMAN, J.—I also am of opinion that on the facts as set forth by the learned Chief Justice the plaintiff in this case is entitled to the benefit of s. 14 of the Indian Limitation Act, 1877, and that his suit is not beyond time. **[261]** It is clear that the Legislature did not intend to limit the privilege given by that section to cases in which the civil proceeding has been instituted in a wrong Court. Had this been its intention, the words " or other cause of a like nature " would not have been found in the section. To what cases do the words just quoted refer ? The question is not free from difficulty, but after careful consideration I am of opinion that the intention of the Legislature was that, given good faith and due diligence on the part of the plaintiff, he was not to suffer from any *bona fide* mistake in procedure which would have the same effect as if he had gone to the wrong Court, that is, which would have had the effect of preventing the Court *in limine* from approaching the consideration of the case on its merits. I think the Legislature endeavoured to make this intention clear by the alteration which it made when enacting Act No. XV of 1877. In the concluding words of the first paragraph of the section in the preceding Act No. IX of 1871, the words were " a Court which is unable to try it." In the present Act for the word " try " the Legislature has substituted the word " entertain." As has been pointed out in the case of *Deo Prosad Singh* v. *Pertab Kairee* (1), the responsibility of the plaintiff for the mistake which led to the earlier suit being thrown out is no true criterion as to whether s. 14 is applicable. It is unnecessary for me to refer to the cases which have been cited in the judgment of the learned Chief Justice and my brother Banerji. I concur in the answer proposed to be given to the reference.

On the appeal going back to the Bench which made the reference the following order was passed :—

FINAL ORDER OF THE DIVISION BENCH.

STRACHEY, C.J., and BANERJI, J.—The result of the judgment of the Full Bench is that the decree of the Court below dismissing the suit as barred by limitation must be set aside and the case remanded to that Court for disposal on the merits under s. 562 of the Code. In dealing with the agreement of the 19th March 1887, the Court will have regard to our judgment in First Appeal No. 165 of 1898, which was delivered on the 20th of February last. The appellant will have his costs of this appeal.

Appeal decreed and cause remanded.

(1) 10 C. 86.

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APPELLATE CIVIL.

22 A. 262 = 20 A.W.N. (1900) 57.

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[262] APPELLATE CIVIL.

Before Mr. Justice Knox.

ABDUL GHAFUR (*Defendant*) *v.* RAJA RAM (*Plaintiff*).*

[9th March, 1900.]

Civil Procedure Code, s. 211—*Mesne profits—Interest on mesne profits not given by decree—Interest not obtainable in execution—Costs of collection of rents by a trespasser in possession not to be set-off against mesne profits—Execution of decree.*

A plaintiff sued for cancellation of a certain lease, and for ejectment of the defendant as a trespasser, and for mesne profits with interest on such mesne profits. The decree which he obtained was a decree for cancellation of the lease and ejectment of the defendant, and ordered that mesne profits should be ascertained in the execution department, but was silent as to interest. *Held*, that interest on the mesne profits could not be obtained in execution of the decree. *Hurro Durga Chowdhrani* v. *Surut Sundari Debi* (1) and *Kishna Nand* v. *Kunwar Partab Narain Singh* (2) referred to.

Held, also that as the defendant had thrust himself into an estate and not acted in the exercise of a *bona fide* claim of right, he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co.* v. *Cornwall* (3) distinguished.

[**Reversed**, 23 A. 252=21 A.W.N. 80; **R.**, 24 A. 376 (380)=22 A.W.N. 96.]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

JUDGMENT.

KNOX, J.—This appeal arises out of proceedings taken in execution of a decree passed on the 7th of December, 1896, in favour of one Babu Raja Ram, respondent to this appeal. In order to understand the points which arise for determination, it will be necessary to state briefly the circumstances which gave rise to the suit in which this decree was passed. One Musammat Saheb Jan was the original owner of the property, over which between the years 1882 and 1884 she made three successive mortgages in favour of the ancestor of Raja Ram. Upon these mortgages Raja Ram obtained a decree for sale on the 4th of August, 1890. After the decision had been passed, Saheb Jan, on the 7th of November, 1890, executed a lease over the same property in favour of Sheikh Abdul Ghafur, the present appellant, and three days later she preferred an appeal to the High Court from the decree in favour of Raja Ram. This appeal was **[263]** eventually dismissed. Upon its being dismissed, Raja Ram put the property to sale and himself purchased it. The sale was confirmed on the 20th of September, 1895, and an order for delivery given seven days after. Raja Ram applied for mutation of names to be effected over the property. Abdul Ghafur resisted the application, and it was rejected. Raja Ram had therefore to sue for possession, and he did so on the 5th of September, 1896, asking for further mesne profits in respect of the property, both for the time during which he had been kept out of possession and from institution of the suit until delivery of possession with interest

* First Appeal No. 169 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarb, dated the 12th August 1899.

(1) 8 C. 332. (2) 11 I. A. 88. (3) L. R. (1892) A. C. 75.

upon the same. On the 7th of December, 1896, the Court gave him a decree, which is now under execution. It is a decree for possession by which the lease given to Abdul Ghafur is to be cancelled. As regards the mesne profits, the Court added that the plaintiff is decidedly entitled to the profits from the date of his purchase, but it reserved inquiry into the amount thereof, which was to be decided in the execution department. Neither in the judgment, nor in the decree which followed, was any mention made of the interest upon mesne profis for which Babu Raja Ram had asked. On the 3rd of July, 1899, Babu Raja Ram instituted proceedings in execution. He asked for mesne profits, including interest. The judgment-debtor took exception to the sum of Rs. 719-12 8 at which the plaintiff had assessed the sum he claimed as mesne profits. The objection raised by him was threefold. He first contended that he should be allowed a proper sum for the expenses of collection incurred by him in getting in the rents. The second objection was that the decree-holder was not entitled to interest; and the third, that the decree-holder was not entitled to any sum on account of the *sir* lands, of which Saheb Jan had, by virtue of the decree, become an ex-proprietary tenant. He also took exception to the sum of Rs. 12-14 as pleader's fee on the ground that the decree did not award it. All these objections were overruled, and Abdul Ghafur now comes to this Court, and renews these objections. There was a further plea taken in appeal, namely, the second plea, but this was expressly abandoned by the learned vakil for the appellant.

[264] I deal first with the issue—"Is or is not the decree-holder entitled to interest upon the mesne profits? The contention raised by the appellant is that as this interest was in express terms claimed, but the decree gained does not award it, it must be taken to have been in the discretion of the Court refused. To this it is replied that as the question of mesne profits was left to be determined by the executing Court, that Court had the power to confirm the decree that was passed, and was bound to construe the term mesne profits as including interest. This contention is based upon what may be termed the explanation clause to s. 211 of the Code of Civil Procedure. It is therein stated that mesne profits of property mean certain profits which are defined "together with interest on such profits." I find myself unable to hold that the term "mesne profits" in the Code of Civil Procedure necessarily carries with it as an essential ingredient interest on such profits. It may, of course, and ordinarily does, include such interest, but it seems to me that s. 211 leaves the matter in the discretion of the Court which determines the original suit. It is for that Court to say upon a consideration of the facts of the case whether any interest shall be allowed, and if allowed, at what rate it is to be allowed. If that Court in express terms refuses to grant interest, or if, when such interest is claimed, it passes a decree, the terms of which are silent as regards interest, it seems to me that in either case the Court which executes the decree, even when the amount of mesne profits is left for future inquiry, cannot add to the original decree interest which, as I consider, the original Court refused to grant. To do so would be, as was pointed out in a somewhat similar case by their Lordships of the Privy Council in *Hurro Durga Chowdhrani* v. *Surut Sundari Debi* (1) to add to the decree. The case *Kishna Nand* v. *Kunwar Partab*

(1) 8 C. 332.

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Narain Singh also decided by their Lordships of the Privy Council (1) confirms me in the belief that the question whether interest is or is not to be allowed in awarding mesne profits is a matter for decision of the Court which determines the original suit. In this last case, the explanation added to s. 211 was expressly [265] considered. I therefore hold that decree-holder is not entitled to any sum as interest upon the mesne profits awarded.

As regards the question whether the judgment-debtor is entitled to charge the expenses of collection against the receipts which he has received from the land during the period he was in wrongful possession, I hold that he is not so entitled. The learned vakil for the appellant took his stand upon the decision of this Court, *Altaf Ali* v. *Lalji Mal* (2). His contention was that Shaikh Abdul Ghafur entered upon the property with a *bona fide* belief that he was entitled to do so under the lease he had obtained from Musammat Saheb Jan. In any case the learned vakil argued that this issue had been expressly raised by him in his written statement, and the question whether the lease was or was not a *bona fide* lease had been left undetermined. Shaikh Abdul Ghafur should therefore be given an opportunity of having this issue tried before he was fined by the refusal of the Court to allow his collection charges. He was, however, prepared that it should be determined here, as the materials for the determination was upon the record, and he pointed to the evidence of Kundan, Shaman Khan and Mangli Khan, which will be found in the printed book of the appellants in First Appeal No. 39 of 1897. All that these witnesses state is that Saheb Jan executed the lease in favour of Abdul Ghafur because she had some difficulty in collecting the rent and paying the Government revenue. This is hardly to be wondered at in the year 1890, seeing that a decree for sale of the property had been obtained, and the tenants must have felt conscious that the property was about to pass out of her hands. The evidence of Kundan above quoted and that of Mehdi Hasan, to be found in the respondent's printed book, page 1, together with the written statement of Musammat Saheb Jan Bibi at page 3 of the same book, satisfies me that Abdul Ghafur must have been cognizant of the fact that the decree ordering the sale of this very property had been obtained on the 4th of August, 1890, and he must also have known that the appeal, which he virtually filed on the very last day possible, was purely for the purposes of gaining time. This is a case in which he has, in defiance of the rights of another, thrust himself into an estate, and [266] not a case where he entered upon an estate in the exercise of a *bona fide* claim of right. I am not prepared to allow him charges for collection. Reliance was placed upon a passage in *Hurro Durga Chowdhrani* v. *Surut Sundari Debi* (3) at page 335, in which their Lordships give an opinion that the amount which might have been received from the land deducting the collection charges were the mesne profits of the land. It does not appear what were the facts of that case, and the probability is that the trespasser there was a trespasser in the exercise of a *bona fide* claim of right. Reliance was also placed upon *McArthur and Co.* v. *Cornwall* (4). This case, however, is a peculiar one, and the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bona fide* claim. In the present case I feel satisfied that the action of Sheikh Abdul Ghafur was purposely taken either to delay or abet the delaying of the just claims of the decree-holder.

(1) 11 I.A. 88. (2) 1 A. 518. (3) 8 C. 332. (4) L.R. (1892) A.C. 75.

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There remains a question whether or not the decree-holder is entitled to get any rents in respect of the sir land. Here the argument is that as soon as the sale took place Musammat Saheb Jan Bibi became by process of law ex-proprietary tenant of all the sir land held by her at the time when her property passed out of her possession. The decree holder could not obtain anything from Musammat Saheb Jan Bibi until he at first got a rent fixed by the Rent Court. That being the case nothing could be obtained in respect of these lands. This contention overlooks the possibilty which the law also allows of Musammat Saheb Jan Bibi and the purchaser coming to terms by mutual agreement, that is to say, upon the day of or the day after the sale. But it is added that as Musammat Saheb Jan had, prior to the lease in favour of Sheikh Abdul Ghafur, leased all sir lands to one Din Muhammad, Sheikh Abdul Ghafur could recover nothing. The lease itself refutes this contention. The clause relating to the so-called lease to Din Muhammad confirms me in the view that Din Muhammad was a mere man of straw. Abdul Ghafur in fact entered upon this sir and realized rents from the sub-tenants, as is abundantly proved by the evidence of the patwaris and kbationis. The learned vakil for the [267] appellant said in the course of his argument that he did not object to pay what his client could have realized from Din Muhammad. This contention appears to me to be entitled to no favour, and I disallow it.

There remains the last item on account of the pleader's fee. On this I hold that the respondent is entitled to pleaders's fee in the Court below upon the sum which I now determine to be the sum payable to him.

The result is that this appeal is so far allowed that the appellant is entitled to deduct from the sum awarded against him by the lower Court the amount assessed as interest on the mesne profits. In other respects, the judgment and decree of the lower Court are confirmed. Parties will get costs in this Court and the Court below in proportion to their success and failure in this Court.

[See also in connection with the second point in the case *Sharaf-ud-din Khan* v. *Fatehyab Khan* (1)—ED.]

Decree modified.

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22 A. 267 = 20 A.W.N. (1900) 80.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF LACHMAN AND ANOTHER.* [24th March, 1900.]

Criminal Procedure Code, ss. 133, 135—Order of Magistrate for removal of unlawful obstruction—Application for appointment of a jury—Effect of verdict of jury.

Where a person against whom an order has been made under s. 133 of the Code of Criminal Procedure applies for a jury under s. 135 of the Code, the applicant is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right.

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* Criminal Revision No. 114 of 1900.

(1) 18 A W.N. (1898) 23 = 20 A. 208.

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REVISIONAL CRIMINAL.

22 A. 267 = 20 A.W.N. (1900) 80.

IN this case a Magistrate of the first class issued an order to the petitioners to remove certain obstructions to an old passage for cattle. The petitioners filed a written statement and prayed for the appointment of a jury under s. 135 of the Code of Criminal Procedure to try whether the order was reasonable and proper. The petitioners themselves nominated two persons; two others were appointed by the complainants, and the Magistrate appointed an umpire. Three of the jurors and the umpire returned [263] a verdict that the passage sought to be opened was an old way for cattle, and that the order for its being re-opened was a proper one. The order was accordingly made absolute. Thereupon the petitioners applied to the High Court for revision, pleading that their action in closing the passage was taken in pursuance of a *bona fide* claim of title and ought not to have been thus decided by the Magistrate.

Mr. *C. Dillon*, for the applicants.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

JUDGMENT.

AIKMAN, J.—An order was issued to the applicants by a duly empowered Magistrate, directing them under the provisions of s. 133 of the Code of Criminal Procedure to remove an unlawful obstruction from a road which was said to be a public road, or to appear within a time fixed and move to have the order set aside. The applicants put in a petition, in which they denied that there ever was a road as asserted by the other side. Had they adhered to this position, and had the Magistrate, without considering whether the applicants' plea was or was not a *bona fide* claim of right, passed the order complained against, it would have been a case for interference in revision. But instead of adopting this course the applicants asked the Magistrate to appoint a jury, that being the third alternative given by s. 135 of the Code. The Magistrate nominated the two men named by the applicants, namely, Bachu Lal and Ganesh Prasad Narain. He also appointed two men whose names were supplied by the opposite side, and he appointed as umpire one Munshi Nazir Ali, Manager of the Dubari Estate. Four persons, including the umpire, agreed in finding that the order complained of was a reasonable and proper order. The fifth person did not for some reason join the Jury, and did not concur in the verdict. Amongst the four persons who agreed in finding that the Magistrate's order was a reasonable and proper one were Bachu Lal and Ganesh Prasad Narain, the two persons nominated by the applicants. I am asked to interfere in revision on the ground that there was a disputed question of title, and that therefore there was no jurisdiction to pass the order. On the facts set forth above I decline to do this and reject the application.

22 A. 269=20 A.W.N. (1900) 69.

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22 A. 269=20 A.W.N. (1900) 69.

[269] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

BALDEO BHARTHI (*Defendant*) *v.* BIR GIR AND OTHERS (*Plaintiffs*).* [30th March, 1900.]

Civil Procedure Code, s. 30—*Numerous persons interested similarly in the result of a suit—Permission given to some to sue on behalf of all—Permission granted after the filing of the suit.*

Held, that the permission required by s. 30 of the Code of Civil Procedure may be granted after the filing of a suit by some only of the persons interested therein. *Fernandez* v. *Rodrigues* (1), followed.

[F., 25 M. 399 (401); R., 33 C. 905=10 C.W.N. 867; 91 P. R. 1901=113 P.L.R. 1901.]

THE facts of this case sufficiently apppear from the judgment of the Court.

Munshi *Ram Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BURKITT and AIKMAN, JJ.—In this appeal it is frankly admitted for the appellant that he has no case whatever on the merits. The learned advocate who appears for him raises a technical plea founded on the following facts. The plaintiffs are mahants of a religious body who style themselves Niranjani Akhara comprising hundreds of followers and worshippers. The persons originally claiming in the plaint were the mahants or heads of this body. An objection was taken by the defendants in their written statement that the plaintiffs alone could not sue and that it was necessary that all the other members of the Akhara should join as plaintiffs. Upon this an application was made by the plaintiffs, purporting to be under s. 30 of the Code of Civil Procedure, asking that, as provided in that section, notices should issue to the various parties who, the defendants alleged, ought to be joined as plaintiffs in the suit, and that permission should be given to the plaintiffs to sue on their behalf. The permission asked for was granted, and the suit proceeded to trial and judgment. It is now contended (judgment having been given against the defendants) that the permission given after the suit had been instituted and after the defendants had been summoned, was a bad permission, and that therefore the trial was vitiated, and the decree a bad one. As to this contention it **[270]** is sufficient to refer to the case of *Fernandez* v. *Rodrigues* (1). In that case it was held by a Full Bench that the permission required by s. 30 of the Code of Civil Procedure may be given subsequently to the filing of the suit. In that decision and in the reasoning on which it was based we fully concur. As remarked by the learned Chief Justice in that case, the question is only one of adding parties. We dismiss this appeal with costs.

Appeal dismissed.

* First Appeal No. 185 of 1898 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 22nd June 1898.

(1) 21 B. 784.

22 A. 270 (F.B.) = 20 A.W.N. (1900) 59

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22 A. 270 (F.B.) = 20 A.W.N. (1900) 59.

FULL BENCH.

Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Blair.

EDWARD CASTON (*Petitioner*) *v.* L. H. CASTON (*Respondent*) AND W. T. COGDELL (*Co-Respondent*).*
[27th March, 1900.]

Act No. IV of 1869 *(Indian Divorce Act), ss.* 17, 20—*Decree for nullity of marriage passed by a District Judge—Confirmation of decree by High Court—Period for confirmation—Effect of confirmation, if made before statutory period has elapsed—Act No. 1 of* 1872 *(Indian Evidence Act), ss* 41, 44.

Section 20 of the Indian Divorce Act, No. IV of 1869, does not make the proviso in s. 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A v. B.* (1) dissented from.

Assuming the proviso in s. 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by a Court not competent to make it, within the meaning of ss. 41 and 44 of the Indian Evidence Act, 1872, and is therefore, under s. 41, conclusive proof that the marriage was null and void.

[R., 26 A. 522 = 24 A.W.N. 110 (112); 55 P.R. 1912 = 242 P.W.R. 1912.]

THIS was a reference arising out of a suit for divorce pending in the Court of the District Judge of Agra. The suit was brought by the husband as petitioner against his wife and a co-respondent. In the course of the hearing the counsel for the co-respondent put in a petition in which he represented that the suit must be dismissed, inasmuch as the petitioner had never been lawfully married to the respondent. The facts upon which that contention [271] was based were the following:—The respondent had formerly gone through a ceremony of marriage with one Elloy. On the 28th of July 1888 she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of s. 42 of Act No. XX of 1890, was a "District Judge" within the meaning of s. 3, cl. 2, of the Indian Divorce Act, for Oudh. On the 7th of December 1888, the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under s. 3, cl. 1, of the Act. On the 21st December 1888, the respondent was married to the petitioner. It was contended that under s. 20, read with the proviso in s. 17, the High Court was not competent to confirm the Judicial Commissioner's decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that therefore the decree must be treated as not having been validly confirmed; and that consequently, the subsequent marriage of the respondent with the petitioner was also illegal and could not be made the subject of a decree for dissolution of marriage. The District Judge accordingly stayed proceedings and referred to the High Court, under s. 9 of the Indian Divorce Act, 1869, the question whether, having regard to the facts just stated, the marriage sought to be dissolved was a valid marriage.

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* Matrimonial Reference No. 1 of 1900.

(1) 23 B. 460.

Mr. *W.K.Porter* (as *amicus curiæ*) for the co-respondent. I submit that the proceedings held by the High Court on the 7th December 1888, for confirmation of the decree of nullity of marriage passed by the Judicial Commissioner on the 28th July 1888, in the suit between the respondent and Elloy were null and void, and that therefore the marriage between the respondent and Elloy has never yet been annulled. Section 20 of Act No. IV of 1869 renders applicable to decrees made by a District Judge, which the Judicial Commissioner for the purposes of these proceedings was, in a suit for nullity of marriage, the provisions of s. 17, cls. 1, 2, 3 and 4. The term "clause" is nowhere defined in the Act, but, turning to s. 17, it will be seen that it consists of six paragraphs. The fifth paragraph contains a material proviso to the effect that "no decree shall be confirmed under this section **[272]** till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." This proviso is indissolubly connected with all the four preceding paragraphs, so that, if the "clause" spoken of in s. 20 means one of the paragraphs of s. 17, then "cl. 1, 2, 3 and 4" must include also the fifth paragraph of s. 17. If this be so, there is a direct statutory prohibition against the confirming of a decree for nullity of marriage passed by a District Judge until after six months from the date of the pronouncing thereof. I rely on the case of *A.* v. *B.* (1). If there has been a proceeding held within the statutory period of six months purporting to confirm such a decree, such proceeding will be of no legal validity. See the remarks made by Edge, C. J., near the commencement of the judgment in the case of *Percy* v. *Percy* (2).

Mr. *R. K. Sorabji* (as *amicus curiæ*) for the petitioner.

Section 20 of the Indian Divorce Act directs—"that the provisions of s. 17 cl. 1, 2, 3, 4 shall, *mutatis mutandis*, apply to such decrees," *i.e.*, decrees of nullity.

Section 17 contains six paragraphs. The fifth paragraph evidently applies to all the four preceding paragraphs. It can hardly be said to be a part of paragraph 4, for that paragraph makes complete sense without it; and it, in turn, is quite intelligible without reference to the particular paragraph preceding it. It, in fact, is a clause by itself, *i.e.*, it is the fifth clause of s. 17, and, as such, is not made applicable to decrees of nullity by s. 20. If punctuation be any guide to the construction to be put on Acts of the Legislature, the full stop, in the original edition of the Act, at the end of paragraph 4, would seem to indicate that the following paragraph was not intended to be read as part of the preceding clause.

In *A.* v. *B.* (1) the acting Chief Justice's reference to sections of the Criminal Procedure Code to support the argument that paragraphs 4 and 5 of s. 17 form one clause, is not so forcible as might at first sight appear, for it is quite evident that each of the provisos in the sections to which he refers, has no meaning apart from the clause immediately preceding.

[273] The Act very clearly shows that it saw no reason for delay in nullity decrees. Section 16 expressly provides that a decree for dissolution of marriage, passed by a High Court, should be *nisi*, and also provides for intervention. Section 17 provides for intervention during a suit for dissolution in the Court of a District Judge. As there are no such provisions with regard to suits for nullity, it is evident that the Legislature

(1) 23 B. 460.

(2) 18 A. 375.

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intended that there need be no delay in the confirmation of decrees of nullity.

And in reality there is no call for delay. The grounds for decrees of nullity are—(*a*) Impotency. (*b*) Consanguinity and affinity. (*c*) Lunacy and idiocy. (*d*) The existence at the time of marriage of a former husband or wife. All these are matters which are capable of direct proof at once, and are reasons which existed at the time of the marriage. The reasons for dissolution are such as arise subsequent to the marriage, and are acts of one or other party—and are less capable of proof than the reasons for nullity—and may be mere allegations, the result of collusion.

The fact that English law, at the time the Act was passed, required no delay in decrees of nullity, would have led the Legislature to have made it very clear, had they intended delay in nullity decrees in India.

Nor can it be claimed that under s. 7 of the Act, the present English Procedure should govern decrees of nullity out here; for s. 7 only applies English law where the Act is silent—but s. 20 taken with s. 17 makes it very clear what the Legislature intended with regard to delay, *viz.*, that it was necessary in regard to decrees of dissolution, but not in regard to decrees of nullity.

JUDGMENT.

STRACHEY, C.J.—This is a reference to the Court under s. 9 of the Indian Divorce Act (IV of 1869), by the District Judge of Agra, of a question arising in a suit for dissolution of marriage pending in this Court. The suit was brought by the husband as petitioner against his wife, the respondent, and against a co-respondent. In the course of the hearing, counsel for the co-respondent contended that the petition must be dismissed on the ground that the respondent had never been lawfully married to the petitioner. It appears that the respondent [274] had formerly gone through a ceremony of marriage with one Elloy. On the 28th July, 1888, she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of s. 42 of Act XX of 1890, was "a District Judge," within the meaning of s. 3, cl. 2 of the Indian Divorce Act, for Oudh. On the 7th December, 1888, the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under s. 3, cl. 1 of the Act. On the 21st December, 1888, the respondent was married to the present petitioner. The contention now raised by the counsel for the co-respondent is that under s. 20, read with the proviso in s. 17, the High Court was not competent to confirm the Judicial Commissioner's decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that, therefore, the decree must be treated as not having been validly confirmed; and that, consequently, the subsequent marriage of the respondent with the petitioner was also illegal, and cannot be made the subject of a decree for dissolution of marriage. The District Judge has accordingly stayed the proceedings pending a reference under s. 9 of the question whether, having regard to the facts just stated, the marriage sought to be dissolved was a valid marriage.

There are two questions to be considered. The first is, whether the High Court's decree of the 7th December, 1888, was in contravention of

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s. 20, read with s. 17 of the Act. The second is whether, if so, it follows that that decree was void and inoperative as a confirmation of the Judicial Commissioner's decree of the 28th July, 1888. In regard to the first point, reliance is placed on the decision of the High Court of Bombay in *A* v. *B* (1). In that case no question arose as to the effect of a confirmation made by the High Court before the time, if any, prescribed by the Divorce Act. It was a submission by a District Judge of a decree for nullity for confirmation under s. 20, upon which the petitioner applied to the High Court for immediate confirmation. The Court held that it could not confirm the decree before the expiration of six months from the **[275]** pronouncing thereof, and so rejected the application with leave to renew it when the six months' period had expired. We have first to consider whether we agree with the construction placed by the Bombay High Court upon ss. 17 and 20 of the Act. After the fullest consideration I am unable to agree with it. Section 20 provides that "every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of s. 17, cls. 1, 2, 3 and 4 shall, *mutatis mutandis*, apply to such decrees." Section 17 provides for the confirmation by the High Court of decrees for dissolution of marriage made by a District Judge. It consists of six paragraphs. The fifth paragrap is as follows :—"Provided that no decree shall be confirmed under this section till after the expiration of such time not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." If this fifth paragraph is the fifth "clause" of s. 17 within the meaning of s. 20, then s. 20 does not make it applicable to decrees of nullity of marriage made by a District Judge, and such decrees, therefore, need not wait for six months, but may be confirmed at once. If, though the fifth paragraph, it is to be regarded as the fourth "clause" of s. 17 within the meaning of s. 20, then s. 20 makes it applicable to decrees of nullity of marriage, and such decrees, like decrees for dissolution of marriage, cannot be confirmed till after the expiration of six months from the pronouncing thereof.

Now the word "clause" used in s. 20 is nowhere defined in the Act. The paragraphs into which s. 17 is divided are not numbered, and so far as the form of the section is concerned, there is nothing to suggest that one paragraph is more or less a "clause" than another, or that the fifth paragraph is not a clause. It is rather difficult to gather from the judgments in the Bombay case what the learned Judges considered to be the exact relation between the proviso and the other paragraphs of s. 17. Mr. Justice Parsons says :—"The fifth paragraph is not, in my opinion, a clause of the section. It is a proviso to the clause which precedes it, joined to it as printed in the Government of India (Legislative Department) edition 1887 of the Acts, by a colon, and must be **[276]** considered to be a part and parcel of the foregoing clauses, governing and controlling them, and not forming itself a separate clause." Mr. Justice Ranade says :—"The proviso appears as a separate paragraph, but it is clear from its context that it cannot be read as a separate clause from paragraph 4, which it qualifies. It does not, as the preceding four paragraphs, or the succeeding sixth paragraph, relate to distinct subject-matters." Mr. Justice Fulton holds that "the proviso governs and forms part of the fourth clause." Now if it is correct to say that the fifth paragraph is "a proviso to the clause which precedes it" and "forms part of" that clause and cannot be read as separate from that

(1) 23 B. 460.

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clause, it seems contradictory to say, as Mr. Justice Parsons goes on to say, that it "must be considered to be a part and parcel of the foregoing clauses governing and controlling them." Apart from this, it appears to me quite impossible to hold that the proviso merely forms part of the clause immediately preceding it. That clause relates only to cases in which the District Judge has, upon the direction of the High Court, made further inquiry or taken additional evidence. That is clearly shown by the word "thereupon." If the proviso merely formed part of that clause, it would follow that it did not apply to the far more numerous cases in which no further inquiry or additional evidence is required, and the result would be that, contrary to the obvious intention of s. 17, the vast majority of decrees for dissolution of marriage might be confirmed at once. As then the proviso clearly applies to cases not falling within the preceding clause, it cannot merely form part of that clause; and if it does not merely form part of any one of the previous clauses, but governs and controls each, there can be no reason for not regarding it as itself a clause. Upon similar reasoning to that of the Bombay High Court, it would be logical to hold that paragraph 4 also was not a separate clause, as, notwithstanding the observation of Mr. Justice Ranade to the contrary, it also does not "relate to distinct subject-matters:" it is merely consequential to cl. 3; and there is, in my opinion, more reason to hold that paragraph 4 forms part of cl. 3, and is therefore not a separate clause than to hold that the proviso forms part of cl. 4. In regard to Mr. Justice Parsons' argument based on the colon at the end of paragraph 4, the Privy [277] Council in *The Maharani of Burdwan* v. *Krishna Kamini Dasi* (1) at page 372 of the report say (in accordance with many English authorities) that "it is an error to rely on punctuation in construing Acts of the Legislature." The soundness of this principle is well illustrated in the present instance by the fact that in the original edition of the Indian Divorce Act (see that *Gazette of India*, March 6th, 1869, p. 375), there is not a colon at the end of the fourth paragraph of s. 17, but a full stop. Mr. Justice Parsons proceeds to give illustrations from the Code of Criminal Procedure in support of the proposition that if in s. 17 of the Indian Divorce Act the clauses had been numbered, the proviso would not have been numbered as a clause. When the sections of the Code to which he refers—ss. 33, 35, 48, 57 and 123—are looked at, I think it clearly appears that they establish no such proposition. In every one of those sections it is obvious from the context that the proviso was intended to apply to, and govern the immediately preceding proposition only, and that to mark this the proviso was not separately numbered. But, for the reasons which I have just given, it is impossible to hold that the proviso in s. 17 was intended to apply to and govern the fourth paragraph only. I agree with Mr. Justice Ranade, that from the point of view of considerations of expediency or public policy, such as the interests of children, the prevention of collusion, and so forth, decrees for dissolution and decrees of nullity should stand on the same footing. But the question is whether that was the view of the Legislature in 1869 when the Indian Divorce Act was passed. So far as collusion is concerned, it certainly was not. It is obvious from s. 20 that the Legislature deliberately excluded from the case of decrees of nullity the last paragraph of s. 17, authorizing intervention on the ground of collusion during the progress of a suit for divorce in the District Court.

(1) 14 C. 365.

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Further, in regard to suits tried by the High Court in its original jurisdiction, whereas under s. 16 a decree for dissolution must, in the first instance, be a decree *nisi*, not to be made absolute for at least six months, during which period any person may show cause why the decree should not be [278] made absolute by reason of collusion, or concealment of material facts; on the other hand, a decree for nullity under s. 18 is made absolute at once, and there is no provision for intervention. Again, in England in 1869 the same distinction obtained, and it was not until the passing of the Matrimonial Causes Act, 1873, that decrees for dissolution and decrees of nullity were assimilated in respect of confirmation and intervention. It cannot therefore be argued that there was in 1869 any *a priori* probability or presumption that because a decree for dissolution made by a District Judge had to wait for confirmation for six months, therefore the Legislature considered a similar delay as appropriate for the confirmation of decrees of nullity. Mr. Justice Ranade, in connection with the Matrimonial Causes Act, 1873, relies on s. 7 of the Indian Divorce Act, which provides that "subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief." In the first place, that section is "subject to the provisions contained in this Act." This shows, I think, that the principles mentioned in the section are only applicable in the absence of express provisions in the Act; they cannot be applied to construe the provisions contained in the Act, such as ss. 17 and 20, or to extend or restrict the operations of those provisions. In *Abbott* v. *Abbott* (1), Mr. Justice Macpherson held that "s. 7 of the Divorce Act applies not to points of procedure, but to the general principles and rules on which the Court is to act and give relief." Sections 17 and 20 relate to "points of procedure" only. In *A.* v. *B.* (2), it was held by Sir Charles Farran, C. J., and Mr. Justice Tyabji, that the principles and rules referred to in s. 7 were not mere rules of procedure, such as the rules which regulate appeals; and I think that the same may be said in reference to the rules which regulate confirmation, especially when it is remembered that in England there is nothing which precisely corresponds to the matrimonial jurisdiction of a District Court in India, or the [279] confirmation of the decrees of those Courts by the High Court. I understand the practice of this Court to have been in accordance with the view that s. 20 of the Divorce Act does not make the proviso in s. 17 applicable to the confirmation of decrees of nullity made by a District Judge. I see no reason to think that this practice is wrong, and I am therefore of opinion that this Court had power, on the 7th December 1888, to confirm the Judicial Commissioner's decree of nullity of the 28th July, 1888.

The next question is, assuming that by reason of the proviso in s. 17, the High Court ought not to have confirmed the Judicial Commissioner's decree until after the expiration of six months from the pronouncing thereof, does it follow that the confirmation was null and void, and the subsequent marriage of the respondent with the petitioner invalid? The District Judge in his reference assumes that the answer to this question must be in the affirmative; but he gives no reasons, and I cannot agree with him. The decree of the High Court of the 7th December, 1888,

(1) 4 B.L.R. 51.
(2) 22 B. 612.

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was a decree of the kind specified in s. 41 of the Indian Evidence Act, 1872. It was a final decree made in the exercise of matrimonial jurisdiction, declaring the present respondent not to be the wife of the then respondent. If it was the decree of "a competent Court," then, however erroneous or irregular it may have been, it is under the section conclusive proof that the respondent's previous marriage was a nullity. The effect of such conclusive proof can only be avoided by showing that the High Court was not "a competent Court" within the meaning of s. 41, or was "a Court not competent to deliver" the decree within the meaning of s. 44. Unless that can be shown, the decree is conclusive, as no fraud or collusion is suggested. The question then is, was the High Court's decree of the 7th December, 1888, "delivered by a Court not competent to deliver it?" It appears to me that this question must be answered in the negative. The High Court had undoubted jurisdiction in the suit for nullity of marriage. As regards place, it possessed the local jurisdiction defined by the Act. It possessed personal jurisdiction over the parties to that suit who were persons governed by the Divorce Act; and it had jurisdiction over the subject-matter, or the class of suit as **[280]** disclosed in the petition for declaration of nullity. It was properly seized of the case, which was duly transmitted to it by the Court of the Judicial Commissioner, and notice of the date fixed for confirmation was duly served upon the parties, of whom the petitioner was represented at the hearing by a pleader. There was no appeal to Her Majesty in Council from the decree of confirmation, as there might have been under s. 56. Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would of course include any question of procedure, such as a question of the construction of ss. 17 and 20 of the Indian Divorce Act. To illustrate this, let us suppose that at the hearing either the petitioner or the respondent had formally taken the objection that an adjournment was necessary, as under the proviso in s. 17 the decree could not be confirmed until the six months' period had expired. Suppose further that, after full argument on the point, the High Court had taken a view of s. 17 different from that expressed in the Bombay case, and had confirmed the decree of the Judicial Commissioner accordingly. In such a case surely the Court would not only be competent but bound to decide the question thus raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was "competent" to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless "competent to deliver" it. If not, what is the alternative? Could any Court, however subordinate, in any subsequent suit, at any distance of time, treat the High Court's decree as a nullity and the parties still husband and wife? For instance, could a creditor successfully sue the former husband in a Small Cause Court for the price of necessaries supplied to the wife after the decree, on the ground that the decree was void, as the High Court had taken an erroneous view of the proviso in s. 17? Again, after the High Court's decree, could either of the parties re-marrying be prosecuted for bigamy and the children of the subsequent marriage be held illegitimate? If these conclusions would be absurd where the High Court decided the question of the construction of s. 17 after argument, they must equally be so in a case **[281]** like the present. The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued by a

party or counsel. An express decision upon the construction of ss. 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in s. 17 could only be supported on the principle that wherever a decision is wrong in law, or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place, it is opposed to the language of ss. 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decrees which they refer to conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used, and it would be inaccurate to describe such decrees as constituting "conclusive proof." In the second place, if the principle were sound, any judgment might be collaterally attacked by contending that it was in violation of such rules of procedure as the rule of *res judicata* contained in s. 13 of the Code of Civil Procedure, or the rule of limitation contained in s. 4 of the Limitation Act, 1877. These rules are expressed in language as peremptory as that of the proviso in s. 17 of the Divorce Act; but it has never been held, and it could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred, or as barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. The insecurity of titles and of status arising from the adoption of such a principle is just what ss. 41 and 44 of the Evidence Act were intended to prevent. The sections recognise that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative. In the third place, the judgment of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) shows that, even for the purposes of direct attack in revision under s. 622 of the Code of Civil Procedure, a decree cannot be held to have been made without jurisdiction **[282]** or illegally, merely because it is wrong in law or alleged to be in violation of such rules of procedure as those contained in ss. 13 and 43 of the Code. If so, then *a fortiori* such a decree could not be regarded as made without jurisdiction for the purposes, not of direct but merely collateral attack in a subsequent suit. In *Sardarmal Jagonath* v. *Aranvayal Sabhapathy Moodliar* (2), a judgment-creditor sought to maintain an attachment on the property of his debtor who had previously been adjudicated an insolvent by the Madras Insolvent Court, and to resist a claim by the Official Assignee, under s. 278 of the Code, for the release of the property from attachment, on the ground that the order of adjudication and the vesting order were null and void, and gave no title to the Official Assignee, inasmuch as the original petition to the Insolvent Court disclosed no act of insolvency on which an order of adjudication could legally be passed under the Statute. I held that as the Madras Court was undoubtedly competent to deal with the petition, and was both competent and bound to consider whether the acts alleged in the petition constituted acts of insolvency within the meaning of the Statute, the order, even if wrong in law, was not one which the Madras Court was not competent to deliver within the meaning of s. 44 of the Evidence Act, and that therefore it could not be treated in collateral proceedings as null and void, but was conclusive of the insolvency and of the Official Assignee's title. At page 214 of the Report, I said :—"Once

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(1) 11 C. 6=11 I.A. 237.

(2) 21 B. 205.

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recognize that a Court is competent to decide a suit or a petition in insolvency or any other matter, and it follows that it is competent to decide all questions which arise in that matter, whether they are questions of fact or of law, and whether they appear on the face of the plaint or petition or arise subsequently. If it decides them wrongly, its decision may be subject to reversal on appeal or otherwise, but cannot be treated as a nullity." The same principle is, I think, recognized in the judgment of Mr. Justice Knox and Mr. Justice Aikman in *Durga Prasad* v. *Mahabir Prasad* (1). The English, Indian and American authorities collected in Mr. Hukm Chand's learned Treatise on the Law of *Res judicata*, Chap. VII, ss. 186, 187, 189, 190 and 192, establish that for the purpose of showing **[283]** in collateral proceedings that a judgment is void for want of jurisdiction or competency in the Court, it is not sufficient to show error in law, irregularity in practice, or departure from the provisions of the law of procedure, as for instance, by taking the proceedings at a wrong or unauthorised time. In one American case cited at p. 475, it was said, "the principle "is so well settled that it is said to be an axiom of the Law, that when a "Court has jurisdiction over the subject-matter and the parties, its judg- "ment cannot be impeached collaterally for errors of law, or irregula- "rity in practice." In another American case cited at page 476, it was said:—"Jurisdiction having been obtained, the fact that the "judgment was rendered sooner than it should have been, does "not make the judgment void; a judgment thus rendered is irregu- "lar only." The whole subject is elaborately discussed by a learned American author, Mr. Vanfleet, in his work "The Law of Colla- "teral Attack on Judicial Proceedings" (see especially Chapter VIII). In Chapter XIV, ss. 710, 711, 712 and 713, the author gives instances to show that a "premature judgment," that is, a judgment given before it ought to have been given according to the law of procedure, cannot therefore be treated in collateral proceedings as void and given by a Court without jurisdiction. "An administrator's order to sell land could not be "granted lawfully until after the final account of the personal assets had "been settled; but an order granted before that had been done is not "void. The Missouri Statute required the Court to delay the approval "of an administrator's or guardian's sale of land until the next term after "it was made, but such a sale is not void because approved at the same "term or an adjourned term."

For these reasons I would answer the reference by saying that, in our opinion, the marriage of the respondent with the petitioner was not invalid by reason of any want of jurisdiction in the High Court's decree of the 7th December, 1888.

I desire to repeat what I stated at the hearing, that the Court is much indebted to Mr. Porter and Mr. Sorabji, who appeared as *amici curiæ* for the co-respondent and the petitioner, respectively, for the assistance rendered to the Bench by their very able argument.

[284] KNOX, J.—I fully concur both in the reasons and in the conclusions arrived at by the learned Chief Justice, and have nothing further to add.

BLAIR, J.—I also entirely concur in the conclusions arrived at by the learned Chief Justice and in the reasoning on which those conclusions are based. I have only one addition to make. It is that, in my opinion, the judgment of a Bench of this Court confirming the decree for nullity of

(1) 19 A.W.N. (1899) 199.

marriage is an authority on the question of law whether for the validity of such a confirming order a delay of six months is necessary. The Bench which implicitly decided that the six months' delay imposed in cases of dissolution of marriage was not necessary in cases of nullity was a Bench similarly constituted to the present, and of co-ordinate authority; and, if not by strict law, by the comity of the Courts, the law in such a decision ought to be taken as authoritative until declared to be erroneous by a Full Bench of the Court. *A fortiori* it was not open to an inferior Court to question the decision of any Bench of this Court. It is impossible to draw the inference which appears to be suggested by the District Judge that the matter was not considered and decided by the Bench of this Court which confirmed the decree of nullity. It was necessary as a foundation for the order which it made that it should have adjudicated on that question and decided that the six months' delay was not in that case imposed by the law. Therefore on authority as well as on the reasoning set forth in detail in the learned Chief Justice's judgment I would make the same answer to this reference.

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Before Sir Arthur Strachey, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BISHESHUR DIAL AND ANOTHER (*Plaintiffs*) *v.* RAM SARUP (*Defendant*).* [3rd April, 1900.]

Act No. IV of 1882 (Transfer of Property Act), s. 82—Mortgage—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect **[285]** of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (1) followed. *Nand Kishore* v. *Raja Hariraj Singh* (2) and *Sumera Kuar* v. *Bhagwant Singh* (3), and *Chunna Lal* v. *Anandi Lal* (4), considered. *Mahabir Pershad Singh* v. *Macnaghten* (5), *Nawab Azimut Ali Khan* v. *Juwahir Singh* (6) and *Mahtab Singh* v. *Misri Lal* (7), referred to.

[F., 8 A.L.J. 227 = 10 Ind. Cas. 729 (730) = 33 A. 434 (435); 4 C.L.J. 317; 10 Ind. Cas. 235; **R.**, 26 A. 72 (75) = 23 A.W.N. (1903) 190; 31 A. 373 (374) = 6 A.L.J. 451; 26 B. 88 (92, 96, 99) = 3 Bom. L.R. 628; 6 Bom. L.R. 284 (286); 4 C.L.J. 195 (196); 8 C.L.J. 92 (93) = 12 C.W.N. 745 (746); 11 C.L.J. 639 = 15 C.W.N. 800 (804) = 6 Ind. Cas. 842; 9 Ind. Cas. 725 = 4 S.L.R. 224; 7 O.C. 307 (309); 9 O.C. 259 (264); **D.**, 28 A. 700 (705) = 3 A.L.J. 791 = A.W.N. (1906) 208; 26 B. 88 (102, 105) = 3 Bom. L.R. 628; 34 C. 13 = 4 C.L.J. 573 (576).**]**

THE facts of the case are as follows:—Balak Ram, the ancestor of the defendants, made a simple mortgage for Rs. 1,000 in favour of Jai

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* Second Appeal No. 221 of 1897 from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 22nd December, 1896, reversing a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 30th of June, 1896.

(1) 22 B. 304. (2) 20 A. 23. (3) 15 A.W.N. (1895) 1. (4) 19 A. 196.
(5) 16 C. 682. (6) 13 M.I.A. 404. (7) N.W.P.H.C.R. (1867) 88 = 2 Agra 88.

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Gopal, the plaintiffs' ancestor, on November 3rd, 1885. In 1893, the property mortgaged was advertised for sale in execution of a decree of one Kunj Behari and another. As the amount of the decree of Kunj Behari was only Rs. 1,155-1-9, only half of the property was sold by auction and it was purchased, on November 21st, 1893, by the plaintiffs for Rs. 1,500. At the time of the auction sale an application was made to notify the amount of the mortgage-money. The plaintiffs, alleging that as they had purchased only half of the property, one-half only of the mortgage-debt had been discharged, brought a suit against the defendants claiming that the remaining half of the property in the hands of the defendants was liable for the other half of the mortgage-debt, together with interest, and asking that that amount might be awarded to them and in default of payment sale of that half of the property which remained with the defendants. The defendants objected that, the plaintiffs having purchased half of the property, the whole hypothecation debt should be charged against that half.

The first Court decreed the claim for a moiety of the principal and dismissed the claim for interest. The lower appellate Court allowed the appeal of the defendants, dismissing the suit of the plaintiffs on the ground that the property purchased by them was worth, approximately, Rs. 3,000, and that as they had purchased it for Rs. 1,500 only it must be taken that they purchased it for Rs. 1,500 *plus* Rs. 1,000, the mortgage-money **[286]** due to them, and which mortgage was duly proclaimed at the time of the sale of half the property.

Pandit *Sunder Lal*, with whom was Munshi *Ram Prasad*, for the appellant.

Where several parcels of property are jointly mortgaged to secure a mortgage-debt, in the absence of a contract to the contrary each parcel is jointly and severally liable for the whole debt due to the mortgagee. If one of these parcels is purchased by a person other than the mortgagee, it may be sold in execution of the decree obtained by the mortgagee on his mortgage. As between themselves each parcel is liable to contribute rateably to the debt secured by the mortgage (*vide* s. 82 of Act IV of 1882). The parcel purchased by the stranger from the mortgagor as between it and other mortgaged parcels was liable to contribute its quota of the mortgage-debt apportioned according to the valuation of each of the mortgaged parcels and so was every other parcel mortgaged.

If the whole of the mortgaged debt was recovered by sale of the parcel purchased by the stranger, the owner of this parcel could claim contribution from the owners of the other parcels for the sum recovered from it in excess of its proper quota, under s. 82 of Act IV of 1882.

If the mortgagee himself purchased one of the parcels, as owner of the parcel purchased, he is bound to pay to himself the quota of the mortgage-debt for which the parcel in question is liable under the rule formulated in s. 82 of Act IV of 1882. In such case there is a confluence of the estates of the mortgagor and the mortgagee in the same person, and to the extent of the quota of the mortgage-debt, for which this property is liable, the mortgage is extinguished, the balance of the mortgage-debt being still recoverable by the mortgagee. The last paragraph of s. 60 of Act No. IV of 1882 is based on the same principle. Where the mortgagee himself purchases a part of the mortgaged property, the remainder of the mortgaged property might be redeemed " on payment of a proportionate part of the amount remaining due on a mortgage." These propositions are supported by the following cases :—*Nawab Azimut*

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Ali Khan v. *Jawahir Singh* (1), *Mahtab Singh* v. *Misri Lal* (2), [287] *Kesree* v. *Seth Roshan Lal* (3), *Sobha Sah* v. *Inderjeet* (4), *Nathoo Sahoo* v. *Lalah Ameer Chand* (5), *Gossyen Luchmee Narain Poori* v. *Bieram Singh* (6), *Hirdy Narain* v. *Syed Allaoollah* (7), *Bisheshar Singh* v. *Laik Singh* (8), *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (9), *Flint* v. *Howard* (10).

The Honorable Mr. Justice Aikman referred to *Maharajah Kishen Pertab Sahee Bahadoor* v. *Lalla Nund Coomar Singh Parray* (11), *Sheonath Doss* v. *Janki Prosad Singh* (12). These cases support the appellant's contention. A mortgagee purchasing a part of the mortgaged property at a public auction with the leave of the Court is exactly in the same position as a stranger purchaser.

The rule laid down in *Sumera Kuar* v. *Bhagwant Singh* (13) is based on no principle. On this rule the liability of each parcel of the property would depend :—(*a*) upon who the purchaser is at the public auction, whether he is the mortgagee himself or a stranger ; (*b*) upon the fluctuations of the market at the sale of each parcel of the mortgaged property.

In the case, say of a mortgage of ten parcels of property, the amount for which the last parcel is liable to the mortgagee, would fluctuate with the prices fetched by each of the nine other parcels and upon the purchaser of the parcel being the mortgagee or a stranger. The true rule is the one on which the last paragraph of s. 60 and s. 82 of Act IV of 1882 are based.

The principle upon which the ruling of the majority in the Full Bench in *Nand Kishore* v. *Raja Hariraj Singh* (14) is based also supports my case.

The reason for the rule I contend for is thus explained in N.W.P. H. C. Rep. 1873 at p. 150 :—

"The reason of this is obvious. The whole estate as to one portion "of the property has merged in the mortgagee, and the mortgagor, if com- "pelled to redeem by payment of the whole debt, would have to sue the "mortgagee for contribution afterwards [288] and thus by two suits "between the same parties attain the result which, under the law as "above interpreted, is now attained by one suit."

Pandit *Madan Mohan Malaviya*, for the respondent.

JUDGMENT.

BANERJI, J.—This appeal has arisen in a suit brought under s. 88 of Act No. IV of 1882 for sale upon a mortgage, dated the 3rd of November, 1885. A moiety of the mortgaged property was sold by auction on 21st of November, 1893, in execution of a simple decree for money held by other creditors of the mortgagor, and was purchased by the mortgagee subject to the above mortgage. The plaintiffs, who represent the mortgagee, seek in this suit to bring to sale the other moiety of the mortgaged property for recovery of a moiety of the amount due upon the mortgage. The Court of first instance made a decree in favour of the plaintiffs for one-half of the principal amount of the mortgage and dismissed the claim for interest. Upon the appeal of the defendant, who represents the original mortgagor, the lower appellate Court dismissed the

(1) 13 M.I.A. 404. (2) N.W.P.H.C.R. (1867) 88=2 Agra 882.
(3) 2 N.W.P.H.C.R. (1870) 4. (4) 5 N.W.P.H.C.R. (1873) 148.
(5) 15 B.L.R. 303. (6) 4 C.L.R. 294. (7) 4 C. 72.
(8) 5 A. 257. (9) 22 B. 304.
(10) L.R. (1893) Ch.D. Vol. 11, p. 54. (11) 25 W.R. 388. (12) 16 C. 132.
(13) 15 A.W.N. (1895) 1. (14) 20 A. 23.

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suit. The Court found that the market value of the moiety of the mortgaged property purchased by the mortgagee, if sold as unincumbered property, was Rs. 3,000; that the price paid for it by the mortgagee was Rs. 1,500, and that the difference between those two sums was equal to the amount due upon the mortgage. The Court held that the purchase by the mortgagee had thus the effect of fully discharging the mortgage, and that the plaintiffs' claim was not therefore maintainable. The correctness of this conclusion has been challenged in this second appeal, and it is contended that the purchase of a moiety of the mortgaged property by the mortgagee extinguished the mortgage debt to the extent of one-half only, and not in its entirety.

The view of the Court below is supported by the ruling in *Sumera Kuar* v. *Bhagwant Singh* (1). Having regard to that ruling and certain observations contained in the judgments of my brother Blair and myself in the Full Bench case of *Nand Kishore* v. *Raja Hariraj Singh* (2), this case has been referred to a Full Bench.

In some of the earlier cases decided by this Court, it was held that the mere fact of the mortgagee buying a part of the mortgaged **[289]** property subject to his mortgage had the effect of totally extinguishing the mortgage. This view was dissented from in the Full Bench ruling referred to above, and it was held that such a purchase "has not necessarily the effect of fully discharging the mortgage." To what extent the mortgage should be held to have been discharged by the purchase was not decided in that case. That question, however, arises in this appeal, and is the only question to be determined by the Full Bench.

It is urged on behalf of the appellants that the price paid by the mortgagee for the portion of the mortgaged property purchased by him is not, in the absence of fraud, a material factor in determining the extent of the mortgage debt which is extinguished by the purchase, and that in each case the amount by which the mortgage debt is reduced, is that portion of it for which the property purchased was proportionately liable. After careful consideration I am of opinion that this contention is valid.

When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. This is the rule enunciated in s. 82 of the Transfer of Property Act, 1882. The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability, *inter se*, is, as stated above, proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate, and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount **[290]** of the mortgage

(1) 15 A.W.N. (1895) 1.

(2) 20 A. 23.

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debt. For instance, if three parcels of property, each of the value of Rs. 500, are mortgaged to secure a debt of Rs. 300, each parcel is liable for Rs. 100. If one of them be purchased at auction for Rs. 50 and the purchaser be compelled to discharge the mortgage, he would be entitled to claim from the mortgagor or purchasers of the other two parcels Rs. 200, the amount for which those parcels were liable, although he himself benefited immensely by his purchase. The above is no doubt an extreme case, but it is not one which is wholly inconceivable. In such a case the price paid by the purchaser is never taken into account, and it has never been held that any equities exist as between him and the mortgagor or the purchasers of the remainder of the mortgaged property. Upon this point there is no controversy.

Does the case become different if the purchaser of a part of the mortgaged property be the mortgagee himself? When he buys a portion of that property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, become vested in the same person, and the result is that a part of the mortgage debt is wiped out by reason of this fusion of interests, and the balance only is recoverable from the remainder of the mortgaged property. It is in consequence of this confluence of interests and the discharge of a portion of the mortgage debt, that upon the mortgagee purchasing a part of the property, the integrity of the mortgage is broken up, and the mortgagee is not allowed to recover the whole amount of the debt from the remainder of the property. As has been already stated each parcel of the mortgaged property is liable for the debt rateably to its value. Therefore when the rights of the mortgagee and the mortgagor become vested in the same person, only so much of the debt can be held to have been discharged as was proportionate to the value of the property in respect of which the confluence of rights takes place. There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, all that the mortgagor or other person interested in the remainder of the mortgaged property can claim is, that he should not be placed in **[291]** a worse position than that in which he would have been had the purchase been made by an outsider; that is to say, that the property in his hands should not be rendered liable for a larger amount than the sum with which it would have been chargeable in the case of a purchase by a stranger. In the latter case, if the mortgagor or other owner were compelled to discharge the whole of the debt he would be entitled to contribution from the purchaser rateably to the value of the property purchased by him. In the case of a purchase by the mortgagee there appears to be no reason why the mortgagor or his representative should be allowed anything beyond a right to have his liability reduced to the same extent as in the case of a purchase by an outsider, and this seems to be the only equity to which he is entitled. It has been held by the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (1), that a mortgagee who buys the mortgaged property at auction with the leave of the Court is not a trustee for the mortgagor, and is in the same position as any independent purchaser. As against the mortgagee, therefore, no higher equity exists in this respect in favour of the mortgagor than that which exists against any other purchaser. These considerations were overlooked in the case of *Sumera* v. *Bhagwant* (2), and in my judgments in *Chunna Lal*

(1) 16 C. 682.

(2) 15 A.W.N. (1895) 1.

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v. *Anandi Lal* (1), and *Nand Kishore* v. *Raja Hariraj Singh* (2). When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property for a grossly inadequate value, it no doubt appears at first sight that an injury has been done to the mortgagor, and that the mortgagee has taken advantage of his position. That was the case in *Sumera* v. *Bhagwant* (3). But where no fraud has been perpetrated and no undue advantage has been taken by the mortgagee, and he has purchased the equity of redemption in good faith, like any other independent purchaser, there is obviously no reason for placing him in a worse position than any other purchaser.

In *Nawab Azimut Ali Khan* v. *Jawahir Singh* (4), where the mortgagee had purchased a part of the mortgaged property, their Lordships of the Privy Council observed that the proportion of the debt chargeable on each village ought to vary [292] according to the actual value of the village, and the plaintiff in that case was allowed to redeem the village Hosseinpore purchased by him upon payment of the proportion of the mortgage debt thus chargeable on his village. The actual value paid by the mortgagee for the villages purchased by him was not taken into account.

In *Mahtab Singh* v. *Misri Lal* (5), this Court held in a case similar to the case cited above that each purchaser, including the mortgagee, had "bought subject to a proportionate share of the "burden," and that the plaintiff was entitled to redeem the village purchased by him on payment of such portion of the mortgage debt "as is proportionate to the relative value of the mortgaged "properties."

The case which most resembles the present is that of *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (6). In that case three properties were mortgaged to the plaintiff for Rs. 90. In execution of a simple decree for money the equity of redemption in one of those properties, namely, a house, was sold by auction and purchased by the plaintiff-mortgagee for Rs. 2-2. He sold it to one Francis for Rs. 100, and subsequently brought his suit to recover Rs. 90, the whole of his mortgage money, by sale of the two remaining properties. The suit was dismissed by the Court of first instance, on the ground that the plaintiff had realized Rs. 100 by the sale of the property purchased by him, and that therefore nothing was due. Farran, C. J., held "that the plaintiff, when he purchased the equity of redemption in "the house, purchased it subject to its due proportion of the mortgage "debt. That portion of the mortgage debt thus ceased to exist, and the "plaintiff's right as mortgagee to recover the money secured by his "mortgage was reduced to that extent. What proportion of the mort-"gage debt was thus wiped out depends upon the proportion of the value "of the house to the value of the rest of the mortgaged properties." This "is an instructive case, and shows that the price paid by the mortgagee is not to be taken into account in determining the extent of the mortgage debt discharged by the purchase made by the mortgagee. Upon further consideration, I am of opinion that the rule laid down by the Bombay [293] High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the

(1) 19 A. 196. (2) 20 A. 23. (3) 15 A.W.N. (1895) 1.
(4) 13 M.I.A. 404. (5) N. W.P.H. C.R. (1867) 88. (6) 22 B. 304.

value of the property purchased bears to the value of the whole of the property comprised in the mortgage. It is not necessary to say in this case whether the same result will ensue if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction.

The learned vakil for the respondent referred to the rulings in *Gokaldas* v. *Puran Mal* (1), and *Hart* v. *Tara Prasanna* (2), and s. 90 of the Indian Trusts Act. The first case has no bearing upon the question before us, and, having regard to the decision of the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (3), the argument based on the other ruling and on s. 90 cannot prevail.

As the mortgagee in this case purchased a moiety of the mortgaged property, the mortgage debt became extinct to the extent of a moiety only, and the plaintiffs were entitled to recover the other moiety by the sale of the remainder of the mortgaged property. The Court of first instance granted them a decree for a half of the principal mortgage amount. The plaintiffs submitted to that decree and did not appeal. They are not therefore entitled to a decree for a larger amount than that decreed to them by the first Court. The result is that I would allow this appeal with costs, set aside the decree of the Court below with costs, and restore the decree of the Court of first instance.

STRACHEY, C. J.—I concur in the judgment of my brother Banerji.

KNOX, J.—I also concur.

BLAIR, J.—I also concur.

BURKITT, J.—I am of the same opinion.

AIKMAN, J.—I also concur in the judgment of my brother Banerji.

Appeal decreed.

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[294] APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

ISHRI PRASAD SINGH (*Plaintiff*) *v.* LALLI JAS KUNWAR AND ANOTHER (*Defendants*).*

LALLI JAS KUNWAR AND ANOTHER (*Defendants*) *v.* ISHRI PRASAD SINGH (*Plaintiff*).* [3rd April, 1900.]

Act No. I of 1872 (*Indian Evidence Act*), *ss.* 65 *and* 90—*Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No. LII of* 1803, *s.* 37—*Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.*

Held that the presumption allowed by s. 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (4), followed.

The procedure prescribed by Regulation No. LII of 1803 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order that the disabilities incident to the status of a disqualified proprietor may ensue. *Mohummud Zahoor Ali Khan* v. *Mussumat Thakoorani Rutta Koer* (5), referred to. It is incumbent therefore upon one seeking to dispute

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* First Appeal Nos. 129 and 127 of 1898 from a decree of Maulvi Muhammad Mazhar Hasan, Subordinate Judge of Mainpuri, dated the 21st February 1898.

(1) 10 C. 1035. (2) 11 C. 718. (3) 16 C. 682.
(4) 5 C. 866 = 6 C.L.R. 199. (5) 11 M.I.A. 468.

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an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.

[F., 12 Ind. Cas. 453=21 M.L.J. 981 (982); R., 8 Ind. Cas. 353 (354)=93 P.R. 1910=186 P.L.R. 1910=128 P.W.R. 1910; 7 M.L.T. 117.]

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant in No. 127, respondent in No. 129.

Mr. *D. N. Banerji*, Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the respondents in No. 127, appellants in No. 129.

JUDGMENT.

STRACHEY, C.J., and BANERJI, J.—The plaintiff in this case claiming to be the nearest reversioner to the estate of Thakur Chaturbhuj Singh, deceased, sues for declaratory relief in respect of certain acts done by Thakurain Mahtab Kunwar, widow of **[295]** Chaturbhuj, by Lalli Jas Kunwar, his daughter, and by the second defendant Thakur Umrao Singh. The acts complained of are :—

(1) a transfer made about the year 1850 by the widow Mahtab Kunwar of two villages belonging to the Kotla estate left by Chaturbhuj, namely, Ajaibpur Rakhauli and Ahmadpur Madha, in favour of her daughter, the defendant Lalli Jas Kunwar;

(2) a transfer made by Lalli Jas Kunwar on the 18th February, 1876, during the lifetime of Mahtab Kunwar, of the same two villages, in favour of Mohinder Kunwar, the deceased wife of the second defendant, who is in possession of them by inheritance from her;

(3) an entry obtained by Lalli Jas Kunwar after Mahtab Kunwar's death in April, 1889, of her name in the revenue records in respect of two other villages of the Kotla estate, namely, Khairgarh and Noner, upon the allegation that they formed part of her *stridhan*;

(4) a denial by the defendants in their written statements filed on the 23rd August, 1892, in a suit brought by the present plaintiff in the Court of the Subordinate Judge of Agra, of the plaintiff's title as next reversionary heir of Chatarbhuj to succeed to the Kotla estate as absolute owner after the death of Lalli Jas Kunwar.

The reliefs claimed by the plaintiff are :—

(1) A declaration that he is the next reversionary heir of Chaturbhuj Singh in respect of the whole Kotla estate.

(2) A declaration that the transfer by Mahtab Kunwar in favour of Lalli Jas Kunwar of Ajaibpur Rakhauli and Ahmadpur Madha was void and inoperative as against the plaintiff beyond the life-time of Lalli Jas Kunwar.

(4) A declaration that the four villages named in the plaint are not the *stridhan* of Lalli Jas Kunwar, and that she has no right to make a transfer of them beyond her life-interest.

The defendants raised various pleas, for the most part of a technical character, and to two of which it is unnecessary to refer. Their main pleas were (1) that the plaintiff was not the nearest reversionary heir of Chaturbhuj Singh, and was therefore not entitled to bring the suit; (2) that, in any event, the first prayer of the plaint for declaration of his reversionary title was **[296]** not maintainable; (3) that the suit was barred by limitation; and (4) that the four villages named in the plaint formed part of the defendant Lalli Jas Kunwar's *stridhan*.

The Court below has held, first, that the first prayer of the plaint must be refused on the ground that no suit would lie for such a declaration as prayed therein; secondly, that the second prayer of the plaint was barred by art. 125 of the second schedule of the Limitation Act, 1877; thirdly, that the villages Ajaibpur Rakhauli and Ahmadpur Madha were given to Lalli Jas Kunwar on her marriage as dowry, and therefore constitute her *stridhan*; fourthly, that as regards all the properties left by Chaturbhuj Singh other than Ahmadpur Madha and Ajaibpur Rakhauli, the plaintiff was entitled to the declaration claimed in the third prayer of the plaint, namely, that Lalli Jas Kunwar had only a life-interest and not any alienable absolute interest. The rest of the claim was dismissed. From this decision both parties have appealed, and we have heard the two appeals together. First appeal No. 127 of 1898 is the appeal of the plaintiff. First appeal No. 129 of 1898 is the appeal of the defendants. Both appeals may be disposed of in one judgment.

As regards the first point, the Court below apparently holds that the plaintiff has, during the lifetime of Lalli Jas Kunwar, only a contingent interest as reversioner, and not a vested interest sufficient to support a suit for a declaration under s. 42 of the Specific Relief Act, 1877. In support of this view the Subordinate Judge refers to *Hunsbutti Kerain* v. *Ishri Dut Koer* (1) and *Greeman Singh* v. *Wahari Lall Singh* (2). In the view which we take of the case, it is not necessary for us to decide or discuss this point. It is difficult to say upon what grounds the Subordinate Judge has made the declaration contained in the decree as to the villages left by Chaturbhuj Singh other than those mentioned in the plaint. It is clear from the plaint that those other villages were only included in the suit in reference to the first prayer which the Court below has disallowed. No cause of action is disclosed by the plaint in reference to those other villages either as regards the alienations mentioned in **[297]** paragraphs (4) and (6) (as to which the suit has been dismissed as time-barred), or as regards the allegation as to *stridhan*, the plaintiff not alleging that Lalli Jas Kunwar ever claimed as her *stridhan* any villages besides the villages named in the plaint or in paragraph (18) of the written statement. Upon the view taken by the Subordinate Judge it appears to us that he ought to have dismissed the suit, except to the extent of a declaration that the villages Khairgarh and Noner were not the *stridhan* of Lalli Jas Kunwar.

In the argument of these appeals, as in the Court below, the main question discussed has been whether the plaintiff is the nearest reversioner to the estate of Chaturbhuj Singh so as to entitle him to maintain a declaratory suit impeaching the acts of the widow and the daughter. There can be no question, having regard to the rulings of their Lordships of the Privy Council, that if he cannot show this the whole suit must fail. In the plaint he claims that he stands in that relation to Chaturbhuj Singh by virtue of two adoptions,—first, an adoption of his father Har Narain Singh, secondly, an adoption of Chaturbhuj Singh himself. He further contends that, even if neither of those adoptions is held proved, he is still, with reference to the genealogical table annexed to the plaint, the nearest reversioner to the estate of Chaturbhuj Singh.

In reply to the suit, the defendants in their written statements deny both adoptions, deny the genealogical table asserted by the plaintiff, and set up a different genealogical table of their own. It is, of course, for the

(1) 5 C. 512=4 C.L R. 511.

(2) 8 C. 12.

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plaintiff to prove the adoptions and the genealogical table upon which his title to sue as nearest reversioner is based.

To explain the plaintiff's case as to the relation in which he stands to Chaturbhuj Singh, we may for the present assume the correctness of the genealogical table found to be correct by the Subordinate Judge, and printed in his judgment at page 45 of the paper book, and which does not entirely adopt either the pedigree set up by the plaintiff or that set up by the defendants. According to the plaintiff, Chaturbhuj Singh, who was the son of Bhup Singh in Harkishen Das' branch of the family, was adopted to Sundar Singh in the branch of Raja Ram, brother of [298] Harkishen Das, by Sundar Singh's widow, at Kunwar, about the year 1831. He further alleges that his own father, Har Narain Singh, also in the branch of Harkishen Das, was adopted to Bhagwan Singh, a member of Raja Ram's branch, by Bhagwan Singh's widow, Dhan Kunwar, in 1829. If both these adoptions are proved, the result would be to make Chaturbhuj Singh and Har Narain Singh, the grandson and great-grandson respectively of two brothers Kishen Singh and Jawahir Singh, grandsons of Raja Ram, brother of Harkishen Das. As there are admittedly no other persons living who are descended from Kishen Singh or Jawahir Singh it follows that the plaintiff, as the son of Har Narain Singh, would be the nearest reversioner to Chaturbhuj Singh, whose widow, Mahtab Kunwar, made the alienation first complained of in the plaint, and whose daughter, the first defendant, Lali Jas Kunwar, is in possession of the bulk of the estate. As already stated, however, the plaintiff further contends that even if neither adoption is proved, there would still be no nearer reversioner than himself to Chaturbhuj Singh, and that, therefore, his declaratory suit would still be maintainable. He seeks to prove this by the genealogical table annexed to the plaint. One of the respects in which that table differs from the table accepted as correct by the Subordinate Judge is that the plaintiff denies that Pahar Singh was a son of Harkishen Das, and consequently denies the relationship of Chaturbhuj Singh of all the descendants of Pahar Singh. If, as the defendants contend, and as the Subordinate Judge finds, Pahar Singh was a son of Harkishen Das, then admittedly there are several persons who would be nearer reversioners than the plaintiff to Chaturbhuj Singh; for instance, the grandsons of Arjun Singh, son of Pahar Singh, and the second defendant Umrao Singh, who is the great-grandson of Pahar Singh's son Madho Singh.

The defendants contend that Har Narain was descended, not as alleged by the plaintiff, from Mandhata, a son of Harkishen Das, but from Sartaj Singh, an uncle of Harkishen Das, and that Mandhata died childless. The result of that would be that the plaintiff would be much more distantly related to Chaturbhuj Singh than several other persons. We need only say that the Court below has found that Har Narain was, as the plaintiff [299] asserts, descended from Mandhata, and that as to this we see no reason to disagree with the decision which has hardly been disputed in the appeal before us. The defendants also contend that Harkishen Das had a brother Hansram, whose descendants would also be nearer to Chaturbhuj Singh than the plaintiff. In the view which we take of the case, it is not necessary for us to decide that point.

The result of these opposing contentions may be shortly stated thus. If the plaintiff succeeds in proving both the adoptions alleged by him, he establishes his position as the nearest reversioner to Chaturbhuj Singh. If he proves the adoption of Har Narain Singh only, the suit must fail, as in

that case the plaintiff, having passed by reason of the adoption out of Harkishen's branch into that of Raja Ram, would not be the nearest reversioner to Chaturbhuj Singh in the presence of other persons admittedly living in the branch of Harkishen Das himself to which Chaturbhuj belonged. If the plaintiff proves the adoption of Chaturbhuj only, he can only succeed if Pahar Singh was not a son of Harkishen Das, for, if he was, then, as stated above, several of the descendants of Pahar Singh would be nearer to Chaturbhuj Singh than the plaintiff. If the plaintiff proves neither of the adoptions, then he can only succeed by proving that Pahar Singh was not a son of Harkishen Das.

We will consider in turn each of the two alleged adoptions—and first that of Har Narain Singh. The Subordinate Judge, after a very full statement of the evidence bearing on that adoption, came to the conclusion that it was proved to have taken place in fact, and also that it was a valid adoption in law. So far as the fact of the adoption is concerned, we have arrived at the conclusion that we ought not to dissent from the Subordinate Judge's finding, which is confirmed by materials which were not before the Court below. The earliest documents bearing on the question are a group of three purporting to date from about the time of adoption itself. The first is an agreement purporting to be executed by Dhan Kunwar, and bearing her seal, on the 2nd December, 1829. It states that she has for the preservation of the estate adopted as her son Har Narain, son of Sarup Singh, and adds that the document has been written by way of an **[300]** agreement and of a deed, of adoption. The second is a document, dated 3rd December, 1829, by which Sarup Singh, the natural father of Har Narain Singh, states that he has of his own accord given his son Har Narain Singh to Dhan Kunwar, and that she of her own free will adopted the said son as her own, and made him a substitute for a real son in connection with the estate of her deceased husband. The third is an agreement, dated the 11th December, 1829, purporting to be executed by Ganga Kunwar, widow of a cousin of Bhagwan Singh, the husband of Dhan Kunwar, setting forth the adoption of Har Narain Singh, and stating in substance that she also has put Har Narain Singh in possession of the entire estate in her possession and made him owner thereof. The two first documents bear the sale of a Kazi, and the attestations of numerous witnesses, zamindars and others. All three documents obviously are of great age, and it has not been disputed that they were produced from proper custody. Apart from the general evidence contesting the adoption of Har Narain Singh, no serious argument was addressed to us to show that these documents were not genuine. We agree with the Subordinate Judge in accepting them as genuine, and we base this conclusion partly on the absence of suspicious circumstances in the documents themselves, and partly on the corroboration which, in our opinion, they derive from other documents to which we shall presently refer. The first piece of corroborative evidence is an order passed by the Collector of the Shahabad District, on the 3rd December, 1829, that is, on the day following that on which the instrument executed by Dhan Kunwar purports to have been made. The order recites that Dhan Kunwar, widow of Thakur Bhagwan Singh, intends to adopt the son of Thakur Sarup Singh, and that as the ilaka is, by sanction of the Commissioner, under the Court of Wards, she had, under s. 37 of Regulation No. LII of 1803, no authority to make the adoption without the sanction of the Court of Wards. The order goes on to direct that a copy of

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the proceedings should be sent to the Magistrate of the Etawah District, in which the lady lived, asking him to "prevent the said Musammat "from adopting the son of the Thakur aforesaid; that a parwana be sent "to the Thakurain aforesaid containing the aforesaid particulars; and "[301] that a parwana be sent also to Maulvi Muhammad Azam, Kazi of "pargana Ferozabad, preventing him from affixing the seal to the *hibanama* "(deed of gift, &c.) at the request of the aforesaid "Musammat." At the hearing of the appeal we admitted this document in evidence on the application of the defendants, under s. 568 of the Code for the reasons stated in our order of admission. What authority the Collector had to ask the Magistrate to prevent the adoption, or to forbid the Kazi to affix the seal, it would be difficult to say, and it is unnecessary to discuss. The Collector, as an Officer of the Court of Wards, would no doubt consider it his official duty to warn Dhan Kunwar against making an adoption without the sanction of the Court of Wards, which he believed to be required. The document is of importance as showing that the Collector then treated Dhan Kunwar as contemplating the immediate adoption of Har Narain Singh. There is on the record a document, dated 13th December, 1829, described as "application of Jugul Kishore, "Sazawal, tahsil Narkhi, etc.," upon which there is an order dated the 17th December, 1829, by the Collector, directing that a letter be written to the members of the Court of Wards. The report sets forth, upon hearsay information, that Dhan Kunwar had adopted a boy whose description obviously answers to Har Narain Singh, but we have discarded the document as evidence of the facts therein stated, partly because the information is merely hearsay and partly because there is nothing to show that the report was made by the Sazawal in the execution of any official duty, but we think it may be referred to as explaining the official order of the Collector, which shows that the Collector on the 17th December, 1829, reported to the Court of Wards, who would be interested in any such adoption, information to the effect that it had actually taken place. At the hearing of the appeals we also admitted in evidence, for reasons stated in our order of admission, an order of the Collector, dated 3rd July, 1830. This is described as a "Precept to Thakur Sarup Singh, ancestor of Har Narain "Singh, adopted son of Musammat Dhan Kunwar, zamindar of Katgi, pargana Ferozabad." The order reminds Sarup Singh (who, it will be remembered, was the natural father of Har Narain Singh), that at the time when Dhan [302] Kunwar adopted Har Narain Singh and made a gift of her zamindari property in his favour, an agreement had been made with Sarup Singh for the satisfaction of debts due to creditors. It calls upon him to submit an explanation shewing why he had not performed the promise on which he had given his son in adoption to the said Musammat. We have also admitted in evidence, under s. 568 of the Code, an official letter addressed by the Commissioner of the Agra Division to the Sadr Board of Revenue, dated the 16th of February, 1831, to which we shall more fully refer presently. In that report Har Narain is referred to as the boy "whom the Thakurain had adopted "without authority and consequently illegally, after the estate had been "taken under the Court of Wards." Lastly, there is a petition by Dhan Kunwar to the Collector of Pharah, dated the 28th September, 1831, dealing principally with her disputes with Sumer Singh—disputes to which we need not at present more particularly refer. In that petition Musammat Dhan Kunwar sets forth that she had adopted Har Narain Singh from Sarup Singh "in 1829 by going through the adoption

"ceremonies according to Hindu law." To this extent we think that the statements in the petition may be accepted as true, more especially as the petition refers to official applications and proceedings in which the adoption was asserted, which, owing to lapse of time and destruction of records during the Mutiny, are not now forthcoming, but which Dhan Kunwar in 1829 would hardly have ventured to refer to if they had not been in existence. On behalf of the defendants it was objected that this document was not properly proved to have been executed by Dhan Kunwar. The document is a certified copy purporting to be a copy of an original petition of Dhan Kunwar, dated the 28th September 1831. The copy purports to have been granted on the 20th October 1831. It was filed in the Court below on behalf of the plaintiff. It is common knowledge, of which we are entitled to take notice, that the original records of the Agra Division were destroyed during the Mutiny of 1857, and therefore under s. 56, cl. (*c*) of the Indian Evidence Act, the copy is admissible as secondary evidence of the original. Under s. 90 we may presume that the document was duly executed by Musammat **[303]** Dhan Kunwar. To this it has been objected that s. 90 does not apply so as to warrant the presumption in question, where the original document is not produced in Court, and in support of this argument great stress is laid upon the word "produced" in the section. In *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1) Mr. Justice Wilson applied the presumption of s. 90 to a copy of a document which had been lost and was more than 30 years old, and in reference to the argument based on the words "is produced," said, "I do not think the use of these "words limits the operation of the section to cases in which the document "is actually produced in Court". Although the matter is not free from doubt, we think that we should follow this ruling, and under s. 90 of the Evidence Act, presume the genuineness of the petition of Musammat Dhan Kunwar. We have excluded from consideration a document referred to by the Subordinate Judge, which purports to be a written statement, dated the 9th of November, 1885, filed by Har Narain Singh as defendant in a suit brought in the Court of the Munsif of Agra, by one Parasram Singh against Mahtab Kunwar, Har Narain Singh and others. That written statement has not been proved to our satisfaction as a written statement made by the Har Narain Singh whose adoption is in question in this case.

The documents which we have just considered strongly corroborate the documents of 1829 in regard to the adoption of Har Narain Singh, and satisfy us that he was in fact adopted by Dhan Kunwar in December, 1829. The next question to be considered is whether that adoption was a valid adoption in law. This question has been discussed from two different points of view. In the first place, it was contended on behalf of the defendants that at the time of the alleged adoption, the estate left by Bhagwan Singh was under the management of the Court of Wards; that by s. 37 of Regulation No. LII of 1803, it was enacted that "no adoption by dis-"qualified landholders shall be deemed valid without the previous consent "of the Court of Wards, on application made to them through the Collector"; and that inasmuch as there is no evidence of any sanction having **[304]** been given by the Court of Wards to the adoption of Har Narain Singh by Dhan Kunwar (who, it is contended, was a "disqualified "landholder" within the meaning of the Regulation), that adoption, if it

(1) 5 C. 886 = 6 C.L.R. 199.

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took place, was invalid. The Court of Wards spoken of in s. 37 is shown by s. 2 to be the Board of Revenue. Now in regard to this argument, we are satisfied that at the time of the adoption the estate then held by Dhan Kunwar was, as a matter of fact, in the possession of the Court of Wards. We think this is the only possible inference from the Collector, Mr. Deeds' orders of the 3rd and 17th December 1829, from his precept to Sarup Singh of the 3rd July 1830, and from the Commissioner's letter to the Board of Revenue of the 16th February 1831. The same official documents further show, in our opinion, that the adoption was not sanctioned by the Board of Revenue. But the further question arises whether the possession and management of the estate was not only in fact, but also in accordance with law, assumed by the Court of Wards. Unless that question is answered in the affirmative, s. 37 of the Regulation would not apply, and the adoption would not be invalidated by the absence of such sanction Now the legal requisites of an assumption by the Court of Wards of the possession and management of an estate are set forth in the Regulation. The landholder must be a "disqualified landholder" within the meaning of s. 3, and under ss. 8 and 9, where the landholder is a female, the procedure prescribed is for the Board of Revenue, upon the report of the Collector, to take the estate under their care, and to report the circumstance to the Governor-General in Council, to whom the power is reserved of exempting any female proprietor from the operation of the Regulation. In *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (1) decided under the Regulation, their Lordships of the Privy Council held that "the provisions of such a law should be strictly pursued in order "to effect the disqualification of any particular person," and that it must not be assumed that a female proprietor was necessarily a disqualified person from the estate being in fact under the charge of the Court of Wards. They added, "under this Regulation the Collector is to report a "**[305]** female proprietor as disqualified to the Board of Revenue, and the "Board of Revenue, in their capacity of a Court of Wards, are to report "that they have taken the estate under their charge to the Governor-"General in Council, so as to enable him to exercise his discretion of "exempting her from the operation of the Regulation. Nor are these "mere forms. They are necessary preliminaries to the disqualification "of a female." Their Lordships comment on the fact that the decisions of the Courts below were based exclusively on the ground that the estate was in the custody of the Court of Wards, and that "the "question whether any formal report was ever made of Rattan Koer "being a disqualified female was left wholly unnoticed." In that case their Lordships agreed with the Courts below in finding that, except for the period of the Mutiny, the Court of Wards was continuously in the actual possession of the estate from the year 1811 to August 1862. We think that it follows from this decision that it rests upon one seeking to invalidate an adoption by reason of the provisions of s. 37 to give strict proof, not only that the estate was in the actual possession of the Court of Wards, but that the necessary legal preliminaries to the disqualification of the female proprietor had regularly taken place. Now upon this point the letter of the Board of Revenue to the Commissioner of the Agra Division, dated the 1st March 1831, is of the utmost importance. In that letter the Board state, "as the property has been "managed for 10 years by the Thakurain, and it was not proposed to place

(1) 11 M.I.A. 468.

"it under the Court of Wards until her affairs had fallen into such a state "of confusion as to render it improbable that the interference of the Court "could be productive of any good effect, the Board consider the order "passed by the late Commissioner, under date the 25th June 1829, to "have been both injudicious and irregular,—injudicious for the reasons "above stated, and irregular inasmuch as the Commissioner was not com-"petent of his own authority to place the estate under the management of "the Court of Wards." Again: "Under all circumstances it appears to "the Board that any further interference in the affairs of the estate by the "officers of Government ought to be carefully avoided, and that the orders "of the late Commissioner should be considered of no effect, as having "**[306]** been issued without due authority." That statement made by the Board of Revenue—the Court of Wards itself—shows that the estate was taken under the management of the Court of Wards irregularly and without proper authority, and in disregard of the provisions of the Regulation which the Privy Council held must be strictly pursued. Against this it has been contended on behalf of the defendants that notwithstanding this statement, the Commissioner had, independently of the Board of Revenue, authority to take the estate under the management of the Court of Wards. That contention is based upon the provisions of Regulation I of 1829, constituting Commissioners of Revenue in certain specified divisions, including Shahabad, and upon s. 4, which provides that "the said Commissioners shall, until otherwise specifically "provided by law, possess and exercise within the several districts com-"prised in their respective divisions, the powers and authority now "vested in the Board of Revenue and Court of Wards, subject to the "control and direction of a Sadr or Head Board to be ordinarily sta-"tioned at the Presidency, unless otherwise directed by the Governor-"General in Council and to such restrictions and provisions as the "Governor-General in Council or the said Board with his authority or "sanction may prescribe." That section expressly reserves the control and direction of the Board of Revenue as Court of Wards, and subjects the action of the Commissioners to restrictions and provisions prescribed by the Board of Revenue. The letter of the Board to which we have just referred is an explicit statement by the controlling authority that the Commissioner ought not to have taken the estate under management without reference to them, and that such taking over was in fact contrary to their intention. It is impossible after the lapse of so many years to ascertain what were the directions prescribed by the Sadr Board of Revenue to its subordinate in connection with estates under the Court of Wards. But it must, we think, be presumed that the Board, in 1831, correctly interpreted the relation in which it stood to the Commissioner, aud had sufficient grounds for condemning as it did the assumption of the management of Dhan Kunwar's estate as unauthorized and illegal. At all events so much doubt is thrown **[307]** upon the matter that, particularly in the absence of further evidence as to the circumstances in which the Commissioner acted, we think it impossible to hold that the proof required by the Privy Council in such matters has been given in this case. That being so, the defendants have, in our opinion, failed to establish that the adoption of Har Narain Singh was invalid by reason of the provisions of s. 37 of Regulation LII of 1803, and it is unnecessary for us to consider the argument addressed to us by Pandit Moti Lal as to the construction and effect of that section assuming it to apply. So far therefore as the Court of Wards is concerned, we see no

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reason to doubt the validity of the adoption of Har Narain Singh by Dhan Kunwar in 1829.

[Only so much of the judgment is here printed as deals with the points referred to in the head-note. After discussing several other questions raised in the appeal, their Lordships finally dismissed the plaintiff's suit, holding that he had failed to establish the position necessary for his success.—Ed.]

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22 A. 307=20 A.W.N. (1900) 73.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

MUHAMMAD ASKARI (*Plaintiff*) *v.* RADHE RAM SINGH AND OTHERS (*Defendants*).* [5th April, 1900.]

Act No. IX of 1872 (Indian Contract Act), s. 43—Joint contract—Right of promisee to sue any or all of the joint promisors—Right of joint promisors to be joined as defendants—Decree against some only of several joint promisors—Effects of such decree—Civil Procedure Code, s. 29—Hindu law—Joint Hindu family—Position of managing member—Suit against managing member—Subsequent suit against other members.

The effect of s. 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the cases of *King* v. *Hoare* (1), and *Kendall* v. *Hamilton* (2) is no longer applicable to cases arising in India, at all events in the Mufassil, since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors. *King* v. *Hoare* (1). *Kendall* v. *Hamilton* (2), *In re Hodgson* (3), *Hammond* v. *Schofield* (4). *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (5), *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (6), *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti* (7), *Lukmidas Khimji* v. *Purshotam Haridas* (8), *Rahmubhoy Hubibbhoy* v. *Turner* **[308]** (9), *Chockalinga Mudali* v. *Subbaraya Mudali* (10), *Narayana Chetti* v. *Lakshmana Chetti* (11), *Sitanath Koer* v. *Land Mortgage Bank of India* (12), *Nobin Chandra Roy* v. *Magantara Dassya* (13), *Roy Lutchmiput Singh Bahadur* v. *The Land Mortgage Bank of India* (14), *Radha Pershad Singh Bahadur* v. *Ramkhelawan Singh* (15), *Bhukandas Vijbhukandas* v. *Lallubhai Kashidas*(16), *Laksmishankar Devshankar* v. *Vishnuram* (17), *Dharam Singh* v. *Angan Lal* (18), *Motilal Bochardass* v. *Ghellabhai Hariram* (19), *Brinsmead* v. *Harrison* (20), *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (21), *Robinson* v. *Geisell* (22), *Balmakund* v. *Sangari* (23), *Priestley* v. *Fernie* (24), *Bir Bhaddar Sewak Pande* v. *Sarju Prosad* (25), *Bhawani Pershad* v. *Kallu* (26), *Dhunput Singh* v. *Sham Soonder Mitter* (27), referred to.

The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family.

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* First Appeal No. 177 of 1897, from a decree of Babu Nilmadhab Ray, Subordinate Judge of Benares, dated the 20th of May 1897.

(1) 13 M. and W. 494. (2) L.R. 4 A. C. 504. (3) L.R. 31 Ch. D. 177.
(4) (1891) I. Q. B. 453. (5) 10 B.L.R. 200=18 W. R. 458.
(6) 3 C. 353. (7) 5 M 37. (8) 6 B. 700.
(9) 14 B. 408. (10) 5 M. 133. (11) 21 M. 256.
(12) 9 C. 888. (13) 10 C. 924. (14) 14 C. 469, note.
(15) 23 C. 302. (16) 17 B. 562. (17) 24 B. 77.
(18) 21 A. 301. (19) 17 B. 6. (20) L.R. 7 C.P. 547.
(21) (1893) 1 Q.B. 422. (22) (1894) 2 Q.B. 685. (23) 19 A. 379.
(24) 3 H. and C. 977. (25) 9 A. 681. (26) 17 A. 537.
(27) 5 C. 291.

The plaintiff sued B and M, alleged to be the managing members of a joint Hindu family, for sale upon four mortgages executed by them in respect of property owned by the joint family and obtained a decree in 1894. He brought the present suit against defendants Nos. 1 to 15, other members of the same family, said to be the brothers, brother's sons and cousins of B and M, claiming enforcement of the same mortgages against the said defendants by sale of their interests in the mortgaged property. *Held*, that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of 1894, and that the suit against them is not barred.

[F., 25 A. 57 (59); 25 A. 162 (164); R., 23 A. 355 (359); 34 A. 604 (606)=10 A.L.J. 183=17 Ind. Cas. 89 (90); 25 B. 378 (383, 386); 33 M. 317 (320)=5 Ind. Cas. 735 (736)=7 M.L.T. 373 (375); 25 P.L.R. 1902; D., 29 A. 544 (552)=4 A.L.J. 424=A.W.N. (1907), 159.]

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Messrs. *T. Conlan* and *Karamat Husain*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

JUDGMENT.

STRACHEY, C. J.—This appeal raises an important question, never yet decided, whether the doctrine of *King* v. *Hoare* (1), and *Kendall* v. *Hamilton* (2) as to the effect of a judgment on a joint contract upon a subsequent suit against co-contractors who were not parties to the former suit, should be applied in these Provinces, notwithstanding s. 43 of the Indian Contract Act, 1872.

The suit was a suit for sale on four mortgages executed in 1886, 1888, 1889 and 1890, and was brought against seventeen persons who are admittedly members of a joint Hindu family. In the plaint the plaintiff alleges that the defendants Nos. 16 and 17, Budh Ram Singh and Mahabir Singh, who are *pro forma* [309] defendants only, were the managers of the joint family carrying on its business, and that as such managers and for the purpose of meeting necessary family expenses, these defendants borrowed money from the plaintiff's father and the plainitfff himself on the security of the mortgages in suit, which are mortgages of shares in zemindari property owned and possessed by the joint family. On these mortgages, which were executed by the defendants Nos. 16 and 17 in their own names, the plaintiff formerly sued those defendants only and obtained a decree for sale for Rs.12,857-1-3, which became final on the 5th May 1894 In execution of the decree the mortgaged property was advertised for sale. Thereupon the defendants Nos. 1 to 15 brought a suit against the decree-holder for a declaration that, as they had not been made parties to the first suit, as they should have been with reference to s. 85 of the Transfer of Property Act, 1882, they were not affected by the decree, and their interests in the family property could not be sold in execution of it. The Court trying that suit gave the declaration prayed for on the authority of the decision of the Full Bench in *Bhawani Prasad* v, *Kallu* (3). Thereupon the plaintiff brought the present suit, claiming enforcement of the mortgages against the defendants Nos.1 to 15 by sale of their interests. According to the pedigree annexed to the plaint, these defendants are brothers, brother's sons and cousins of Budh Ram Singh and Maha bir Singh. In defence the defendants raised various pleas, in which they denied that Budh Ram Singh and Mahabir Singh were managers of the joint family and that the loans were taken for purposes binding on the family, and other contentions to which it is unnecessary to

(1) 13 M. and W. 494. (2) L. R. 4 A. C. 504. (3) 17 A. 537.

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refer. The Court below has dismissed the suit on a preliminary point of law. It has held in effect that by the decree of the 5th May 1894, against two only of the persons alleged to be jointly liable under the mortgages, the whole cause of action in the case of each mortgage was merged and could not be made the subject of a fresh suit against joint debtors not parties to the suit in which the decree was passed. The Subordinate judge in his judgment says that he therefore dismisses the suit as barred by s. 43 of the Code of Civil Procedure. The reference to that section is an obvious mistake, as s. 43 [310] of the Code applies only where the former suit was between the same parties or between parties under whom the parties to the subsequent suit claim. *Balmakund* v. *Sangari* (1). I think, however, that the reference to s. 43 of the Code is a mere slip, as the judgment is expressly based on the decision in *Nuthoo Lall Chowdhry* v. *Shoukee Lall*(2), which proceeded, not on the principle of splitting claims now embodied in s. 43 of the Code, but on the principle of *King* v, *Hoare* (3). The question is whether, having regard to that principle and to the provisions of s. 43 of the Contract Act, the principle is applicable to cases of joint liability in this country.

The case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (2) was decided before the Contract Act came into force. Since then it has been held that, notwithstanding s. 43 of the Contract Act, the doctrine of *King* v. *Hoare* (3) should be applied to cases arising in the Presidency towns: *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (4), *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti* (5), *Lukmidas Khimji* v. *Purshotam Haridas* (6) and *Rahmubhoy Hubibbhoy* v. *Turner* (7), which, however, related not to joint contractors but to joint wrong-doers, to whom of course s. 43 has no application. In *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (4)Mr. Justice Markby's judgment appears to have proceeded partly on the fact that the case was one arising in the High Court's original jurisdiction and was governed by English law. In the other High Courts it has often been assumed, though never formally decided after argument, that the doctrine of *King* v.*Hoare*(3), would also be applicable in the mufassil: *Chockalinga Mudali* v. *Subbaraya Mudali* (8), *Narayana Chetti* v. *Lakshmana Chetti*(9), *Sitanath Koer* v. *Land Mortgage Bank of India* (10), *Nobin Chandra Roy* v. *Magantara Dassya* (11), *Roy Lutchmiput Singh Bahadur* v. *The Land Mortgage Bank of India* (12), *Radha Pershad Singh Bahadur* v. *Ramkhelawan Singh* (13), *Bhukhandas Vijbhu-*[311] *kandas* v. *Lallubhai Kashidas* (14) and *Laksmishankar Devshankar* v. *Vishnuram* (15), several of these relate to suits against joint mortgagors. In this Court the question does not appear to have been raised except in *Dharam Singh* v. *Angan Lal* (16), where, however, it was not decided, as it was held that the liability there under consideration was not a joint liability. In two at least of the above cases much doubt has been expressed as to whether it is desirable to extend the doctrine of *King* v. *Hoare* (3) to India, at all events to cases in the mufassil. Such doubts were expressed by Mr. Justice Markby in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshe* (4), where, however, the learned Judge was clearly mistaken in

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(1) 19 A. 379.
(2) 10 B.L.R. 200=18 W.R. 458.
(3) (1844) 13 M. & W. 494.
(4) 3 C. 353.
(5) 5 M. 37.
(6) 6 B. 700.
(7) 14 B. 408.
(8) 5 M. 133 (135).
(9) 21 M. 256.
(10) 9 C. 888.
(11) 10 C. 924.
(12) 14 C. 469, note.
(13) 23 C. 302.
(14) 17 B. 562.
(15) 24 B. 77.
(16) 21 A. 301.

saying that the doctrine has been repudiated in America. See Bigelow on the Law of Estoppel, 4th edition, pp. 104 to 110, and Vanfleet on the Law of Former Adjudication, pp. 1061 to 1063, and also by Mr. Justice Muttusami Ayyar in *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti*(1). The conclusion at which I have arrived is that the doctrine of *King* v. *Hoare* (2) is not applicable in India, at all events in the mufassil, and since the passing of the Indian Contract Act. This conclusion, however, is not based on any view of the doctrine as a merely technical one, or as being inexpedient or unjust. That is a question on which many learned Judges have expressed conflicting opinions, and with which we as Judges are not particularly concerned. It was expressly held by the majority of the Law Lords in *Kendall* v. *Hamilton* (3) and by Lord Justice Bowen in *In re Hodgson* (4), that the rule was not a merely technical one, but was based on considerations of public policy relating to the protection of joint debtors. So far as general expediency or public policy is concerned, considerations of the importance, on the one hand, of checking undue multiplicity of suits, and, on the other hand, of compelling people to pay their debts, are, in India at least, fairly evenly balanced. My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King* v. *Hoare* (2) as on the judgment of the Law Lords in *Kendall* v. *Hamilton* (3). As [312] explained in those judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co-contractors joined as defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement, and since the Judicature Acts by an application for joinder, which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by s. 43 of the Contract Act, and therefore the basis of the doctrine being absent, the doctrine itself is inapplicable, *Cessante ratione legis, cessat ipsa lex.*

That this right of joinder is the real basis of the doctrine appears from *King* v. *Hoare* (2) itself, though not nearly so clearly as from *Kendall v. Hamilton* (3) and other later cases. It appears with special distinctness from the judgment of Lord Cairns, L. C. at pp. 515 and 516, of Lord Hatherley at p. 522, and of Lord Blackburn at pp. 542-544. It is equally implied by the dissentient judgment of Lord Penzance. The main difference of opinion was that in the view of Lord Penzance the joint contractor had, by the abolition of pleas in abatement by the Judicature Acts, lost his absolute right to be sued only in conjunction with his co-contractor. "He can no longer be heard to maintain either that his co-contractor must be sued with him or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. * * Since the Judicature Acts, it is not true that the plaintiff's only right is to sue the defendant jointly with the others." The other Lords, while agreeing that the doctrine of merger depended on the right of the joint contractor to have his co-contractor joined as defendants, held that, notwithstanding the Judicature Acts, the right still remained, though the mode of enforcing it was no longer a plea of abatement, but an application to have the person omitted included as a defendant. As to the basis of the

(1) 5 M. 37.
(2) (1844) 13 M. and W. 494.
(3) (1879) L.R. 4 A.C. 504.
(4) (1885) L.R. 31 Ch. D. 177 (188).
(5) (1844) 13 M. and W. 495.

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doctrine of merger, therefore, there was no difference of opinion. The best statement of the effect of *Kendall* v. *Hamilton* (1) is, I think, that of Lord [313] Justice Bowen in *In re Hodgson* (2) at p. 188 of the report. "The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King* v. *Hoare* (3). There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, it is for the same cause of action—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognized by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors, not only as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged therefore in the judgment, the old debt disappears and the judgment is left in its place. That is the legal view which has been laid in *King* v. *Hoare* (3), and that was the real ground of the decision in *Kendall* v. *Hamilton*" (1). Again in *Hammond* v. *Schofield* (4), Vaughan Willams, J., said:—"It seems also to be well settled by "a series of [314] cases, beginning with *Rice* v. *Shute* and ending with "*Kendall* v. *Hamilton*, that the basis of this defence is not the election or "unconscious election, if there can be such a thing, of the plaintiff, but the "right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that "there shall not be more than one judgment on one entire contract. "These decisions seem to be the logical result of the rule of pleading that "non-joinder of defendants is not matter which can be pleaded in bar, but "only matter which can be pleaded in abatement."

The authorities also show that where the obligation is not joint but joint and several the doctrine of merger does not apply, and a judgment against one of the debtors without satisfaction is not a bar to a suit against the others. See *King* v. *Hoare* (3) and the cases cited in Leake on Contracts, p. 808, Bullen and Leake p. 751, and *Dhunput Singh* v. *Sham Soonder Mitter* (5), In *Kendall* v. *Hamilton* (1) the appellant unsuccessfully contended that as the debt sued on was a partnership

(1) (1879) L. R. 4 A. C. 504.
(2) (1885) L. R. 31 Ch. D. 177.
(3) (1844) 13 M. and W. 494.
(4) (1891) I.Q.B. 453, 457.
(5) 5 C. 291.

debt, the doctrine of *King* v. *Hoare* (1) did not apply, as in equity all partnership debts were joint and several. Under order 16, Rule 6 of the Rules under the Judicature Act, which is identical with s. 29 of the Code of Civil Procedure, the plaintiff may at his option join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract.

The result is, first, that the doctrine of *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2) depends on the ordinary right possessed by a joint contractor in England to have all the co-contractors joined as defendants in a suit on the joint obligation; secondly, that the rule is not applicable where the liability sought to be enforced is joint and several. That being so, how does the matter stand in India? Section 43 of the Contract Act provides:—"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel "any one or more of such joint promisors to perform the whole of the "promise." Illustration (*a*) is as follows:—"A, B and C jointly promise "to pay D Rs. 3,000. D may compel either A or B **[315]** or C to pay him "Rs. 3,000." This is a clear departure from the English law, and in my opinion excludes the right of a joint contractor to be sued along with his co-contractors. That this is the effect of s. 43 is clearly recognized by several decisions; what they do not recognize is that it cuts away the foundation of the English doctrine and makes it inapplicable to India. The explanation of this is, I think, that the cases all follow *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (3) which was decided before the House of Lords in *Kendall* v. *Hamilton* (2) showed more distinctly than *King* v. *Hoare* (1) that the right of joinder is the real foundation of the English rule. In *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (3) the judgment of Mr. Justice Kennedy in the first Court was based in part on the doctrine of election, which the majority of the House of Lords showed was in no sense the reason of the rule. Garth, C. J., correctly stated the effect of s. 43 to be that it "allows the promisee "to sue one or more of several promisors in one suit, and so practically "prohibits a defendant in such a suit from objecting that his co-"contractors ought to have been sued with him." If the learned Chief Justice had had before him the later judgments in *Kendall* v. *Hamilton* (2) and *In re Hodgson* (4), he would, I think, have recognized that the effect of such a prohibition is to make the doctrine of *King* v. *Hoare* (1) inapplicable. In the mistake which he made he was followed by Mr. Justice Muttusami Ayyar in *Gurusami Chetti* v *Samurti Chinna Mannar Chetti* (5). Similarly in *Lukmidas Khimji* v. *Purshotam Haridas* (6) Mr. Justice Latham expressly held that s. 43 of the Contract Act materially altered the rules of the English common law, and disallowed an objection by a partner defendant that the other partners should have been joined as defendants; and yet, while thus clearly recognizing that by reason of s. 43 a joint debtor has no right to have his co-contractors joined as defendants, the learned Judge nevertheless held that the rule in *Kendall* v. *Hamilton* (2) would bar a fresh suit against the other partners. In *Motilal Bechardass* v. *Ghellabhai Hariram* (7) Mr. Justice Farran held in reference **[316]** to s. 43 that "as far as the liability under a contract is concerned, "it appears to make all joint contracts joint and several." If that is a correct view of s. 43, the doctrine of *King* v. *Hoare* (1) is admittedly not

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(1) (1844) 13 M. and W. 494. (2) (1879) L. R 4 A. C. 504. (3) 3 C. 353.
(4) (1885) L.R. 31 Ch. D. 177. (5) 5 M. 37. (6) 6 B. 700. (7) 17 B. 6.

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applicable. In *Narayana Chetti* v. *Lakshmana Chetti* (1) the Court, following *Lukmidas Khimji* v. *Purshotam Haridas* (2) held that "it is not "incumbent on a person dealing with partners to make them all defend- "ants; he is at liberty to sue any one partner as he may choose." The Court expressly applied to partners not only s. 43 of the Contract Act, but s. 29 of the Code of Civil Procedure, which relates not to joint but to several and to joint and several liability. In *Rahmubhoy Hubibhboy* v. *Turner* (3) Scott, J., in the first Court said that "s. 43 of the Contract "Act IX of 1872 is not perhaps "quite clear whether a complete adoption "of the English rule is intended." He, however, applied the decision in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (4) to the case, which was one of joint wrong-doers. Whether the rule as to joint wrong-doers laid down in *Brinsmead* v. *Harrison* (5) should be applied in the Indian Mufassil is a question which I need not consider. To such a question s. 43 of the Contract Act would have no application.

In the other cases the effect of s. 43 of the Contract Act on the doctrine of *King* v. *Hoare* (6) is altogether ignored. In their note to s. 43, Messrs. Cunningham and Shephard, at pp. 158-159 of their commentary on the Indian Contract Act (7th ed.) say that "if this section is intended "to deny to joint debtors the right to be sued jointly in one suit, it involves "a departure from English law," and that "in view of this section "and the 29th section of the Code of Civil Procedure, it is clear that the "non-joinder of a co-debtor is no ground of defence to a suit; but it is "apprehended that an application made under the 32nd section of the "Code to add as a defendant an omitted co-debtor would be dealt with in "the same manner as it is in England." I cannot agree with this view. As the judgments in *Kendall* v. *Hamilton* (7) show, such an application would in [317] England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined. *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (8), *Robinson* v. *Geisel* (9). I agree with Garth, C. J., Latham, J., and the Madras High Court that under s. 43 of the Contract Act the joint debtor has no such right.

For these reasons I am of opinion that the doctrine of *King* v. *Hoare* (6) and *Kendall* v. *Hamilton* (7) does not apply to the present case; that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of the 5th May, 1894, against the defendants Nos. 16 and 17 only; and that so far the suit against them is therefore not barred. Nor is it in my opinion barred by s. 85 of the Transfer of Property Act, 1882: *Balmakund* v. *Sangari* (10), *Dharam Singh* v. *Angan Lal* (11). It was suggested that the suit was barred on a somewhat different ground, namely that the defendants Nos. 16 and 17 were in the position of agents of the joint family, contracting in their own names for themselves and the rest of the family, and that the decree of the 5th May 1894 against them was a bar to a subsequent suit on the contract against their principals, the other defendants, by reason of the principle laid down in *Priestley* v. *Fernie* (12) applied by Lord Cairns in *Kendall* v. *Hamilton* (7) at p. 514 of the report, and followed by this Court in *Bir Bahaddar*

(1) 21 M. 256. (2) 6 B. 700. (3) 14 B. 408. (4) 3 C. 353.
(5) (1872) L.R. 7 C. P. 547.
(6) (1844) 13 M. and W. 494.
(7) (1879) L.R. 4 A.C. 504.
(8) (1893) 1 Q.B. 422.
(9) (1894) 2 Q.B. 685.
(10) 19 A. 379. (11) 21 A. 301.
(12) (1865) 3 H. and C. 977.

Sewak Pande v. *Sarju Prasad* (1). In India the matter depends on the provisions of the Contract Act, and in particular on Chapter X of that Act relating to Agency. It is sufficient to say that it has never been held that the managing member of a joint Hindu family is an agent within the meaning of that chapter and of the rule in *Priestley* v. *Fernie* (2). I agree with the passage at p. 108 of the Tagore Law Lectures for 1870 where Mr. Cowell says:—"When therefore we come "to define the relation of each member, especially of the managing "member, to the joint family and the joint estate, we are brought into "contact with a relationship which has no counterpart in English "[318] law. Neither the term partner, nor principal, nor agent, nor even "co-parcener will strictly apply."

I am of opinion that the Court below ought not to have dismissed the suit, as it did, on the preliminary point, and that the appeal of the plaintiff should be allowed, the decree of the Court below set aside, and the case remanded to that Court under s. 562 of the Code of Civil Procedure for disposal on the merits. The appellant will have his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I agree in the judgment and order of the learned Chief Justice.

The Court below has held that the 43rd section of the Code of Civil Procedure bars the claim. That view is clearly erroneous. As the defendants Nos. 1 to 15, who are the real defendants to the suit and against whom alone the plaintiff seeks relief, were not parties to the former suit brought against the defendants Nos. 16 and 17, that section has no application. Although the learned Subordinate Judge refers to s. 43, the basis of his decision is, as pointed out by the learned Chief Justice, that the cause of action for the present suit is the same as that for the previous suit; that both the suits relate to a joint debt; that the cause of action has merged in the decree obtained in the former suit; and that the present action is consequently not maintainable. He has followed the ruling in *Nuthoolall Chowdhry* v. *Shoukee Lall* (3) which apparently adopted the principle recognised in the well-known case of *King* v. *Hoare* (4). The main question which we have to determine in this appeal, therefore, is whether the former judgment, though unsatisfied, bars this suit. That question was not decided in *Dharam Singh* v. *Angan Lal* (5) on which the learned counsel for the appellant relied. It was held in that case that it was not a case of a joint debt and joint contractors.

The judgment in the former suit would operate as a bar to the present claim if two conditions are fulfilled, namely, first, that the contracts of mortgage upon which the plaintiff's claim is founded were joint contracts by and on behalf of all the [319] defendants; and, second, that the rule laid down in *King* v. *Hoare* (4) is applicable. As to the first point there is no controversy. As to second, if the doctrine of *King* v. *Hoare* (4) cannot be held to apply, there is nothing in reason or justice to bar the suit.

If the plaintiff's statements are true the defendants Nos. 1 to 15 and their interest in the mortgaged property are equally with the defendants Nos. 16 and 17 and their interests liable for the debt, and unless a legal bar exists, of which the defendants are entitled to take advantage, they are not in a position to dispute the claim.

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(1) 9 A. 681.
(2) (1865) 3 H. and C. 977.
(3) 10 B.L.R. 200=18 W.R. 458.
(4) (1844) 13 M. and W. 494.
(5) 21 A. 301.

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Now, is the rule adopted in *King* v. *Hoare* (1) applicable to this case? The reason for that rule was stated by Lord Cairns, L. C., in the later case of *Kendall* v. *Hamilton* (2), to be "that it is the right of per-"sons jointly liable to pay a debt to insist on being sued together." I agree with the learned Chief Justice that that reason cannot apply to cases in this country, at least outside the presidency towns, since the passing of the Contract Act. S. 43 of that Act enables a promisee, in the absence of a contract to the contrary, to compel one or more of several joint promisors to perform the whole of the promise. Under s. 43, therefore, it is not open to a defendant who has been sued as one of the several promisors to contend that all his co-promisors should be made parties to the suit, and so far as this country is concerned the reason on which the rule in *King* v. *Hoare* (1) is founded has ceased to exist. That rule is consequently no longer applicable. Further, the effect of s. 43 is, as observed by Farran, J., in *Motilal Bechardass* v. *Ghellabhai Hariram* (3), "to make all joint contracts joint and several." Where the liability is joint and several and the judgment first obtained has remained unsatisfied a second suit is not barred. This is a proposition which admits of no doubt and is supported by the authorities cited by the learned Chief Justice in his judgment. Therefore, since the enactment of s. 43 of the Contract Act, the recovery of a judgment against one of several joint debtors does not bar a subsequent suit against his co-debtors. The result is that in either view the present claim is maintainable. I am moreover not satisfied as to the expediency of extending the **[320]** doctrine of *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2) to suits arising in these provinces. Having regard to the fact that those cases were based mainly on doctrines and rules of procedure peculiar to English law, there is evidently no reason why their authority should be recognised in the Courts in this country. The desirability of applying to cases in this country the rule laid down in those decisions was questioned by Mr. Justice Markby in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (4), and by Mr. Justice Muttusami Ayyar in *Gurusami Chetti* v. *Samurti Chinna Mannar Chetti* (5), and those learned Judges were of opinion that the rule might be productive of hardships in this country, as it undoubtedly would be in many cases. It was pointed out by Mr. Justice Markby that the rule was not recognised in any continental country in Europe, and in his dissentient judgment in *Kendall* v. *Hamilton* (2) Lord Penzance considered it not to be consistent with justice. "What justice," his Lordship observed, "is there in saying that when three persons "are all and each individually liable to pay a debt, an action and judg-"ment (still unsatisfied) against two of them should extinguish the liabi-"lity of the third?" He held the rule to be one of procedure, and characterized it as one "which, without affecting to assert any joint rights on the "part of the defendants, denies the aid of the law to enforce those of the "plaintiffs." "Procedure," he said, "is but the machinery of the law after "all—the channel and means whereby law is administered and justice "reached. It strangely departs from its proper office when in place of facilitat-"ing, it is permitted to obstruct, and even extinguish legal rights, and is "thus made to govern where it ought to subserve." Having regard to the fact that even in England the propriety of the rule has been questioned by high authority, I do not think there is sufficient justification for extending

(1) (1844) 13 M. and W. 494.
(2) (1879) L R. 4 A. C. 504.
(3) 17 B. 6.
(4) 3 C. 353.
(5) 5 M. 37.

it to the Courts in these provinces. Upon grounds both of law and expediency, therefore, I am unable to hold that the plaintiff is precluded from maintaining the present suit by reason of the decree obtained by him in 1894.

I fully concur with the learned Chief Justice in the view that the manager of a joint Hindu family is not in the position of an [321] ordinary agent as regards the other members of the family. The contention of the learned counsel for the respondents, based on the argument that the defendants Nos. 16 and 17 were agents of the other defendants, cannot therefore prevail.

Appeal decreed and cause remanded.

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22 A. 321 = 20 A.W.N. (1900) 87.

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Before Mr. Justice Banerjee and Mr. Justice Aikman.

SHEO SAMPAT PANDE AND ANOTHER (*Plaintiffs*) *v.* BANDHU PRASAD MISR AND OTHERS (*Defendants*).* [17th April, 1900.]

Act No. XIX of 1873 (*N W.P. Land Revenue Act*), *ss.* 166, 167, 168—*Act No XII of* 1884 (*Agriculturists' Loans Act*), *s.* 5—*Takavi loan - Sale of house in default of payment of loan—Effect of such sale.*

The provisions of ss. 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lal*, (for whom Maulvi *Ghulam Mujtaba*) and Babu *Jiwan Chandar Mukerji*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The decree of the lower appellate Court cannot possibly be supported. The suit was one for sale upon a mortgage. The property mortgaged consisted of a house and certain zamindari property. Subsequently to the mortgage the mortgagor took takavi advances from Government which he did not repay. The Government therefore caused the said house, upon the security of which the takavi advance had been made, to be sold, and Sheo Sahai, defendant, purchased it. Both the Courts below have dismissed the claim in respect of the house on the view that the purchase by Sheo Sahai conveyed to him the house free from the incumbrance created by the mortgage in suit. The learned Judge has relied on the provisions of s. 167 of Act No. XIX of 1873, and holds that as arrears of takavi are, by virtue of s. 5 of Act No. XII of 1884, realized in the same manner as arrears of land revenue, property [322] sold for recovery of takavi loans is sold free of all incumbrances. The learned Judge

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* Second Appeal No. 700 of 1897, from a decree of Mr. V. A. Smith, Judge of Gorakhpur, dated the 22nd May 1897, confirming the decree of Maulvi Saiyid Jafar Husain, Subordinate Judge of Gorakhpur, dated 19th February 1897.

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has overlooked the fact that s. 167 relates to the sale of the patti or mahal in respect of which an arrear of land revenue is due. In such a case the purchaser would no doubt acquire the patti or mahal sold free of all incumbrances. But if any property other than the patti or mahal in respect of which arrears are due be sold, the purchaser would only acquire the rights and interests which the defaulter had at the time of the sale, and any incumbrances created by him would not be rendered invalid by reason of the sale. This is clear from the provisions of s. 168. The learned Judge no doubt refers to that section, but he says that the section would have applied had the house in question not been hypothecated to Government as security for the takavi loan.

We fail to see how the fact of a hypothecation subsequent to that in favour of the plaintiff can in any way affect the plaintiff's right under his prior mortgage and invalidate that mortgage as against the purchaser under the later hypothecation. The mortgagor, when he made the hypothecation in favour of Government, hypothecated only such rights as he had at the time of the hypothecation. Those rights were nothing more than the right to redeem the mortgage in favour of the plaintiff. In our opinion the Courts below erred in exempting from the claim the house purchased by Sheo Sahai, and we think the plaintiffs were entitled to a decree for the sale of that house.

We notice that although in the judgment of the Court of first instance the house was exempted from liability for the claim, the decree which was drawn up directed the sale of the house. This was evidently an oversight as the decree totally exempted Sheo Sahai from liability.

We allow the appeal and make a decree in favour of the plaintiff for the sale of the whole of the property mentioned in the plaint. We extend the time for the payment of the mortgage money to the 1st August 1900. The appellants will get their costs of this appeal and of the appeal to the Court below from Sheo Sahai. defendant, who will also be liable for the costs of the Court of first instance.

Appeal decreed.

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[323] REVISIONAL CRIMINAL.

Before Mr. Justice Burkitt.

QUEEN-EMPRESS *v.* SAMUEL LUKE.* [20th April, 1900.]

Act No. XI of 1878 (*Indian Arms Act*), *s.* 19 (*f*)—*Notification No.* 458 *of the* 18*th March* 1893—*Exemptions from the operation of the Arms Act—Volunteers.*

A volunteer, being a person exempted in virtue of Notification No. 458, dated 18th March 1893, of the Government of India, is not exempted merely with reference to his duties as a volunteer, but generally (subject to the exceptions mentioned in the said Notification). It is therefore not unlawful for a volunteer to possess fire-arms and to use the same.

THIS was an application for revision of an order passed by a Magistrate of the Philibhit district. The facts of the case sufficiently appear from the order of the Court.

Mr. *R. K. Sorabji*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

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* Criminal Revision No. 177 of 1900.

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ORDER.

BURKITT, J.—This is an application in revision against the conviction and sentence passed on the applicant by a Sub-Divisional Magistrate in the Philibhit district under s. 19 (*f*) of the Indian Arms Act, No. XI of 1878. The Magistrate found that the petitioner had fire-arms in his possession in contravention of the prohibition contained in s. 14 of the Act.

The learned Government Pleader very properly admits that the conviction and sentence cannot be supported. The plea raised by the learned counsel who appeared for the applicant is that "as a volunteer petitioner is exempted from the operation of the section under which he has been convicted." That plea, in my opinion, is a good plea, and must be allowed,

The Magistrate who convicted the petitioner admits that the petitioner is a volunteer. It would therefore, *prima facie*, appear that under the provisions of the Government Notification No. 458, dated the 18th March 1898, the petitioner did not commit any offence in having fire-arms in his possession. The Magistrate, however, has an easy way of getting over that difficulty. He contemptuously brushes it aside by holding that though the petitioner is a volunteer, and as such "is exempt from the operation [324] of the Arms Act, 1878," * * * * * * "he is exempt only for the purposes of volunteering. "He is not exempt from possessing fowling pieces, which he did (*sic*) in "spite of his fowling piece having been confiscated by the District Magis-"trate." The Magistrate further found that in spite of the previous warning the applicant "has again possessed himself of the fowling pieces," and "uses these fowling pieces in shooting wild animals." (The former case mentioned by the Magistrate is one in which in another district the applicant was convicted of a similar offence under the Arms Act. In that case he was let off with a warning, and his gun was confiscated. The Sessions Judge on appeal held that he ought to have been fined under s. 19 (*e*) of the Arms Act, 1878.) The Magistrate goes on to add that the petitioner "should have obtained a license under the Arms Act, 1878, "if he wanted fowling pieces for the protection of his cultivation. As a "volunteer he is not entitled to keep fowling pieces, nor is he entitled as "such to use them for the purpose of protecting his cultivation." Acting on his view the Magistrate inflicted a fine on the applicant and directed his guns to be confiscated.

In my opinion the Magistrate has adopted an absurdly erroneous view of the law. I have no hesitation in holding that, being admittedly a volunteer, the applicant is (to use the language of the Magistrate) entitled to keep fowling pieces, and to use them for the purpose of protecting his cultivation. I know of no authority for the interpretation put by the Magistrate on the words "all volunteers" in the Notification mentioned above, nor has the Magistrate cited any. Those words, read in their ordinary grammatical sense, exempt "all volunteers" from the operation of all the prohibitions and directions contained in ss. 13, 14, 15, and 16 of the Arms Act, with certain exceptions not in point in this case. The Magistrate does not accept that view. He holds that the applicant "is exempt only for purposes of volunteering" It is difficult to say what meaning the Magistrate intended to be put on those words. Most probably they mean that applicant was entitled to the benefit of the exemption only when attending volunteer parades and when in possession of the

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rifle which had been entrusted to his care as a volunteer. If this restricted meaning is to be attached to the words "all volunteers," a [325] similar restriction must necessarily be applied to all the other classes of persons exempted in similar language. The result of this would be absurd in many cases: to take one case among many, it would render it illegal for native commissioned officers of Her Majesty's native army to possess or use, unless they had obtained license under the Act, any arms other than those supplied to them by Government for military purposes.

I cannot believe that it was intended that such a narrow and restricted interpretation should be placed on the Notification. On the contrary, I believe that the exemption of "all volunteers" from the operation of the prohibitions and directions contained in certain sections of the Arms Act, 1878, was granted with a view to encourage volunteering among that class of the public who otherwise would be subject to those prohibitions and directions. But as interpreted by the Magistrate in this case the Notification is inoperative as far as volunteers of that class are concerned. It would leave them in exactly the same position as before under the Arms Act, and it would still be necessary for volunteers of that class, who, like the applicant, desire to possess and use fire-arms, to take out licenses under the Act. It follows, as a necessary consequence of this interpretation, that it is only by virtue of the exemption in the Government Notification mentioned above that volunteers, like the applicant, and officers and soldiers of the native army, can legally possess and use the arms supplied to them for volunteering and military purposes. In my opinion that interpretation is wrong and would defeat the object aimed at by the Notification. I hold that the applicant was not bound to take out a license for the fire-arms he possessed, and was therefore improperly convicted. Accordingly, setting aside the conviction and sentence, I direct that the fine, if paid, be refunded and that the confiscated guns be restored to the applicant.

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[326] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAM KUNWAR (*Plaintiff*) *v.* RAM DAI (*Defendant*).*
[27th April, 1900.]

Hindu law—Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—Act No. IV of 1882 *(Transfer of Property Act), s.* 39.

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal* v. *Banna* (1) nd *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2) referred to.

[F., 12 C.W.N. 100 N.; 10 Ind. Cas. 985 (986)=4 S.L.R. 278 (280); R., 24 A. 160 (163); 4 C L.J. 476=10 C.W.N. 1074.]

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* Second Appeal No. 774 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd June 1897, modifying a decree of Babu Bipin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 3rd March 1896.

(1) 4 A. 296 (2) 2 B. 494.

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APRIL 27.
APPELLATE CIVIL.
22 A. 326 = 20 A.W.N. (1900) 97.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji* and Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The appellant, who is the widow of one Thakur Gir Prasad Singh, brought the suit out of which this appeal has arisen to recover arrears of maintenance from her husband's sons and from the estate left by her deceased husband, a part of which is in the possession of the respondent, who was the third defendant in the Court of first instance, under a usufructuary mortgage executed by one of the sons on the 19th April, 1894. Previously to the institution of the suit the plaintiff had sued the sons for her maintenance, and obtained decrees, the earliest of which was passed in 1887. The present suit was opposed by the respondent, who claimed to be a transferee for consideration, without notice of the plaintiff's right. The Court of first instance decreed the claim against her, but the lower appellate Court set aside that portion of the decree which affected the respondent. The plaintiff has preferred this appeal, and the question we have to determine is, whether the property in the hands of the respondent is liable for the amount claimed by the plaintiff. **[327]** Both the Courts below have found that the respondent is a mortgagee for consideration, but had notice of the plaintiff's right. The first Court also held that the transfer under which she is in possession was made with the intention of defrauding the plaintiff, and depriving her of her right, and applied the provisions of s. 39 of the Transfer of Property Act. The lower appellate Court, however, was of a contrary opinion, and found that the mortgage was not made with the intention of defeating the plaintiff's right to maintenance. It held that the claim could not be enforced against that portion of the property which is in the respondent's hands, although she had notice of the appellant's rights.

It is conceded that the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband, until it is fixed and charged upon the estate by a decree or by agreement. This was held by a Full Bench of this Court in the case of *Sham Lal* v. *Banna* (1). It is further conceded that there was no agreement by which any particular property was charged with the maintenance of the plaintiff. It is, however, contended that the decree obtained by the plaintiff on 22nd August, 1887, created a charge upon the property left by the deceased husband of the plaintiff. If this is so, the respondent took the property, of which she is the mortgagee, subject to that charge, and cannot claim exemption from liability. We have examined the decree of 22nd August, 1887, and have satisfied ourselves that the only charge declared by that decree was a charge for the amount of maintenance which had already accrued due and was decreed to the plaintiff. No charge for future maintenance was created by the decree. Such being the case, the learned counsel for the appellant next relies upon s. 39 of Act No. IV of 1882, and in particular on the concluding words of that section. That section, so far as it relates to maintenance, provides that "where a third person has a right to receive maintenance from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous, but not against a transferee for consideration and without notice of

(1) 4 A. 296.

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APRIL 27.
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22 A. 326 = 20 A W.N. (1900) 97.

[328] the right, nor against such property in his hands." The object of the section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable. In our opinion an essential condition for the enforcement of the right under the section against a transferee is that the transfer has been made with the intention of defeating the right. Where a transfer has been made with such intention and the transferee has notice of it, he cannot defeat the right, although he may be a transferee for consideration. Again, if the transfer is gratuitous, the transferee can in no case defeat the right. Where, however, the transfer is for consideration, and the transferee has no notice of the right, it cannot be enforced against him, even if the transfer was made with the intention of defeating the right. As we read the section, a condition precedent to the enforcement of the right against the transferee in all cases is that the transferor has acted in fraud of the person entitled to the right. The words " and such property is transferred with the intention of defeating such right " govern all that follows those words. Given a right to receive maintenance from the profits of immoveable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. As observed in the commentaries on the Transfer of Property Act by Messrs. Shephard and Browne, something more than mere notice of the right has to be proved against a transferee. It must also be established that the transfer was made in bad faith, that is, with the intention of defeating the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of Court, is only enforceable like any other liability in respect of which no charge exists. See the Full Bench decision in *Sham Lal* v. *Banna* (1). A right of such a nature should not equitably be enforced against a transferee for value unless the transfer was **[329]** made in fraud of the right of maintenance. In *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2) it was held that the mere circumstance that a purchaser for value had notice of the claim for maintenance is not conclusive of the widow's rights against the property in his hands. Mr. Justice West further held that " what was honestly purchased is free from her claim for ever : what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." As pointed out by Mr. Mayne in his work on Hindu Law, paragraph 421, page 518, 5th Edition, s. 39 of the Transfer of Property Act, substantially gives effect to the views expressed in the case cited above.

For these reasons we are of opinion that the view taken by the learned Judge of the lower appellate Court is right and that this appeal must fail. We dismiss it with costs.

Appeal dismissed.

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(1) 4 A. 296 (299).

(2) 2 B. 494.

22 A. 329 = 20 A.W.N. (1900) 116.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ASHIQ HUSAIN (*Objector*) *v.* MUHAMMAD JAN AND OTHERS (*Applicants*).* [28th April, 1900.]

Act No. XIX of 1873 (*N.W.P. Land Revenue Act*), *ss.* 107 *et seqq*—*Partition*—*Revenue Courts not competent to partition buildings.*

In a partition under the North-Western Provinces Land Revenue Act, 1879, neither buildings nor the materials thereof can be partitioned; what is partitioned is the land in the mahal. Where such land is covered with buildings, the Court making the partition has to follow the provisions of s. 124 of the Act; but it can decide no question of right to the buildings, nor can it partition them.

THIS appeal arose out of an application made by the respondents for partition of certain resumed muafi and shamilat lands in the village of Muhammadpur, together with the buildings thereon, consisting of various shops and houses. Objections were filed by the appellant Ashiq Husain, including one, to the effect that the Revenue Court was not competent to partition the shops and houses. These objections were disallowed summarily by an Assistant Collector, but on appeal the District Judge made an **[330]** order of remand under s. 562 of the Code of Civil Procedure. On this remand the Assistant Collector went into the case at length and passed an order directing the partition of nine shops and buildings appertaining thereto, as also of a certain *diwan khana* and *rath khana*.

From this order the objector, Ashiq Husain, appealed to the District Judge, again urging that the order for partition of the buildings was not within the competence of a Court of Revenue.

The District Judge, apparently without considering the question of jurisdiction raised by the appellant's first plea, dismissed the appeal and confirmed the order of the Assistant Collector.

The appellant thereupon appealed to the High Court.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for partition made under Act No. XIX of 1873. Some objections having been raised, the Court of Revenue tried those questions under s. 113 of the Act. In doing so the Assistant Collector determined the extent of the shares of the different owners of the mahal in respect of certain buildings, and ordered that the Amin should make a partition of the buildings, including rafters, bricks, stones and other materials of each building. We are surprised that such an order of the Assistant Collector, which was manifestly *ultra vires*, has been sustained by the learned District Judge. It is beyond question that in partition proceedings under the North-Western Provinces Land Revenue Act neither buildings nor the materials thereof can be partitioned. What is partitioned is the land of the mahal:

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* Second Appeal No. 829 of 1897 from a decree of C. Rustomjee, Esq., District Judge of Moradabad, dated the 5th August 1897, confirming the order of Kuar Bahadur, Assistant Collector of Moradabad, dated the 18th June 1895.

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22 A. 329= 20 A.W.N. (1900) 116.

where such land is covered by buildings the Court making the partition has to follow the provisions of s. 124 of the Act, but it can decide no question of right to the buildings, nor can it partition them. We allow the appeal and set aside so much of the order of the Courts below as directs the partition of the buildings in question. The parties will pay their own costs in all Courts.

[This ruling was followed by Banerji, J., in Second Appeal No. 13 of 1900, decided on the 9th June, 1900, the judgment in **[331]** which is printed below.* See also the case of *Abdul Rahman* v. *Mashina Bibi* (1) —ED.]

Decree modified.

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* BANERJI, J.—I think that the decree of the Court below is right and this appeal must be dismissed. The suit relates to a one-fourth share of the walls of an enclosure, and to gates, and turrets appertaining to a garhi in the village Talra. The plaintiff claims a moiety of the said share. He is one of the three sons of one Jawahir Singh. The defendants are his nephews, being the sons of the plaintiff's brother Fateh Singh. The third brother, Anup Singh, is dead and left no issue. The plaintiff's case is that the three brothers were joint, that the property in question was acquired with joint funds, and that consequently he is entitled to a half share of the said property. It appears that a partition of the village has been effected and the shares owned by the parties have been divided by the Revenue Authorities. The walls, gates, and turrets in suit are said to have been allotted by the Revenue Authorities to the defendants as appertaining to their share. It is in consequence of this order of the Revenue Authorities that the plaintiff has brought the present suit. The lower appellate Court has found as a fact that the property was acquired by Anup Singh when the family was joint, that the plaintiff and the defendants' father Fateh Singh lived jointly with Anup Singh, and that upon Anup Singh's death both of them became owners in equal moieties of the property in question. It has also been found that the defendants had failed to prove that the property had been acquired separately by Fateh Singh. That Court has decreed the plaintiff's claim with the exception of a small portion of it with which we are not concerned in this appeal. The first two pleas taken in the memorandum of appeal are to the effect that the decision by the Revenue Authorities precludes the plaintiff from maintaining the present suit. This objection is, in my opinion, utterly untenable. It was not within the competency of the Revenue Authorities to partition a building. It is only the land of a mahal which the Revenue Authorities are empowered to partition by Act No. XIX of 1873. If those authorities took upon themselves to partition the buildings, that is, the walls, the gates and the turrets in suit, they acted *ultra vires*. This was held in second appeal No. 829 of 1897, decided on the 28th of April, 1900. Further, I notice that in this case the District Judge held in the appeal preferred to him from the order passed in the partition proceedings that the parties should have their rights to the buildings determined by a Civil suit. It is clear, therefore, that the plaintiff is not precluded from maintaining the present suit in the Civil Court as held by the Courts below. The other grounds of appeal must, having regard to the findings of the lower appellate Court, fail. As I have said above, that Court has found, and I think upon cogent grounds, that the property was joint. Therefore the plaintiff was entitled to the decree which has been granted to him. I dismiss the appeal with costs.

[N.B.—This case has been followed in 22 A. 329.—ED.]

(1) 19 A.W.N. (1899) 49.

22 A. 331 = 20 A.W.N. (1900) 96.

APPELLATE CIVIL.

Before Mr. Knox, Ag. Chief Justice, and Mr. Justice Blair.

SHIAM KARAN AND ANOTHER (*Judgment-debtors*) *v.* RAGHUNANDAN PRASAD AND ANOTHER (*Decree-holders*).* [30th April, 1900.]

Letters Patent, s. 8—Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor.

Held, that the presentation of an appeal by a person who was not an advocate, vakil or attorney, of the Court, nor a suitor, is not a valid presentation in law, having regard to s. 8 of the Letters Patent of the High Court.

[D., 24 A. 172.]

[332] IN this case the petition of appeal was signed and presented to the Court by a person who was neither an advocate, vakil or attorney of the Court, nor a suitor, but who appears to have been a mukhtar-a'am of the appellant. At the hearing of the appeal a preliminary objection was taken that this was not a valid presentation, having regard to s. 8 of the Letters Patent.

Munshi *Gulzari Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the respondents.

JUDGMENT.

KNOX, AG. C. J., and BLAIR, J.—A preliminary objection has been taken to the effect that the petition of appeal, which was presented in this Court, was presented by an agent and not by any of the persons enumerated in s. 8 of the Letters Patent of this Court. The memorandum of appeal appears to have been presented by some person who was clearly neither of the appellants before the Court, and who may or may not be a person holding a power-of-attorney to appear and act on behalf of the appellant. It is contended that a mere presentation of an appeal does not come within the words of s. 8. We hold that this contention is wrong. The words of s. 8 are very clear and positive. We accordingly dismiss the appeal with costs.

Appeal dismissed.

* First Appeal from order No. 121 of 1899 from an order of Babu Kunwar Mohan al, Subordinate Judge of Benares, dated 15th July 1899.

1900

MAY 2.

APPELLATE CIVIL.

22 A. 332=20 A.W.N. (1900) 98.

22 A. 332=20 A.W.N.ε(1900) 98.

APPELLATE CIVIL.

Before Mr. Knox, Ag. Chief Justice, and Mr. Justice Blair.

MANMOTHONATH BOSE MULLICK (*Plaintiff*) *v.* BASANTO KUMAR BOSE MULLICK (*Defendant*).* [2nd May, 1900.]

Act No. VIII of 1890 (*Guardian and Wards Act*), *s* 41—*Guardian and Ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.*

Held, that no suit would lie by a ward against the son of his late guardian for rendition of accounts. *Rameshur Tiwari* v. *Kishun Kumar* (1) referred to.

[Diss., 18 Ind. Cas. 876 (877)=17 C.W.N. 695 (696); **F.**, 9 Ind. Cas. 591=78 P.L.R. 1911=74 P.W.R. 1911; **Doubted**, 16 C.L.J. 282=17 C,W.N. 5 (7)=16 Ind. Cas. 742 (744).**]**

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satish Chandar Banerji*, for the appellant.

[333] Babu *Jiwan Chandar Mukerji* (for whom Pandit *Baldeo Ram Dave*), for the respondent.

JUDGMENT.

KNOX, AG. C. J., and BLAIR, J.—The plaintiff, who is the appellant before us, filed a suit in the Court of the Munsif of Allahabad, alleging that one Babu Tara Kinker Bose Mullick, who had been appointed his guardian, had not rendered accounts beyond the first year of such guardianship, that the said guardian died during plaintiff's minority, and that "the plaintiff has every reason to believe that out of the said assets the said Babu Tara Kinker Bose Mullick misappropriated a large sum of money to his ow nuse." Nothing further was alleged either as to the nature, quantity, kind or manner of the misappropriation which the plaintiff believed had been made. But the plaintiff called upon the defendant, who is the son of the said guardian, to settle the accounts of the estate, to pay out of the estate any sum or sums found due upon such settlement of accounts, or if the accounts could not be settled, to pay such sum or sums as the plaintiff might succeed in proving to be due. The Court of first instance decided that the son was bound to render an account. In appeal the District Judge held that the son could not be called upon to render accounts, and that it was no business of his to do so; that the plaintiff could call upon him to hand over any papers, account-books, etc., relating to the estate which might have come into his possession. He further held that upon such a vague allegation of misappropriation no decree could be given against the defendant. He accordingly set aside the decree for the rendition of accounts, and remanded the case to the Court below with instructions to frame an issue regarding the items believed to have been misappropriated. In appeal before us the appellant urges that as the respondent is in possession of his father's estate, he can be held liable to render accounts, and more to account to him for the period of his father's management. For this proposition no authority was cited to us beyond certain principles said to be found in the case

* First Appeal from Order No. 117 of 1899 from an order of Khan Bahadur Mir Aktar Husain, dated the 14th September 1899.

(1) 2 A.W.N. (1882) 6.

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APPELLATE CIVIL.
22 A. 332=20 A.W.N. (1900) 98.

of *Concha* v. *Murrieta* (1). That case related to special circumstances based upon the law of Peru. On the other hand, we have a case of this Court, namely, *Rameshur Tiwari* v. *Kishun Kumar* (2). The learned [334] Judges who decided that case evidently considered that the law governing a relationship of the special nature must be looked for within the four corners of the Statute which created that relationship; the same law governs the present case; and they held that under s. 21 of Act No. XL of 1858 the Judge had no power to require the heirs of a guardian to account for moneys received and disbursed by the father in the capacity of a guardian. The provisions of s. 21 are personal to the guardian himself, and refer to cases in which his certificate has been recalled for incompetency, dishonesty or some other good cause, and not where his appointment has lapsed through death. This precedent was presumably known to the Legislature when they enacted Act No. VIII of 1890, and from the words used by them in s. 41 of that Act, it seems to have been considered as the law which should prevail upon the point. The respondent has filed objections, and one of them is to the effect that the present suit would not lie. The objection is a good one and fatal to the suit.

We dismiss the appeal, and upon the objection taken we set aside the order of remand, and further direct that the suit as brought stand dismissed with costs in all Courts.

Appeal dismissed.

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22 A. 334=20 A.W.N. (1900) 115.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Kt., Chief Justice, and Mr. Justice Banerji.

MALIK MUHAMMAD KARIM AND OTHERS (*Plaintiffs*) *v.* GANGA PANDE AND OTHERS (*Defendants*).* [3rd May, 1900.]

Act No. XII of 1881 (*N.W.P. Rent Act*), *ss.* 93, 94—*Suit for recorded share of profits—Suit for settlement of accounts—Limitation.*

Where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts [335] incidentally to that main object, and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of s. 93 (*h*) of the N.W.P. Rent Act, 1881. *Rohan* v. *Jwala Prasad* (3), explained. *Indo* v. *Indo* (4), referred to.

[R., 7 O.C. 84 (86, 88).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellants.

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* Appeal No. 5 of 1899 under s. 10 of the Letters Patent.

(1) (1889) L.R. 40 Ch. D. 543.
(2) 2 A.W.N. (1882) 6.
(3) 16 A. 333.
(4) 16 A. 28.

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MAY 3.

APPEL-
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CIVIL.

22 A. 334=
20 A.W.N.
(1900) 115.

Babu *Parbati Charan Chatterji*, for the respondents.

JUDGMENT.

STRACHEY, C.J., and BANERJI, J.—We need not call upon the learned counsel for the appellants to reply. The suit clearly falls within s. 93 (*h*) of the Rent Act (XII of 1881). The only question is whether it falls within the first category of suits mentioned in that clause, namely, suits by recorded co-sharers for their recorded share of the profits of a mahal, or within the second category of suits for a settlement of accounts. If it falls within the first category, then under the first paragraph of s. 94 the period of limitation is three years from the day when the share became due: if it falls within the second category, then, under the third paragraph of s. 94, the period of limitation is one year from the day on which the right to sue accrued. Mr. Justice Burkitt has held that the suit is one for a settlement of accounts, and that having been brought more than one year from the day on which the right to sue accrued, it was barred by paragraph 3 of s. 94. Now in order to see whether the suit falls within the first or the second category mentioned in s. 93 (*h*), it is necessary to look at the plaint. The suit purports to be brought by certain co-sharers of the village against certain other co-sharers. It is headed as a "claim for the recovery for Rs. 516-11-6 principal and interest after adjustment of account from 1301 to 1303 Fasli, on account of lands in mauza Poni, pargana Ghosi." It sets forth that the profits arising from the plaintiffs' share during the years in question amounted to Rs. 2,000 odd, out of which the plaintiffs received from the tenants Rs. 1,600 odd, and that the remaining sum of Rs. 436-11-6 due to the plaintiffs was appropriated by the defendants, first party. It further alleges that out of the profits for the years in question the defendants have collected Rs 436-11-6 on account of the plaintiffs' share in excess of the defendants' **[336]** own share of the profits, and have not paid it in spite of repeated demands. The only relief prayed in the plaint, apart from costs, is that a decree for the recovery of Rs. 436-11-6 principal, and Rs. 80 interest, in all Rs. 516-11-6 may be passed in favour of the plaintiffs against the defendants. There is no specific prayer referring to accounts. The only allusion to an account is in the heading of the plaint, where the claim is described as one for the recovery of Rs. 516 "after adjustment of accounts." It is thus clear that the main and substantial object of the suit is to recover from the defendants with interest a specific sum which the defendants are alleged to have recovered from the tenants in excess of their own share of the profits and to hold on account of the plaintiffs' share. For the purpose of ascertaining the correctness of the amount claimed, but for no other purpose, the Court is asked to adjust the accounts. Now this being the nature of the claim, the ruling of the Full Bench in *Rohan* v. *Jwala Prasad* (1) appears to us to show clearly that the suit falls within the first category mentioned in s. 93 (*h*) and not within the second category. The Full Bench held in effect that where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement

(1) 16 A. 333.

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MAY 3.
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of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts incidentally to that main object and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of s. 93 (*h*). Now the claim in that case very closely resembled the claim in the present case. There a specific sum was claimed by a recorded co-sharer against four [337] other co-sharers in the village, not against the lambardar, as a share of the profits which the defendants were alleged to have realized in excess of what they were entitled to. The plaint asked for the recovery of the amount claimed "by means of adjustment of account," the same expression as is used in the plaint before us in the only reference which it makes to accounts. The prayer was there, as here, not any prayer referring to a settlement of accounts, but a decree for the specific amount claimed with interest. It was held by the Full Bench that, notwithstanding the reference to an adjustment of accounts, the suit fell within the first category of s. 93 (*h*) and was for the purposes of limitation to be regarded as a suit for a share of the profits of a mahal. We cannot agree with the learned Judge who heard this appeal that the present suit falls within the second category of cases mentioned by the Full Bench. We think that it clearly falls within the first category. The learned pleader for the respondent has referred to an earlier Full Bench case of *Indo* v. *Indo* (1). It is not necessary to discuss that case beyond saying that if the decision lays down anything inconsistent with the case of *Rohan* v. *Jwala Prasad* (2), it must be taken to have been overruled by that case, which was decided by six Judges of the Court, including the three Judges who were parties to the former case.

Mr. Justice Burkitt does not in his judgement discuss the other points raised by the memorandum of appeal to this Court. We have heard the pleader for the respondent in support of these pleas, and we think there is no force in any of them.

We allow this appeal, set aside the judgment of Mr. Justice Burkitt and dismiss the appeal to this Court with costs.

[A similar case was decided by Banerji, J., on the 6th June, 1900, S. A. No. 891 of 1899, the judgment in which is given below*.—ED.]

Appeal decreed.

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* BANERJI, J.—The suit which has given rise to this appeal was brought under cl. (*h*) of s. 93 of Act No. XII of 1881, for the plaintiffs' recorded share of profits for the years 1302, 1303 and 1304 Fasli. The plaintiffs own a fourth share in Khata No. 21, and an eighth share in Khata No. 22, and they seek to recover the amount claimed as arrears of profits in respect of those [338] shares for the three years mentioned above. The lower appellate Court was of opinion that the suit was one for a settlement of accounts, and applying to the suit the limitation of one year prescribed by s. 94 of the Act, has dismissed the claim in respect of the profits for the years 1302 and 1303 Fasli on the ground of limitation. This view of the learned Judge is clearly erroneous. As I have said above, the suit was in terms a suit for profits and not one for a settlement of accounts. The distinction between the two classes of suits was explained by the Full Bench in the case of *Rohan* v. *Jwala Prasad* (2). It was there held that a suit for profits does not become a suit for a settlement of accounts because the Court may have to take an account for the purpose of granting a decree to the plaintiff. It is only when the main object of the suit is to have an account taken from the defendant that the suit becomes one for a settlement of accounts Such is not the

(1) 16 A. 28. (2) 16 A. 333.

1900

MAY 5.

APPELLATE CIVIL.

22 A. 338=20 A.W.N. (1900) 107.

22 A. 338=20 A.W.N. (1900) 107.

[338] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

BANSIDHAR AND OTHERS (*Defendants*) *v.* GANESHI AND ANOTHER (*Plaintiffs*).* [5th May, 1900.]

Hindu Law—Mitakshara—Succession—Daughter's daughter.

Held, that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather.

[Diss., 28 A. 187=2 A.L.J. 654=A.W.N. (1905) 242; 28 A. 307=3 A.L.J. 87=A.W.N. (1906) 13; R., 4 N.L.R. 31 (35); 20 P.R. 1906=69 P.L.R. 1906.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal*, for the appellants.

Mr. *E. Chamier* and Pandit *Madan Mohan Malaviya*, for the respondents.

JUDGMENT.

HENDERSON, J. (BURKITT, J., concurring).—In this case it appears that on the 21st July, 1842, one Rai Singh sold certain land for Rs. 351. The sale-deed, after reciting that the price had been paid and possession given to the vendee, contained the following provision:—"If the said vendee should on another occasion sell the said property, then for the same price

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case here. The learned Judge of the lower appellate Court thinks that because an account had to be taken of the rent payable by the defendants for the *Khudkasht* land held by them, the suit must be taken to be a suit for a settlement of accounts. Having regard to the Full Bench ruling referred to above, that view cannot be supported. The suit was in terms one for profits, and it was in substance a suit of that description. This case is very similar to the case of *Malik Muhammad Karim* v. *Ganga Pande* (L. P.A., No. 5 of 1899) decided on the 3rd of May 1899, and following the ruling in that case, I hold that the present suit is one for profits and not for a settlement of accounts. No portion of the claim was therefore barred by limitation.

[The lower appellate Court has found that the plaintiffs' share of the profits for each year was Rs. 124-2-1. An exception was taken to this finding in the third ground of appeal, but that plea is not pressed. The respondents have preferred objections under s. 561 of the Code of Civil Procedure on the ground that it has not been found that the respondents had collected rents from tenants. But this ground is wholly untenable, as the learned Judge of the lower appellate Court has distinctly found that "the evidence on the record shows that he (Shib Singh) has gone on collecting as usual," so that the finding of the lower appellate Court that Rs. 124-2-1 is the plaintiffs' share of the profits of each year is not open to objection. The plaintiffs were consequently entitled to a decree for the profits of the three years in question at that rate together with interest upon the amount due for each year at the rate allowed by the lower appellate Court. The result is that I decree the appeal and vary the decree below by making a decree in favour of the plaintiffs for the profits of the years 1302 and 1303 Fasli at the rate of Rs. 124-2-1 per annum together with interest thereon in addition to the amount decreed by the lower appellate Court for the year 1304 Fasli. The parties will pay and receive costs in all the Courts in proportion to their failure and success.

The objections under s. 561 are dismissed.]

N.B. (1) This case has been followed in 22 A. 334. ED.

N.B. (2) The portion in rectangular brackets forms a portion of the judgment of the case reported in 22 A. 337-N. But it does not find a place in the I.L.R. Series. ED.

* Second Appeal No. 851 of 1897, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Aligarh, dated the 17th August 1897, reversing a decree of Maulvi Abdul Rahim, Munsif of Kasganj, dated the 18th December 1893.

he shall sell to *me the vendor*, and in case of my refusal he shall sell to any other person."

[339] On the 15th December, 1892, the representatives of the vendee, who had in the meantime died, sold a one-sixth share of the land to the defendants for Rs. 1,000 without giving the persons claiming to be the representatives of the vendor, who had also died, the option of purchasing the share.

In 1893 the plaintiffs, who are the daughter's daughter of the vendor and her son, claiming to be the heirs of the original vendor, sued the defendants, the purchasers of the $\frac{1}{6}$th share, to recover that share on payment of Rs. 58-8-0, that sum being a one-sixth of the original price.

The lower appellate Court dismissed the suit, and on an appeal preferred to this Court, it was held by another Bench that the provision in the deed to which we have referred amounted to a covenant running with the land and was binding upon any purchaser. It was also held that the benefit of the covenant inured to the heirs of the original vendor, and that they would be entitled to sue upon the covenant, and the case was remanded to the lower Court for re-trial.

On remand the lower appellate Court found that the plaintiffs are both heirs of the original vendor, and has given them a decree for possession of the land on payment of Rs. 58-8-0.

The defendants have now appealed to this Court. The questions whether the plaintiffs (or either of them) are entitled to the benefit of the provision which has been held by another Bench of this Court to be a covenant running with the land, and whether that is provision binding upon the defendants, are not now before us, and we therefore refrain from expressing any opinion upon those questions.

The only points which are now open to us are whether the plaintiffs are the heirs of the original vendor, and whether, on the construction of the deed of sale, the price to be paid on a re-sale was the original price, or the price which an intending purchaser was prepared to give.

As to the first point, we think it is clear, on the authorities which have been quoted before us, and the learned vakil for the appellant at the end of the argument on the other side was forced to admit, that in the absence of preferential male heirs the plaintiff Ganeshi is heir to her maternal grandfather, the original **[340]** vendor. It has been found by the lower appellate Court, and the finding has not been challenged, that there are no preferential male heirs.

The other point as to the construction of the deed is not free from difficulty. On the whole, however, we are of opinion that the contract between the original vendor and vendee was that the price to be paid on a re-sale was the original price mentioned in the deed of sale. We therefore dismiss this appeal and affirm the decree of the lower appellate Court as far as the female plaintiff is concerned.

The added plaintiff, the son of the female plaintiff, has no title during his mother's life time, and is not entitled to a decree jointly with her. His suit must be dismissed, but, under the circumstances, without costs. Musammat Ganeshi is entitled to her costs in this Court.

Decree modified.

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MAY 14.

REVISIONAL CRIMINAL.

22 A. 340 = 20 A.W.N. (1900) 110.

REVISIONAL CRIMINAL.

Before Mr. Knox, Acting Chief Justice and Mr. Justice Blair.

QUEEN-EMPRESS *v.* NARAIN SINGH.* [14th May, 1900.]

22 A. 340 = 20 A.W.N. (1900) 110.

Criminal Procedure Code, s. 556—Act No. V of 1861 (Police Act), s. 29—Trial by District Magistrate for breach of orders of a Reserve Inspector of Police—Magistrate not "Personally interested."

Held, that the Magistrate of a district was not, on account of his being the head of the police of the district, debarred by reason of s. 556 of the Code of Criminal Procedure from trying a person accused under s. 29 of the Police Act, 1861, of a breach of the orders of a Reserve Inspector of Police.

[R., 24 M. 238 (240) = 2 Weir 238.]

THIS was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Jhansi, in respect of an order passed by the District Magistrate of Jhansi, whereby the Magistrate had convicted one Narain Singh of a breach of an order issued by a Reserve Inspector and had sentenced him to two months' rigorous imprisonment under s. 29 of Act V of 1861. The Sessions Judge was of opinion (1) that it was not proved that the accused knew of the order in question and wilfully disobeyed it, and (2) that the Magistrate as head of [341] the police in the district was debarred by s. 556 of the Code of Criminal Procedure from trying the case. The Sessions Judge was of opinion that "the Full Bench ruling of the Allahabad High Court in the matter of the petition of *Ganeshi* (1) has been practically overruled by the addition of the illustration to s. 556, Criminal Procedure Code, by Act V of 1898."

The facts of the case are more fully stated in the order of the Court.

ORDER.

KNOX, Acting C. J., and BLAIR, J.—Narain Singh, a constable, was convicted by the District Magistrate of Jhansi of an offence under s. 29 of Act V of 1861, and sentenced to two months' rigorous imprisonment. Narain Singh was a recruit, and, as such, under the orders of the Reserve Inspector. There is evidence on the record that all policemen at every parade from the 11th were informed by orders of the Reserve Inspector that no recruit was to be absent from the lines without a pass. Upon the evidence the District Magistrate rightly found, if he believed the evidence, which he did, that Narain Singh was absent from the roll-calls at which he was bound to be present at 7 P. M. and 9-30 P. M. on the 22nd February. The defence of the accused was that he was unable to be present at the first of the two roll-calls because he had been in the Court Inspector's office till 6-30 P. M. of that evening, and when he went home to get his food, was delayed because the food was not ready. As regards the second roll-call, he says he was asleep. He does not anywhere set up the defence that he was ignorant of the rule about the roll-call. The defence, moreover, is disbelieved, and we shall certainly not disturb the Magistrate's finding on these matters of fact. The finding proceeds upon evidence, with which he was more competent to deal, in that it was given in his presence, and he had better opportunities of appraising its worth. There is also much force in what the District

* Criminal Revision No. 215 of 1900.

(1) 15 A. 192.

Magistrate says, that he tried the offence summarily, and all that a Magistrate trying the case summarily is required by law to enter is the finding, and in case of a conviction, a brief statement of the reasons therefor. We do not expect to find the evidence in full, nor can we lay down, **[342]** for that would be legislation, that in a case of this kind the Magistrate is bound to do more than record a judgment embodying the substance of the evidence.

But it is contended that the Magistrate had no jurisdiction to try this case, and the contention is based upon the words contained in s. 556 of the Code of Criminal Procedure. The argument is that the accused should not have been tried by the District Magistrate in one capacity for breach of an order issued by, or approved of by himself in another capacity as accused's superior officer. We have in this Court in Full Bench decided what meaning is to be put on the words "a party or personally interested," and that judgment is in no way affected by the explanation which has been added by Act No. V of 1898, certainly so far as the circumstances of this case are concerned. The accused could have at a proper stage raised this point; he did not do so, nor do we think he could have done so successfully, for we see in the case no substantial interest giving rise to real bias in the mind of the District Magistrate. We do not agree with the learned Judge that the fact that the District Magistrate was much concerned on account of riots between the police and the Madras Infantry Regiment, and that he was taking energetic steps to prevent disturbance of the public peace, is any evidence of any bias on the part of the District Magistrate. Any such conclusion as this we most emphatically decline to draw. A Magistrate may be very properly interested in securing the proper peace of his district, and be at the same time rigidly impartial in trying persons charged with a breach of that peace. The Code of Criminal Procedure recognises this when it gives the District Magistrate special powers of dealing in appeal with proceedings taken to insure security against any breach of the peace. The order therefore which we are now passing is in no way concerned with any such reasoning as that given above. We take into consideration that the accused was a recruit, that nothing was shown against his previous character. Three months is the maximum punishment provided by law, and we think that, on the whole, a sentence of one month's rigorous imprisonment would have sufficed. We accordingly reduce the sentence to one of rigorous imprisonment for one month with effect from the 28th February, 1900. **[343]** Any imprisonment which the accused has suffered since that date will be deemed part of this sentence. Any balance of imprisonment not suffered will run from the date on which he is arrested or submits himself for arrest.

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MAY 14.

APPELLATE CIVIL.

22 A. 343 = 20 A.W.N. (1900) 102.

22 A. 343=20 A.W.N. (1900) 102.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

NAJM-UN-NISSA (*Plaintiff*) *v.* AJAIB ALI KHAN (*Defendant*).*
[14th May, 1900.]

Muhammadan law—Pre-emption—Invalid sale—Time when right of pre-emption arises.

No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. *Begam* v. *Muhammad Yaqub* (1), referred to.

[R., 7 O.C. 98 (99).]

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and Pandit *Moti Lal*, for the appellant.

Mr. *Karamat Husain*, for the respondent.

JUDGMENT.

HENDERSON J. (BURKITT, J., concurring).—These second appeals, No. 631 of 1897 and No. 687 of 1897, have been heard together.

The facts are very simple. One Amirullah, who was the owner of one of four adjacent houses, on the 17th May, 1895, by a registered contract of sale, sold that house to Ajaib Ali, the respondent in this appeal, for Rs. 84 for the site, and a further sum for the buildings, to be ascertained by carpenters or masons to be appointed by the vendor and vendee, it being stipulated that upon the additional sum being ascertained and paid, possession of the house should be made over within ten days.

On the 14th July, 1896, Abrar Husain, the owner of the remaining three houses, sold them to his wife, Najm-un-nissa, the **[344]** present appellant. It so happened that Amirullah did not carry out the terms of his contract with Ajaib Ali, refusing to join in appointing carpenters or masons to ascertain the price of the buildings, and the latter found it necessary to institute a suit for specific performance of the contract, and eventually obtained a decree on the 15th May, 1896, whereby, *inter alia*, it was directed that the parties to the suit should within a month join in nominating four carpenters or masons to ascertain the value of the buildings, and that in default of their so doing, the Court Amin should ascertain the value. The parties did not carry out the first direction, and the Amin subsequently made an inquiry and ascertained the value to be Rs. 111-8-0. This sum Ajaib Ali paid on the 15th August, 1896, and thereafter, on the 6th September 1896, he obtained possession under the decree. Neither the contract of the 17th May, 1895, nor the decree in the suit for a specific performance are upon the record, but the facts, as above stated, are admitted.

Najm-un-nissa and Ajaib Ali have now each sued the other, each claiming to have a right of pre-emption against the other. Both suits

* Second Appeal No. 631 of 1897, from a decree of D. F. Addis, Esq., C. S., District Judge of Shahjahanpur, dated the 2nd August 1897, reversing a decree of Babu Baij Nath, Subordinate Judge of Shahjahanpur, dated the 3rd June 1897.

(1) 16 A. 344.

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were filed on the 22nd February 1897. Najm-un-nissa in her suit alleged that the proprietary right or ownership in the house purchased by Ajaib did not pass to him on the execution of the contract of the 17th May, 1895; and that on the date of her purchase, namely, on the 14th July, 1896, he was not the owner, and in fact did not, according to Muhammadan law, become the owner until the 6th September 1896, when he got possession, and she claimed that her right of pre-emption against him then arose.

Ajaib Ali in his suit claimed to have been the owner of the house purchased by him as from the 17th May 1895, the date of the purchase by him, and, as such, to have been entitled to pre-emption as against Najm-un-nissa upon her purchasing his house on the 14th July, 1896. In the other suit he contended that Najm-un-nissa could have no right of pre-emption against him, as her purchase was long after his.

The first Court decided in favour of Najm-un-nissa's contention and dismissed the suit of Ajaib Ali. On appeal the District Judge dismissed both suits.

[345] Both have now appealed to this Court. The only questions argued before us were as to the effect, according to Muhammadan Law, of the contract of sale of the 17th May 1895. Mr. *Abdul Raoof*, who appeared for Najm-un-nissa, contended—(1) that the contract of sale to Ajaib Ali was what is known to the Muhammadan Law as an invalid sale; (2) that no right of pre-emption can be claimed by or against the purchaser under an invalid sale so long as the invalidating circumstances or conditions exist; (3) that the sale to Ajaib Ali did not become complete until he obtained possession on the 6th September 1896, and that until that date the proprietary interest of his vendor did not pass to him. He has referred us to the case of *Begam* v. *Muhammad Yakub* (1), a case decided by a Full Bench of this Court, and to a large number of authorities on Muhammadan Law. The case referred to is an authority for the proposition that in considering whether a right of pre-epmtion arises, the Muhammadan Law is to be applied, and that if there is a complete sale under that law, although not under the general law, the right of pre-emption will arise. It is also an authority for the proposition that the sale to Ajaib Ali was complete on the 6th September 1896, when the price had been paid and possession given to him; but it is not an authority, unless perhaps impliedly, upon the question whether the ownership in the house purchased by Ajaib did or did not pass to him as from the date of his purchase.

In support of the contention that the contract of sale of the 17th May, 1895, was in invalid sale, a number of passages from Baillie's Muhummadan Law of Sale and other text-books on Muhammadan Law have been referred to. In Baillie's Muhummadan Law of Sale at p. 4, dealing with the conditions necessary to the validity of sale, it is said: (it is required) "thirdly, that both the thing sold and the price be so known "and determined as to prevent dispute between the parties, and any "ignorance that may tend to produce contention between them is "sufficient to invalidate the sale, as in the case of a single goat undefined "from a particular flock, or *of anything at a price to be fixed by another "person.* * * * Fifthly, it is necessary to the validity of all sales "that they be free from vitiating or invalidating **[346]** conditions which "are of various kinds. * * They may be described generally in "this place as conditions that are not in harmony with the contract "or within the usual scope of such transactions among men, or

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" conditions that are dependent on events that are either alto-
" gether fortuitous, or the time of the occurrence of which cannot be
" *predicted with any degree of certainty.*"

The original text from which the former portion of the passage quoted has been taken with its translation is as follows :—

و منها ان يكون المبيع معلوماً والثمن معلوما علما يمنع من المنازعة فبيع المجهول جهاله تفضي اليها غير صحيح كبيع شاة من هذا القطيع و بيع الشي بقسمة و بحكم فلان *

عالمگيري جلد ثالث كتاب البيوع باب اول صفحه ٣ - طبع نولكشور *

(Alamgiri, Vol. III, p. 3, Lucknow edition.)

" One of them (the conditions of the validity of the sale) is that the " thing sold and the price be so known as to avoid any dispute, hence the " sale of a thing so unknown as to lead to dispute is invalid ; tor example, " the sale of any goat in a particular flock and *the sale of a thing for its price* " (*whatever it may be*) *or* (*for such a price*) *as such an one may settle.*"

In Baillie's Moohummudan Law of Sale, at p. 176, it is said :— " Any ignorance of the thing sold or of the price that affords room for " objection to its delivery prevents the legality of sale ;" and again at p. 208 :—" When delay is stipulated for in the delivery of the thing sold " and the thing is specific the contract is invalid." In Hamilton's Hedaya, edition 1870, at p. 242, it is said :—" It is here proper to observe " that every species of uncertainty which may prove an occasion of con- " tention is invalid in a contract of sale."

Having regard to these authorities, it appears to us that the contract of the 17th May, 1895, amounted to an invalid sale. The price was not so known or determined as to prevent dispute ; the contract was for the sale of a house at a price to be fixed by third parties ; the delivery of possession was indefinitely delayed, being dependent upon the ascertainment at some future time of the value of the buildings.

[347] Mr. *Karamat Husain*, who appeared for Ajaib Ali, did contend that the sale was of the category of operative sales, but such sales are defined as " sales which take effect immediately." Baillie's Moohummudan Law of Sale, p. 6 ; Baillie's Digest of Moohummudan Law, p. 484 (6), but he was forced to concede that in its inception, at all events, it was an invalid sale.

If then the sale was an invalid sale, there are numerous passages in the Muhammadan Law Books which show that such a sale cannot give rise to a claim for pre-emption by or against the purchaser so long as the invalidating circumstances exist. It is sufficient to refer to the following: —" The privilege of Shaffa cannot take place regarding a house transferred " by an invalid sale "—Hamilton's Hedaya, p. 650. " There must also " be an entire cessation of all right on the part of the seller. There is " therefore no right of pre-emption for an invalid sale "—Baillie's Digest of Moohummudan Law, p. 477.

و منها زوال حق البائع فلا تجب الشفعة في الشراء فاسداً *

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Alamgiri, Vol. IV, p. 3, Lucknow edition. Book on Pre-emption, Chapter I.

"And one of them (the conditions of pre-emption) is the extinction "of the vendor's title, hence the (right of) pre-emption does not arise in "an invalid sale." "The right of pre-emption arises only when the con- "tract transferring the right of property from the vendor to the vendee has "become complete. A mere executory contract does not give rise to a right "of pre-emption. * * * * Nor does the right take effect in respect of a "transfer made under an invalid sale, for the transferor under such a "sale maintains all his rights intact, and so long as he has not delivered "the property to the purchaser can exercise his right of pre-emption "over the transfer of an adjacent property "—Syed Ameer Ali's Muham-madan Law, 2nd edition, p. 591.

The reason for the rule that a right of pre-emption does not arise upon an invalid sale is that the ownership of the vendor in the property sold must be extinguished before the right can arise. One of the condi-tions of Shaffa is that "there must be a cessation of the seller's right "in the subject of the sale." Baillie's Digest **[348]** of Muhammadan Law, p. 476. So long as the proprietary right has not passed under a contract of sale from the vendor to the vendee, the vendor may himself claim a right of pre-emption against the purchaser of an adjacent tenement. This is clear from the following passage in the Fatwa Alamgiri :—

اگر مشتري نے بطور فاسد خريدي هوے دار کو اپنے قبضہ میں کرلیا حتی
کہ اُسکا مالک هوگیا پھر اِس دار کے پہلو میں دوسرا دار فروخت کیا گیا تو
مشتري کو شفع حاصل هوگا پس اگر اوسنے هنوز دوسرے دار کو شفع میں نہ
لیا تھا کہ اوسکے بائع نے اُس دار مبیعہ کو بوجہہ فساد بیع کے واپس کرلیا تو
مشتري کو دوسرے دار کے لینے کا اختیار نرهیگا اور اگر مشتري دوسرے کو
بحق شفع لے چکا هو پھر اوسکے بائع نے اوس سے دار مبیعہ بحکم فساد بیع
واپس لیا تو بحق شفع لینا برقرار کہا جائیگا - یہہ محیط میں هی •

Alamgiri, Vol. IV, p. 5, Lucknow edition :—

"The purchaser of a house sold under an invalid sale took possession "of it, whereby he became its owner. Then if a house adjacent to that "house was sold the purchaser would have the right of pre-emption.

"If prior to his acquiring the second house by pre-emption his vendor "took back the house sold to him owing to the invalidity in the sale, the "purchaser will not then have a right to take the house by right of pre-"emption.

"If the vendor takes back the house by reason of its invalidity after "the vendee has acquired the second house by pre-emption, then the "acquisition (of the house) by pre-emption will not be disturbed. This "is in Moheet."

But in the case of an invalid sale the right of pre-emption arises when the contract transferring the property becomes complete by posses-sion being given. According to the Hedaya, "in case of invalid sale, the "purchaser becomes proprietor of the article upon taking possession of it, "and is responsible for it, if it be lost in his hands "—Hedaya, p. 267. The same principle is also laid down in the following passage from the Fatwa Alamgiri :—

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واما شرائط الصحة فعامته و خاصة فالعامته لكل بيع ما هو شرط الانعقاد للن مالا ينعقد لم يصح ولا ينعكس فان الفاسد عندنا منعقد نافذ اذا اتصل به القبض *

[349]

22 A. 343 = 20 A.W.N. (1900) 102.

عالمگيري جلد ثالث كتاب البيوع باب اول صفحه ۳ - طبع نولكشور لكهنؤ *

Alamgiri, Vol. III, p. 3, Lucknow edition: Book on Sales, Chapter I.

"And the conditions of the invalidity (of the sale) are either general or "special. The general condition in case of each sale is that which is the "condition of the constitution (of the sale) because what is not constitut-"ed is not valid, and the contrary, is not true, because according to "us an invalid sale is constituted and takes effect when possession is "joined with it."

So in Baillie's Muhammadan Law of Sale it is said:—"An unlawful "sale is that which takes effect when followed by possession of the thing "sold" (p. 7).

Having regard to the authorities quoted above, we are of opinion that the sale of the 17th May 1895 was an invalid sale; that the ownership in the subject of the sale did not pass to Ajaib Ali on the date of the contract, nor until the 6th September 1896, when he, on payment of the price, obtained possession.

On behalf of Ajaib Ali it has been contended by Mr. *Karamat Husain* that sale is completed by declaration and acceptance, that is to say, when the offer of the vendor has been accepted by the vendee; and he has referred us to the Hedaya, p. 241. The passage, however, appears to refer to the constitution of the contract of sale, and has no reference to the conditions necessary to its validity. With regard to the constitution of the contract of sale, there is no material difference between the Muhammadan and other systems of law. The contract, whether the sale be a valid or invalid sale, is complete, in the sense of the agreement being concluded, upon the offer of the seller being accepted by the purchaser.

In the case of a valid sale there is clear authority to show that ownership passes before delivery of possession. "The legal effect of "sale is to establish a right of property in the buyer to the thing sold "and in the seller to the price when the sale is absolute," *i.e.*, absolute as distinguished from dependent (with an option) or invalid. Baillie's Muhammadan Law of Sale, p. 7. See Hamilton's Hedaya, p. 553, where it is said:—"If, the Shafee bring the seller into Court whilst "the house is still in his **[350]** possession, he (the Shafee) may commence "his litigation against him, and the seller may retain the house in his "own possession until he receive the price from the Shafee. The Kazee, "however, is not in this case to hear the evidence until the purchaser also "appear, as for his presence there is a twofold reason; for, first, the "purchaser is proprietor of the ground, and the seller the possessor; and "as the decree of the Kazee must be against both, both therefore must be "present. (It is otherwise where the purchaser has obtained possession: "for then there can be no occasion for the presence of the seller, as he has "become like a stranger, having neither the property nor the possession.)"

In the case of an invalid sale we have seen that the purchaser becomes the proprietor of the thing sold on taking possession of it: but it has

been contended that he becomes owner as from the date of the original contract, and in support of this contention we have been referred to a number of texts. All these texts, however, deal with cases of sales with an option. The general rule appears to be that "when an option is reserved to the seller the right of the property in the thing sold does not pass from him, but such right in the price passes from the purchaser;" and "when the option is reserved to the purchaser the right of property in the price does not pass out of him, but the thing sold passes from the seller." See Baillie's Muhammadan Law of Sale, pp. 67-68. To take the case of an option reserved to the seller, the sale on principle, so far as he is concerned, is otherwise a valid or out-and-out sale, and therefore the right of property passes from him as in the case of an ordinary valid or out-and-out sale.

It is a well recognized principle that there must be a cessation of the seller's ownership in the thing sold, an ownership in the pre-emptor "*at the time of the purchase* in the mansion on account of which he (the pre-emptor) claims the right of pre-emption"—Baillie's Digest, pp. 476-477. That there is no such cessation of the seller's ownership in the thing sold and ownership in the purchaser at the time of a contract of invalid sale seems to be clear from the fact that so long as the vitiating circumstances are not removed it is the seller, and not the purchaser, who is entitled to pre-emption in the case of a subsequent **[351]** sale of an adjoining tenement. The text quoted from the Alamgiri, Vol. IV, p. 5, to which we have already referred, seems to leave no doubt upon the point. That text seems also to show that when on the vitiating circumstances being removed, as by possession, an invalid sale becomes complete, the ownership does not pass from the seller to the purchaser as from the date of the sale.

The result is that we must find, firstly, that Ajaib Ali did not become the owner of the house purchased by him until the 6th September 1896, and therefore he was not entitled to claim pre-emption against Najm-un-nissa when she purchased her houses on the 14th July 1896; secondly, that Najm-un-nissa was entitled, on the sale to Ajaib Ali becoming complete on the 6th September 1896, to claim pre-emption against him. Accordingly we allow the appeal of Najm-un-nissa and dismiss that of Ajaib Ali. Najm-un-nissa will have her costs of both appeals.

Appeal decreed.

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22 A. 351=20 A.W.N. (1900) 106.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DAMODAR DAS (*Plaintiff*) *v.* MUHAMMAD HUSAIN (*Defendant*).*

[18th May, 1900.]

Act No. IX of* 1872 (*Indian Contract Act*), ss. 135, 137—*Principal and Surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be

* Second Appeal No. 22 of 1898, from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 29th September 1897, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly dated the 24th February 1897.

consideration therefor. *Philpot* v. *Briant* (1), *Tucker* v. *Laing* (2), and *Clarke* v. *Birley* (3), referred to.

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APPELLATE CIVIL.

22 A. 351 = 20 A.W.N. (1900) 106.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant Wali Ahmad, was discharged [352] under s. 135 of the Indian Contract Act. What happened was this. Wali Ahmad had written a letter to the plaintiff, asking for time to pay the instalments which were payable by him. In reply to that letter the plaintiff wrote to say :—"If there is no legal impediment, then I agree ; if there is, then I do not agree." It was contended in the lower appellate Court that this was a conditional acceptance of the proposal of the principal debtor. The learned Judge overruled this contention, and held that by reason of the creditor, plaintiff, accepting the proposal to grant time to the principal debtor the surety was discharged. It is contended before us, and in our opinion rightly, that a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract, that is, unless the agreement is one enforceable by law at the instance of the debtor. An agreement is not enforceable by law unless there is consideration for it. In this case there was no consideration for the plaintiff's agreement to delay the realization of the instalments originally fixed. This agreement was nothing more than a mere gratuitous forbearance on the part of the creditor within the meaning of s. 137 of the Contract Act. Under s. 135 the liability of the surety would cease if there was a contract between the creditor and the principal debtor by which the creditor promised to give time to the principal debtor. The real test for the application of that section is whether the agreement became a contract, that is to say, whether there was consideration for the promise made in the agreement. In the absence of such consideration the agreement could not be enforced by the debtor. The cases of *Philpot* v. *Briant* (1), *Tucker* v. *Laing* (2) and *Clarke* v. *Birley* (3), which were cited at the hearing, entirely support the contention of the learned counsel for the appellant. It was not suggested in this case that s. 139 of the Contract Act had any application. For the above reasons we are unable to agree with the Courts below in holding that the surety was discharged by reason of the forbearance of the plaintiff to realize the instalments payable by the principal debtor. We allow this appeal and vary the decree of the Court below by setting [353] aside that portion of the decree which dismissed the claim against Muhammad Husain with costs, and we decree the claim against the said defendant with costs here and in the Courts below, and direct the property hypothecated by the said defendant to be sold for the realization of the amount decreed, together with interest at the rate of 6 per cent. per annum up to the date of realization, unless the amount payable under the decree is paid on or before the 15th November 1900. Our decree will be drawn up in the terms of s. 88 of the Transfer of Property Act.

Decree modified.

(1) (1828) 4 Bing. 717. (2) (1856) 2 K. and J. 745. (3) (1888) L.R. 41 Ch. D. 422.

22 A. 353 = 20 A.W.N. (1900) 100.

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APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

22 A. 353 = 20 A.W.N. (1900) 100.

DEBI SAHAI (*Defendant*) *v.* SHEO SHANKER LAL AND ANOTHER (*Plaintiffs*).* [19th May, 1900.]

Hindu law—Mitakshara—Stridhan—What constitutes stridhan—Property inherited from a female—Descent of stridhan.

Amongst property which becomes *stridhan* according to the law of the Mitakshara is property inherited from a female.

It is not the case that where such *stridhan* has once devolved according to the law of succession which governs the descent of this peculiar species of property; it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee* v. *Rai Baluk Ram* (1), *Bhugwandeen Doobey* v. *Myna Baee* (2), *Cholay Lall* v. *Chunno Lall* (3), *Phukar Singh* v. *Ranjit Singh* (4), and *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (5), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandar Mukerji*), for the appellant.

Pandit *Sundar Lal* and Munshi *Haribans Sahai*, for the respondents.

JUDGMENT.

AIKMAN, J. (BURKITT, J., concurring).—This is an appeal brought by the defendant to a suit instituted by the plaintiffs-respondents to recover possession of landed property of considerable value together with mesne profits, and for invalidation **[354]** of a deed of gift, dated the 8th October 1882, executed in favour of the defendant by one Musammat Dilla Kunwari. According to the plaint Dilla Kunwari had only a life interest in the property. She died on the 25th September 1895, and the plaintiff's case is that with her death any interest which her donee, the defendant, had in the property, determined.

The property in suit at one time belonged to Bhawani Dayal and Basant Lal, two brothers, members of a joint Hindu family. Bhawani Dayal died in 1851, leaving him surviving two widows, Kishen Kunwari and Dilla Kunwari, and a daughter by Kishen Kunwari named Jado Nath Kunwari. On Bhawani Dayal's death the property passed by right of survivorship to his brother Basant Lal, who died in 1859, leaving two widows, but no issue. These widows, who had entered into possession of the estate, both died in 1861. On their death the widows of Bhawani Dayal in some unexplained manner got possession of the estate in equal moieties, although it is admitted the title to it devolved on the nearest reversioners, Hanuman Prasad and Hanwant Prasad. The latter died in 1865, and his rights in the estate passed to his son Debi Prasad. On the 8th September 1866, Debi Prasad and his uncle Hanuman Prasad executed a deed of gift of the whole estate in favour of Musammat Jado Nath Kunwari, daughter of Bhawani Dayal. At that time Jado Nath's mother, Kishen Kunwari and Kishen Kunwari's co-widow Dilla Kunwari, were in possession in equal shares. Jado Nath's

* First Appeal No. 46 of 1898, from a decree of Maulvi Saiyid Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated 7th December 1897.

(1) 11 M.I.A. 139. (2) 11 M.I.A. 487. (3) 6 I.A. 15.
(4) 1 A. 661. (5) 3 M. 290.

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mother died in 1869, and Jado Nath then got possession of half of the estate. In 1870, Jado Nath Kunwari brought a suit against Dilla Kunwari and one Ram Manorath Lal, in whose favour Dilla Kunwari had executed a deed of gift to recover possession of the rest of the property. The Court of first instance decreed Jado Nath's claim for possession of all the property save eleven villages. As to these the decree declared that Dilla Kunwari would remain in possession for her lifetime without power of alienation. On appeal this Court reversed the decree of the first Court so far as it decreed to the plaintiff possession of any part of the property, and dismissed the suit, but with the declaration that any transfer or alienation made by Dilla Kunwari to Ram Manorath Lal was not to take effect against the reversioners. The defendant-appellant, in whose favour Dilla Kunwari **[355]** executed the second deed of gift which this suit seeks to invalidate, is the son of Ram Manorath Lal abovementioned. Jado Nath Kunwari died in 1879, and it is admitted that on her death her rights in the property in suit passed to her daughter Jagarnath Kunwari, who died on the 13th November 1896. The plaintiffs are the sons of Jagarnath Kunwari, and claim that the right to the property in suit devolved on them on their mother's death.

The lower Court decreed the plaintiff's claim, and against that decree the present appeal has been brought by defendant. For the appellant it is contended, in the first place, that the deed of gift executed by Hanuman Prasad and Debi Sahai in favour of Jado Nath Kunwari, plaintiff's predecessor in title, is bad as being the gift of merely a contingent interest. We are of opinion that there is no force in this plea, as the succession of the donors opened up on the death of Basant Lal's widows, and their interest then ceased to be contingent. It is next contended that Musammat Dilla Kunwari, through whom the appellant claims, had acquired by adverse possession a complete title to the property. We are of opinion that in the face of the judgment of this Court, dated 19th April 1871, a judgment in a suit between the predecessors in title of the parties before us, and of the subsequent judgment of this Court dated 4th July 1883, also a judgment *inter partes*, in which the effect of the decree of 1871 was considered, this is a position which cannot successfully be maintained, it having been clearly held in these judgments that Musammat Dilla Kunwari had only a life-interest in the property.

A third and more formidable objection taken by the defendant is that the plaintiffs are not competent to maintain the suit.

It is admitted that the property in suit, having been conveyed by gift to the plaintiff's grandmother Jado Nath Kunwari, became her *stridhan*, and was inherited by her daughter Jagarnath Kunwari, mother of the plaintiffs. If it was *stridhan*, in the hands of Jagarnath Kunwari it is admitted that the plaintiff's suit cannot succeed, as the property would in that case pass on Jagarnath Kunwari's death, not to the plaintiffs but to the plaintiff's sisters, who, it is admitted, are alive. The question then, which **[356]** we have to consider, is whether the property in suit was Jagarnath's *stridhan*. This question, which is by no means free from difficulty, has been the subject of long and learned argument at the bar.

For the appellant the text of the Mitakshara, Chapter II, s. 11, § 2, which includes amongst woman's property property which a woman has acquired by inheritance, is relied on.

If the plain meaning which the words bear is to be given to this passage, there is no doubt that the appellant is entitled to succeed.

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On the part of the respondents, reliance is placed on a passage in Macnaghten's Principles and Precedents of Hindu Law (p. 38, 3rd edition), to the effect that *stridhan* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance, and on certain decisions of the Calcutta and Madras High Courts in which this view has been adopted and given effect to.

The Mitakshara, however, is the paramount authority which governs such questions in these provinces, and we are unable to find in it any warrant for the opinion expressed by Sir William Macnaghten, who does not cite any authority for the view which he expresses. It is true that he says that "in the Mitakshara whatever a woman may have acquired, whether "by inheritance, purchase, partition, seizure or finding, is denominated "woman's property, but it does not constitute her *peculium*." But, as Messrs. West and Bubler have demonstrated (Hindu Law, 3rd edition, p. 146, etc.), no such distinction between *stridhan* and what Sir W. Macnaghten calls a woman's *peculium*, was present to the mind of the author of the Mitakshara. As to this see also Banerjee's Hindu Law of Marriage and Stridhana, 2nd edition, p. 276.

The doctrine that *stridhan* which has once passed by inheritance ceases to be *stridhan* is apparently derived from the Daya Krama Sangraha of Sir Krishna Tarkalankara. This work is described by Mayne as "very modern, its author having lived in the beginning of the last century." It, like the Daya Bhaga, is of high authority in the Bengal school, but it has **[357]** never, so far as we know, been recognized as of any authority in the Benares school.

Mayne, in his "Hindu Law and Usage," considers that the author of the Mitakshara included in the term *stridhanum* property which a woman has acquired in any way whatever. But he is of opinion that the special line of descent of such property set forth in s. 11 of the Mitakshara does not apply to property which a woman has inherited from a male, that having already been treated of in earliar sections. He is also of opinion that there is no reason why the author of the Mitakshara should not have included in the property for which in s. 11 he prescribes a special line of descent property inherited from a female.

The question whether, according to the Mitakshara, property inherited from a female should be subject to the special rules of descent governing *stridhan* has not formed the subject of judicial consideration, either in the Privy Council or in this Court. But, so far as can be gathered, the views of their Lordships of the Privy Council are quite consistent with the opinion expressed by Mayne. The cases of *Thakoor Deyhee* v. *Rai Baluk Ram* (1) and *Bhugwandeen Doobey* v. *Myna Baee* (2) dealt with property which a woman had inherited from her husband, and the case of *Chotay Lall* v. *Chunno Lall* (3) with property inherited by a daughter from a father. A case in this Court, *Phukar Singh* v. *Ranjit Singh* (4) had to do with property inherited by a grandmother from her grandson. In all these cases it was held that the woman took only a restricted interest, and that on her death the property passed to the heirs of the last male owner.

In the case *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (5) it was contended that a zamindari property inherited by a daughter from

(1) 11 M.I.A. 139. (2) 11 M.I.A. 487. (3) 6 I.A. 15.
(4) 1 A. 661. (5) 3 M. 290.

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her father was her *stridhan*, and passed to her heirs on her death; and reliance was placed on what is called the much-discussed passage in the Mitakshara, Chapter II, s. 11, § 2. As to this their Lordships of the Privy Council remark at p. 301 of the judgment:—"It is not necessary now "to state in any detail how impossible it is, whether with regard "to other commentators or to other passages of the Mitakshara itself, to [358] "construe this passage as conferring upon a woman taking by "inheritance from a male a *stridhan* estate transmissible to her own "heirs." As the text in the Mitakshara refers to acquisitions by inheritance in general, the insertion by their Lordships of the words "from a male" in the passage above cited from their judgment is significant, and, as said above, is an indication that the views of the Privy Council are not inconsistent with the opinion expressed by Mr. Mayne.

In the Bombay Presidency, save in the case of a widow succeeding to her husband, it is held that property which a woman takes by inheritance is her *stridhan*, and passes to her heirs.

In this state of the authorities, and in the absence of any authority to the contrary, which is binding upon us, we arrive at the conclusion that the estate which the mother of the plaintiffs inherited from her mother was *stridhan*, governed by the special rules of devolution applicable to this species of property. The sisters of the plaintiffs therefore and not the plaintiffs are entitled to succeed to it. We accordingly sustain the first ground set forth in the memorandum of appeal, and holding that the plaintiffs are not competent to maintain the suit, set aside the decree of the lower Court and dismiss the suit wtth costs in both Courts.

Appeal decreed.

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22 A. 358 = 20 A.W.N. (1900) 108.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

THAKUR RAM *(Decree-holder)* *v.* KATWARU RAM *(Judgment-debtor)*.*

[21st May, 1900.]

Execution of decree—Limitation—Act No. XV of 1877— *(Indian Limitation Act), sch. ii, art.* 179 (4)—*Application to take some step-in-aid of execution—Payment of process fee.*

The mere payment of process fee for the issue of notice for the purpose of an inquiry under s. 287 of the Code of Civil Procedure, or the payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point for limitation within the meaning of art. 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Har Sahai* v. *Sham Lal* (1) and *Dwarkanath Appaji* v. *Anandrao Ramchandra* (2) followed. *Barmha Nand* v. *Sarbishwara Nand* (3) distinguished. *Radha Prosad Singh* v. *Sundar Lall* (4) dissented from.

[F., 30 A. 179 = 5 A.L.J. 258 = A.W.N. (1908) 74; 8 O.C. 161 (163); R., 17 C.L.J. 422 424 = 13 Ind Cas. 189.]

[359] THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal No. 772 of 1899, from a decree of Munshi Achal Behari, Officiating Additional Subordinate Judge of Ghazipur, dated the 23rd June 1899, reversing a decree of Chaudhri Saiyid Abdul Hussain, Munsif of Ghazipur, dated the 11th April 1899.

(1) 20 A.W.N. (1900) 88.
(2) 20 B. 179.
(3) 3 A.W.N. (1883) 247.
(4) 9 C. 644.

Mr. *Abdul Raoof* and Maulvi *Muhammad Ishaq*, for the appellant.
Pandit *Madan Mohan Malaviya*, for the respondent.

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APPELLATE CIVIL.

22 A. 358 = 20 A.W.N. (1900) 108.

JUDGMENT.

BANERJI, J.—This appeal arises out of the execution of a decree passed under s. 88 of the Transfer of Property Act on the 19th November, 1890. An order absolute was made under s. 89 on the 11th September, 1894. The first application for execution was presented on the 29th November, 1895. The present application was made on the 7th December, 1898. The question is, whether the application last mentioned was within time. The lower appellate Court has held that it was barred by limitation, and it is contended that this decision is incorrect. The learned vakil for the appellant relies on the fact that on the 24th December, 1895, process fee was deposited for the issue of a notice for the purpose of an inquiry under s. 287 of the Code, and also upon the fact that on the 8th July, 1896, costs for the issue of a proclamation of sale were deposited. He contends that limitation should be computed from these dates, and that as the present application was made within three years from both of these dates, it was not time-barred.

Under cl. 4 of art. 179 of the second schedule to the Indian Limitation Act, 1877, the three years' limitation must be computed from the date of applying in accordance with law for execution of the decree, or to take some step in aid of execution. It is clear that under that article a fresh start for the computation of limitation is allowed, not from the date of taking a step in aid of execution, but from the date of applying to take some step in aid of execution. The record of this case shows that no application, either oral or in writing, was made when the deposit of process fee and of costs of sale was made on the 24th December, 1895, and the 8th July, 1896. The mere fact of the making of the deposit cannot amount to the making of an application within the meaning of art. 179 (4). The learned vakil for the appellant relies on the ruling of this Court in *Barmha Nand* v. *Sarbishwara Nand* (1). In that case what the learned Judges said was **[360]** that "the decree-holder applied within the period of limitation for steps to be taken in execution when he deposited the necessary fees for notices and advertisements of sale." From this statement it seems that some application was made in that case. In the recent case of *Har Sahai* v. *Sham Lal* (2), it was held that payment into Court of postage for the purpose of getting a record forwarded to another Court in a case where the transfer of a decree for execution had been ordered under s. 223 of the Code of Civil Procedure did not amount to an application to the Court to take a step in aid of execution. In *Dwarkanath Appaji* v. *Anandrao Ramchandra* (3), it was held that the mere deposit of process fee for the service of notice was not an application within the meaning of art. 179, cl. (4), which could save the operation of limitation. The case of *Radha Prosad Singh* v. *Sunder Lall* (4) is no doubt an authority in favour of the appellant's contention, but in that case the learned Judges overlooked the fact that under cl. (4) of art. 179, there must be an application to take a step in aid of execution in order to save the operation of limitation, and that the mere fact of a step being taken in aid of execution cannot have that effect. I am therefore unable to agree with the ruling last mentioned. As in this case the decree-holder did not apply for execution or to take a step in aid of

(1) 3 A. W. N. (1883) 247.
(2) 20 A. W. N. (1900) 88.
(3) 20 B. 179.
(4) 9 C. 644.

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execution within three years before the date of his present application for execution, that application was time-barred, and this appeal must fail: it is dismissed with costs.

I may observe that the lower appellate Court was wrong in stating that notice under s. 248 was issued on the 24th December, 1895. If that date had been correct the present application might have been within time; but, as a matter of fact, the order for the issue of notice was made on the 30th November, 1895, and the notice was actually, issued on the second December, 1895, and the present application was made beyond three years from both these dates.

Appeal dismissed.

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22 A. 361=20 A.W.N. (1900) 111.

[361] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

NANKU RAM (*Plaintiff*) *v.* THE INDIAN MIDLAND RAILWAY COMPANY (*Defendant*).* [25th May, 1900.]

Act No. IX of 1890 *(Indian Railways Act), ss.* 72, 76 *–Act No IX of* 1872 *(Indian Contract Act), ss* 151, 152, 161*—Contract – Bailment—Liability of bailee—Burden of proof—Railway Company.*

Where goods are delivered to a railway company for carriage not "at owner's risk," and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company, but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire.

[R., 3 N.L.R. 94 (96).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

The respondent was not represented.

JUDGMENT.

BANERJI and AIKMAN, JJ.—The facts which gave rise to the suit were these. The plaintiff's agent consigned to the defendant company 30 bales of cotton for conveyance to Bakhtiarpur, a station on the East Indian Railway. Twenty-eight of these bales were loaded in a wagon on the 3rd January 1896, and the wagon was attached to a mixed train which left the Kirwi station on the same day a little after 4 P.M. After the train had been in motion about 40 minutes, it was discovered that the wagon containing the cotton bales was on fire. It is admitted that all the cotton loaded in that wagon was destroyed. In the present suit the plaintiff claims damages for the loss sustained by him in consequence of the destruction of the cotton. The defendant company did not dispute the amount claimed, but they claimed exemption from liability on three grounds: (1) that the plaintiff at the time of despatch elected to pay the owner's risk rate, (2) that the fire was the result of spontaneous combustion, and (3) that the fire was not the result of any negligence

* Second Appeal No. 857 of 1897 from a decree of G. Forbes, Esq., District Judge of Banda, dated the 16th August 1897, confirming a decree of Babu Sanwal Singh, Subordinate Judge of Banda, dated the 12th May 1897.

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22 A. 361 = 20 A W N. (1900) 111.

on the part of the company or its servants. On the first point the Court of first instance found against the defendant company, and that finding was never questioned. It must therefore be taken that the goods—so far as they were to be conveyed over the line of [362] the defendant company—were not at the risk of the owner. The Courts below have, however, dismissed the claim, holding that the defendant company was not liable. The lower appellate Court was of opinion that it was for the plaintiff to prove that the defendant company was guilty of negligence in respect of the bales of cotton consigned to it. The learned Judge says:—"The party damnified has no cause of action unless he alleges negligence; such an allegation must not be a general sweeping one, but must be such as to give notice to the defendants of the case they will have to meet." The learned Judge further adds:—"Clearly a plaintiff must affirm some specific act of negligence, or suggest some such act: thus it was open to the plaintiff appellant in the present case to assert in his plaint that he believed the fire to have been caused either by sparks from the engine, or to have been caused by some fire left carelessly in the wagon before the bales were loaded into it, or by some person smoking while engaged in loading." Being of that opinion the learned Judge held that the plaintiff had not proved that the defendant company were guilty of any act of negligence, and affirmed the decree dismissing the suit. We are unable to agree with the view of the law taken by the learned Judge. By s. 72 of Act No. IX of 1890 the responsibility of a railway administration for the loss or destruction of goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act. Section 76 of the Act provides that in any suit against a railway administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. The passages quoted from the learned Judge's judgment show that he overlooked the important provisions of s. 76, which cast, not on the plaintiff, but on the railway company, the burden of establishing the circumstances which, under ss. 151 and 152 of the Indian Contract Act, would exonerate the bailee from liability. It was sufficient for the plaintiff to prove delivery of the goods to the railway company and the fact that the goods were destroyed whilst in the custody of the company. Those facts being admitted in this case, it was for the company to establish [363] the circumstances which would entitle them to be relieved from liability. This the defendant company in this case failed to do. The Court of first instance says in its judgment that the fire must have been the result of spontaneous combustion. There is not a particle of evidence to show that this was so, and no such conclusion can be drawn from the evidence on the record. We may accept the evidence that the fire did not originate from a spark from the engine; but that alone does not lead to the conclusion that there was no other cause for the bales catching fire except the theory of spontaneous combustion. It appears from the note which the locomotive foreman recorded on the driver's report of the 25th January 1896, that, in his opinion, the wagon was on fire before it left Kirwi station. We may mention that the locomotive foreman happened to be travelling by the train to which the wagon was attached. If this was so, it was for the company to prove that the possibilities indicated by the learned Judge in his judgment as to the origin of the fire, namely, that of some fire having been left carelessly in the wagon before the bales were loaded into it, or of some person smoking whilst loading, did not exist, or that precautions were taken to

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prevent the originating of the fire in any of the ways indicated. It is true that the learned Judge in his judgment says that "upon the evidence on the record the lower Court's finding that the fire was due to spontaneous combustion and that the company's servants had not been guilty of negligence, was sound and proper." We may observe that this opinion as to the absence of negligence on the part of the defendant company and their servants is based on the erroneous view which the learned Judge entertained as to the burden of proof. We may further observe that the finding, to which we have referred above, is based on no evidence whatever on the record. The learned advocate for the appellant asked our leave to contend that there was no evidence whatever to justify the finding as to the fire being due to spontaneous combustion or as to the absence of negligence on the part of the defendants. We granted him the leave asked for, and we have gone carefully through the evidence. After having heard that evidence we can unhesitatingly say that there is no evidence to support the conclusion of the Courts below. The plaintiff was therefore entitled **[364]** to a decree for the amount claimed, the correctness of which was not disputed. We may mention that the railway company was not represented in the appeal before us, and that consequently the appeal has been heard *ex parte*. The result is, that we allow the appeal, and, setting aside the decrees of the Courts below, decree the claim as laid in the plaint with costs in all Courts and future interest. We direct that the future interest hereby awarded be calculated at the rate of 6 per cent. per annum from the date of suit till the date of realization.

Appeal decreed.

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22 A. 364=20 A.W.N. (1900) 119.

APPELLATE CIVIL.

Before Mr. Knox, Ag. Chief Justice, and Mr. Justice Blair.

HIMANCHAL SINGH (*Judgment-Debtor*) *v.* JHAMMAN LAL (*Decree-Holder*).* [25th May, 1900.]

Act No. XIX of 1873 (*N.W.P. Land Revenue Act*), *s* 205-*B—Court of Wards—Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards.*

Section 205-B of Act No. XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court.

[R., 24 A. 136 (137).]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandar Mukerji*) and Munshi *Gulzari Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

JUDGMENT.

KNOX, Ag. C. J., and BLAIR, J.—The order passed by the learned Subordinate Judge is wrong. We do not know whether his

* First Appeal No. 222 of 1899, from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 25th November 1899.

attention was or was not drawn to s. 205 B of Act No. XIX of 1873. It is contended that the contracts out of which this decree issued were contracts entered into by the judgment-debtor while his property was under the superintendence of the Court of Wards. This contention was clearly placed before the learned vakil for the respondent and was not contested by him. We take it therefore that the contracts abovementioned were entered into at a time when Himanchal Singh was a ward of Court. If gentlemen of the money-lending profession will [365] frustrate the object of the law by lending money to wards of Court, they have themselves to thank if they find that their money has been thrown away. Property while under the superintendence of the Court of Wards cannot, without the sanction of the Court, be in any way charged, nor can such property be taken in execution of a decree made in respect of contracts entered into by a ward of the Court while his property is under such superintendence. The contention that the restriction only remains in force so long as the property is under superintendence and is immediately removed the moment the superintendence ceases is not warranted by law.

To put it more clearly, Section 205 B of Act No. XIX of 1873 in clear terms provides that no property which has been under the superintendence of the Court of Wards shall be liable to be taken in execution of a decree made in respect of any contract which was entered into by a disqualified person during the time while his property was under such superintendence. To limit the operation of the section to the exact moment when the property is released from the superintendence of the Court of Wards would defeat the manifest object of the Legislature. That intention was that persons whose property was under the superintendence of the Court should not be competent to create without the sanction of the Court any charge upon such property, and that, if they did execute any document purporting to create such charge, that document should at no time have any operation *quoad* the property supposed to be so charged. The whole aim and object of the legislature would be frustrated if, while the Court of Wards was building up and nursing the estate, the disqualified proprietor should be left free to destroy the work of the Court.

The appeal is decreed, the judgment and decree of the lower Court are set aside, and the application for execution is dismissed with costs.

Appeal decreed.

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22 A. 366 = 20 A.W.N. (1900) 109.

[366] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHER SINGH AND ANOHTER (*Defendants*) *v.* DIWAN SINGH AND OTHERS (*Plaintiffs*).* [26th May, 1900.]

Civil Procedure Code, s. 591—Appeal—Appeal from decree in suit, the grounds of appeal being solely directed against an interlocutory order in the suit.

Held, that no appeal would lie where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. *Sheo Nath Singh* v. *Ram Din Singh* (1), followed.

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* Second Appeal No. 960 of 1897 from a decree of L.G. Evans, Esq., District Judge of Aligarh, dated the 17th September 1897, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated 24th December 1896.

(1) 18 A. 19.

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[N.F., 9 O.C. 80 (83); F., 34 M. 228 (230)=6 Ind. Cas. 239=20 M.L.J. 805 (806)=8 M.L.T. 72=(1910) M.W.N. 226; 5 A.L.J. 644=A.W.N. (1908) 242=4 M.L.T. 400.]

APPELLATE CIVIL.

22 A. 366=20 A.W.N. (1900) 109.

THE plaintiffs in this case brought their suit claiming two distinct reliefs. On objection by the defendants that the two reliefs claimed could not be joined in one suit, the Court of first instance put the plaintiffs to their election and fixed a date upon which the plaintiffs were to appear and state which relief they wished to pursue in that suit. On the date fixed the plaintiffs did not appear, and the Court dismissed the suit as for default of appearance. Subsequently the plaintiffs applied for restoration of the suit, and their application was granted, the suit restored, and a decree ultimately passed in their favour. Against this decree the defendants appealed, both attacking the decree on the merits and questioning the procedure of the Munsif in restoring the case. The appeal was dismissed. The defendants thereupon appealed to the High Court; but in this appeal they attacked only the order of the Munsif, by which he restored the suit on the plaintiffs' application.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellants.

Mr. *W. K. Porter* and Babu *Satish Chandar Banerji* for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—We think that this appeal must be dismissed, and the preliminary objection taken by Mr. *Porter* must prevail.

The suit of the plaintiffs-respondents was dismissed by the Court of first instance for default. That dismissal was subsequently set aside, and the case heard on the merits, and a decree made in favour of the plaintiffs. An appeal preferred from that decree **[367]** was dismissed by the lower appellate Court. The defendants have appealed to this Court, and the only ground upon which their appeal is based is that the dismissal of the suit was improperly set aside by the Court of first instance. No objection has been taken to the decree of the lower appellate Court as regards the merits of the case.

This case is clearly governed by the concluding remarks in the judgment of this Court in *Sheo Nath Singh* v. *Ram Din Singh* (1) at p. 22. It was there said that "s. 591 contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591." It is conceded that in this case there is no appeal about anything else. The objections taken in the memorandum of appeal relate only to the order setting aside the dismissal of the suit.

Following the ruling referred to above, we sustain the objection urged on behalf of the respondents and dismiss this appeal with costs.

Appeal dismissed.

(1) 18 A. 19.

22 A. 367=20 A.W.N. (1900) 113.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

JAFRI BEGAM (*Opposite Party*) *v.* SAIRA BIBI (*Petitioner*).*

[1st June, 1900.]

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JUNE 1.

APPELLATE CIVIL.

22 A. 367=20 A.W.N. (1900) 113.

Execution of decree—Civil Procedure Code, s. 234—Successive deaths of judgment-debtor and his legal representative—Execution against legal representative of the legal representative.

The judgment-debtor under a simple money decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come; but before anything was recovered the legal representative, in turn, died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.

IN this case one Jafri Begam obtained a decree against Ezid Bakhsh in 1890. The decree was for Rs. 2,587. The judgment-debtor Ezid Bakhsh was a pensioned Government servant. He died before the whole of the decretal amount was realized. At his death there was a sum of Rs. 1,700 odd in deposit at the **[368]** Jabalpur treasury, arrears of pension which had not been drawn by Ezid Bakhsh. Execution of the decree was then sought as against Muhammad Ibrahim, son of Ezid Bakhsh. He contested the application, urging that Jafri Begam's decree being held in attachment by him was not capable of execution, and further pleading that he was not liable to be proceeded against as he had not realized any portion of the estate of his deceased father. It was ruled that the decree was capable of execution, but that Ibrahim was not liable in his own person or property for the amount due under the decree. Before any further steps were taken by the decree-holders Ibrahim died. It is admitted that previous to his death he had realized the Rs. 1,700 odd from the Jabalpur treasury. On the 26th February there was an application made for execution of the decree against Musammat Saira, widow of Ibrahim. She objected on certain grounds, amongst others, that she could not be proceeded against as she was not the legal representative of the judgment-debtor. The Court of first instance (Subordinate Judge of Jaunpur) allowed the application for execution against Musammat Saira. On appeal the District Judge of Jaunpur set aside the order of the Subordinate Judge and disallowed the application for execution on the ground that such an application was not within the purview of s. 234 of the Code of Civil Procedure, under which section it purported to have been made. The decree-holder thereupon appealed to the High Court.

Maulvi *Karamat Husain*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

JUDGMENT.

BANERJI, J.—We are unable to agree with the learned Judge in holding that the decree-holder appellant was not entitled to take out execution of her decree against the respondent Saira Bibi. The appellant obtained

* Second Appeal No. 43 of 1898, from a decree of B. Lindsay, Esq., District Judge of Jaunpur, dated the 18th November 1897, reversing an order of Rai Mata Prasad, Subordinate Judge of Jaunpur, dated the 8th May 1897.

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22 A. 367 = 20 A.W.N. (1900) 113.

a simple decree for money against one Ezid Baksh. Before the decree could be executed, Ezid Bakhsh died, and after his death execution was sought against Ibrahim, the son of Ezid Baksh, on the allegation that Ibrahim had appropriated and not duly disposed of assets left by Ezid Bakhsh to the extent of Rs. 1,716. If Ibrahim did in fact appropriate the amount of assets alleged to have been received and not duly disposed of by him, he became personally liable to the [369] decree-holder to the extent of those assets, under s. 234 of the Code of Civil Procedure. Ibrahim, therefore, in substance, took the place of the original judgment-debtor to the extent of those assets, and to that extent became, to all intents and purposes, the judgment-debtor to the decree. On his death his legal representative became liable to the extent of the assets appropriated by her, and the decree-holder was entitled to apply for execution against her. In this case it has been found that Ibrahim received Rs. 1,716 payable to Ezid Baksh, the original judgment-debtor. To the extent of that amount he became personally liable, and the decree-holder is entitled to execute his decree against the respondent, the legal representative of Ibrahim, for the realization of that amount. In this view the lower appellate Court erred in dismissing the application for execution. I do not deem it necessary to decide in this case the general question whether, in every instance when the legal representative of a deceased judgment-debtor dies before execution of the decree has been completely obtained, an application for execution may be made against the legal representative of such representative. Having regard to the facts of this particular case, I am of opinion that the application of the decree-holder as against the respondent ought to have been entertained, and that the Court below erred in dismissing it. I would allow the appeal with costs, set aside the order of the lower appellate Court with costs, and restore that of the Court of first instance.

AIKMAN, J.—I agree. In my opinion the learned Subordinate Judge was right, and the learned District Judge took a wrong view of the provisions of s. 234 of the Code of Civil Procedure. If the learned Judge's view were the sound one, much injustice might result. Supposing a judgment-debtor dies leaving property amply sufficient to pay his debts, and this property passes to an only son, who is brought on the record as the legal representative of the judgment-debtor. Then, according to the District Judge, if that son died before execution can be completed, his legal representative could not be proceeded against, although the original debtor's property might be in his hands. I do not think that could have been the intention of the law. We have been unable to find any case similar to the present one. It [370] appears to me, however, that when the son of the original judgment-debtor was brought on the record as his legal representative, and when it was found that that son had in his hand money of the deceased which had not been duly disposed of, the son, to all intents and purposes, became the judgment-debtor. Therefore, in my opinion, the legal representative of the son can under s. 234 be proceeded against subject to the limitations therein set forth. I concur in the order proposed.

BY THE COURT.—The order of the Court is that this appeal is allowed with costs, the order of the lower appellate Court set aside with costs, and that of the Court of first instance restored.

Appeal decreed.

22 A 370 (P.C.)=4 C.W N. 485=2 Bom. L.R. 553=27 I.A 93=7 Sar. P.C.J. 702.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey and Robertson, and Sir R. Couch.

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

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PRIVY COUNCIL.

22 A. 370 (P.C.)=4 C.W.N. 485=2 Bom. L.R. 553=27 I.A. 93=7 Sar. P.C.J. 702.

SAH LAL CHAND (*Defendant-Appellant*) *v.* INDARJIT (*Plaintiff-Respondent*). [15th February and 24th March, 1900.]

Construction of the Indian Evidence Act, 1872, s. 92—Evidence [admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.

The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in s. 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by a recital in the sale deed to that effect, *held* that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them.

[F., U.B.R. (1897—1901) 400 ; R., 27 A. 612 (616)=2 A.L.J. 360=A.W.N. (1905) 129 ; 25 M. 7 (14)=11 M.L.J. 370 (372) ; 25 M. 55 (59)=11 M.L.J. 318 (321) ; 4 A.L.J. 441 (443)=A.W.N. (1907) 181 ; 2 C.L.J. 338 (343) ; 10 C.L.J. 27 (29)=2 Ind. Cas. 953 ; 14 C.L.J. 507=16 C.W.N. 137 (139)=11 Ind. Cas. 713 (715) ; 15 C.P. L.R. 24 ; I P.R. 1904=41 P.L.R. 1904.]

APPEAL from a decree (2nd June 1896) of the High Court (1) reversing a decree (13th June 1893) of the Subordinate Judge of Agra.

[371] The respondent brought this suit on the 6th December 1892 against the appellant and a co-defendant, Musammat Kesar Kuar. The plaintiff obtained a decree in the High Court for Rs. 33,133, being the balance, with interest, of the consideration money for the sale of half of his estate in land, sold by the plaintiff to the defendants by sale-deed dated the 18th February 1888, in the proportion of six annas to the defendant Sah Lal Chand, and two annas to the other.

The main question now related to the effect on this case of s. 92 of the Indian Evidence Act, I of 1872, and to whether or not the High Court had admitted oral evidence of facts which, if allowed, would have contradicted and varied, within the meaning of that section, the terms of a written instrument, the registered sale-deed. In that deed there was a recital that Indarjit had received the consideration Rs. 30,000. This payment was stated to have been made by his receiving Rs. 25,000, handed over to him in cash before the Sub-Registrar, Rs. 3,000 by a set-off against a previous debt due by Indarjit to Lalchand, and Rs. 2,000 by money paid to two vakils on his account.

Section 92 of the Evidence Act enacts that when the terms of a contract in writing have been proved no evidence of any oral agreement or statement shall be admitted, as between the parties thereto, for the purpose of contradicting, varying, adding to, or subtracting from, the written terms.

(1) (1895) *Indarjit* v. *Lalchand*, 18 A. 168.

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22 A. 370 (P.C.) = 4 C.W.N. 485 = 2 Bom. L.R. 553 = 27 I.A. 93 = 7 Sar. P.C.J. 702.

That the consideration agreed upon was Rs. 30,000 was common ground. The plaint alleged that to obtain an advance of money for the costs of a suit whereby Indarjit should obtain possession of his inheritance, then in the hands of strangers without title against him, he had executed the sale-deed of the 18th February 1888; that the present defendants were co-plaintiffs with him in his suit filed on the 21st February 1888; that a decree was made in their favour on the 10th December 1888, upheld on appeal on the 26th May 1891, and possession obtained; that during the suit all the expenses were defrayed by the Kothi of Sah Lal Chand, amounting to about Rs. 2,000. Beyond that the plaintiff had received no consideration money. The terms in which the sale-deed acknowledged receipt appear in their Lordships' judgment.

[372] The defendants filed separate answers, averring payment of the entire sum. One of the issues was whether the plaintiff was precluded from giving oral evidence in contradiction of the deed of the 18th February 1888. Another raised the questions of fact, whether there had been payment, or whether there had been a real arrangement whereby the consideration money was left with Sah Lal Chand on the understanding that the plaintiff, at the end of the litigation about his inheritance, should receive that money subject to a deduction of his share of the costs of the suit of 1888.

The Subordinate Judge found that no part of the consideration money had been paid in the manner alleged in the recital of the deed of the 18th February 1888. But he dismissed the suit on the ground that the plaintiff had not proved an agreement that payment of the purchase-money should be deferred, and should follow upon the termination of Indarjit's suit of 1888.

The High Court found that the case for the plaintiff was proved.

The judgment of the Division Bench (BANERJI and AIKMAN, JJ.) is reported at length in I. L. R., 18 All., 168. They remanded the suit to the lower Court for the determination of the amount of the disbursements by the defendants on behalf of the plaintiff in the suit, which ended in the decree of the 26th May 1891. On return made, the High Court decreed in favour of the plaintiff Rs. 28,000, the balance of the consideration money, and Rs. 5,133-5-0 interest, the amount disbursed having been (as was not any longer disputed) the Rs. 2,000 alleged by the plaintiff to have been spent on the suit.

The defendant Sah Lal Chand alone appealed.

Mr. *G. E. A. Ross*, for the appellant, argued as to the question of the admission of evidence of an agreement, oral and contemporaneous, in variation of the written one evidenced by the sale-deed, that such evidence was disallowed by s. 92. The principle there enacted would exclude the contradiction of the recital, and the addition of the collateral agreement asserted by the plaintiff. Besides this, the evidence, if admissible, was insufficient to outweigh that for the defence. On the facts the [373] suit had been rightly dismissed by the first Court, and that judgment should be restored.

Mr. *Herbert Cowell*, for the respondent, contended that the evidence admitted in this suit was not in variation, or contradiction, of the terms of an agreement in writing. The admission of evidence to contradict the misrecital of a fact, such as payment of the consideration for a sale in a sale-deed, was not within the rule enacted in s. 92. On the contrary it had been clearly established as law that a recital of the payment of the consideration, contrary to fact, was not conclusively binding, but could be

contradicted by proof of the actual transaction that had taken place. He referred to *Hukumchand* v. *Hiralal* (1); *Lala Himmat Sahai Singh* v. *Llewhellen* (2). As showing that the Evidence Act provided for the reception of such evidence, reference was made to explanation 3, under s. 91, relating to the proof of facts; and to explanations 1 and 2 under s. 92, the first expressly referring to want, or failure, of consideration, and the second permitting proof of the existence of any separate oral agreement not inconsistent with the terms of the one contained in the written instrument.

Mr. *G. E. A. Ross* replied.

Afterwards on the 24th March their Lordships' judgment was delivered by LORD DAVEY.

JUDGMENT.

In this case the respondent sued the appellant and another person for a sum of Rs. 33,133-5-3 alleged to be due to the respondent as the balance of the consideration for a certain sale-deed dated 18th February 1888.

The first Court dismissed the suit, but on appeal the High Court of Allahabad, by its decree, dated the 2nd of June 1896, reversed the decree of the Subordinate Judge and gave judgment for the respondent with costs.

By the sale-deed in question, after recitals that the respondent became entitled on the death of his maternal grandmother to the estate of his materoal grandfather, Jiwa Ram, but strangers had had got possession of the estate, and the resuondent had not the necessary means of prosecuting a suit against them, and that he had therefore sold a moiety of the property for Rs. 30,000, as to **[374]** 6 annas to Sah Lal Chand, and as to 2 annas to Musammat Kesar Kuar, and that he had received the entire consideration with reference to the share of each vendee in the manner detailed below, it was agreed that the vendees should institute a claim in the Court of the Subordinate Judge of Agra District jointly with the respondent to recover possession and enter into possession of the property decreed jointly with him, and take mesne profits of their share. And the respondent agreed that after the institution of the suit he would not make any settlement with respect to the subject-matter of the claim, or withdraw the claim, or get the case settled by arbitration without the consent of the vendees. If the decision of the Court should be unfavourable the respondent was to bear the costs of the opposite party and repay the consideration and be responsible for the costs incurred.

The consideration money of Rs. 30,000 was stated to have been received from the vendees in the following manner :—

		Rs.
Received in cash at time of registration	...	25,000
By set-off against a previous debt due in respect of five rukkas	...	3,000
Caused to be paid to Chandi Parshad and Jagan Parshad	...	2,000
Total	...	30,000

(1) 3 B. 159.

(2) 11 C. 486.

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In May 1888 the respondent brought a suit for the recovery of Jiwa Ram's property jointly with the appellant and Kesar Kuar, and a decree was made in their favour by the Judge of first instance which was affirmed by the High Court on the 26th of May 1891. They subsequently executed the decree and obtained possession of the property.

By his plaint in the present suit which was filed on the 6th of December 1892, the respondent alleged that the three items in which the consideration of the sale-deed was said to have been paid, were fictitious and that the money which was produced at the time of registration went back to Sah Lal Chand, and no item was due from the respondent under old accounts, nor was anything paid on respondent's behalf to Chandi Parshad and Jagan Parshad. And the respondent alleged that the sale **[375]** consideration was left with the vendees subject to the condition that the vendees should bear half the costs of the proposed suit and defray the other half (*i.e.*, the respondent's share) out of the consideration money, and after obtaining a decree in the first or the appellate Court pay the respondent the balance (if any). The respondent named the expiry of the time allowed for an appeal to Her Majesty on the 15th January 1892 as the date of accrual of cause of action.

The appellant by his written statement denied the facts alleged by the respondent and pleaded that the claim was barred by time.

Both Courts have agreed that no part of the consideration money was paid to or on account of the respondent, and their Lordships need not say more on that subject than that they agree with the finding. The Subordinate Judge, however, held that the respondent had not made out by evidence the agreement alleged by him and his suit must therefore fail. The High Court on the other hand held that the respondent's story was in accordance with the probabilities of the case and was sufficiently proved by the evidence adduced by him. In this case no question of limitation arises.

The learned Judges have very fully and carefully stated and commented on the evidence of the respondent and his witnesses. Their Lordships agree with the conclusions of the learned Judges on the question of fact and with the reasons which they have given for accepting the respondent's story as true.

The point which was chiefly pressed on their Lordships by the learned counsel for the appellant was also raised in the High Court and considered by the learned Judges, *viz.*, that no evidence should have been received of the agreement alleged by the respondent because it varied or contradicted the written contract, and was therefore inadmissible under s. 92 of the Evidence Act. Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written **[376]** instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c. The contract was to sell for Rs. 30,000 which was erroneously stated to have been paid, and it was competent for the respondent without infringing any provision of the Act to prove a collateral agreement that the purchase-money should remain in the appellant's hands for the purposes and subject to the conditions stated by the respondent. This objection therefore fails.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Pyke* and *Parrott*.
Solicitors for the respondent: Messrs. *Barrow* and *Rogers*.

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22 A. 376 = 20 A.W.N (1900) 129.

APPELLATE CIVIL.

Before Mr. Justice Blair.

LALMAN DAS (*Defendant*) *v.* JAGAN NATH SINGH AND OTHERS (*Plaintiffs*).* [10th February, 1900.]

Civil Procedure Code, s. 244—Plaint in a suit treated as an application under s. 244—Limitation Act No. XV of 1877 (Indian Limitation Act), sch. II, art. 178.

Where a suit is filed under circumstances in which the proper remedy is an application under s. 244 of the Code of Civil Procedure, and the Court in the exercise of its discretion treats the plaint in the suit as an application under s. 244, the rule of limitation applicable will be that appropriate to applications under s. 244, namely, that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877. *Jhamman Lal* v. *Kewal Ram* (1) and *Biru Mahata* v. *Shyama Churn Khawas* (2) referred to.

[R., 7 Ind. Cas. 55 (59).]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BLAIR, J.— It seems to me that this appeal must succeed. At an auction sale held in execution of a mortgage decree a 16-biswansis share was sold instead of a 15-biswansis share, which was all that under the decree should have been brought to sale. **[377]** The purchaser is a stranger, and for some 11 years has been in undisturbed possession of the share. The Court below in a somewhat vague manner has apparently treated this proceeding, not as a suit but as an application under s. 244 of the Code of Civil Procedure, and following therein a decision of this Court in *Jhamman Lal* v. *Kewal Ram* (1), in which a Bench of this Court approved of the ruling in the case *Biru Mahata* v. *Shyama Churn Khawas* (2), decreed the claim of the plaintiffs. Mr. Gokul Prasad argues for the appellant that this proceeding having been treated by the Court below as a proceeding under s. 244, the application of the plaintiff is barred by the operation of art. 178 of sch. ii of the Indian Limitation Act. If that article is applicable, it is clear that the three years' limitation has long expired. Mr. Mujtaba for the respondents has suggested that no article of limitation is applicable to such an application as this. The case which

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* Second Appeal No. 629 of 1899, from a decree of Babu Nihal Chunder, Subordinate Judge of Shahjahanpur, dated the 31st July 1899, confirming a decree of Babu Deoki Nandan Lal Sahai, Munsif of West Budaon, dated the 20th December 1898.

(1) 19 A.W.N. (1899) 219. (2) 22 C. 483.

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FEB. 10.

APPELLATE CIVIL.

he has cited to me is altogether of a different kind, and I see no reason to doubt the propriety of the application of art. 178. For this reason I allow the appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs.

Appeal decreed.

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22 A. 376 = 20 A.W.N. (1900) 129.

22 A. 377 = 20 A.W.N. (1900) 123.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

KAUNSILLA (*Defendant*) *v.* CHANDAR SEN (*Plaintiff*).*

[7th June, 1900.]

Execution of decree—Sale in execution—Title of auction-purchaser—Purchaser not bound to inquire into the validity of the order under which the sale takes place

Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan* v. *Kazim Husain* (1) distinguished. *Rewa Mahton* v. *Ram Kishen Singh* (2) and *Mukhoda Dassi* v. *Gopal Chunder Dutta* (3) referred to.

[Overruled, 25 A. 214 (217, 219, 226.)]

[378] THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal* (for whom Maulvi *Ghulam Mujtaba*), for the respondent.

JUDGMENT.

BURKITT and HENDERSON, JJ.—On the 19th June 1872, one Jagannath mortgaged 11¼ biswas in a particular mahal to Tulshi Ram. This mortgage was a simple mortgage, but it appears that subsequently the mortgagee was let into possession (it is not shown how), and from that time the mortgage was treated as if it had been a usufructuary mortgage. Jagannath died leaving three sons. Raghunath Das, Narain Das and Mulchand, who may be described as Mulchand No. 1.

On the 29th October 1881, Raghunath and Narain Das sold their two-third shares in the 11¼ biswas (or 7½ biswas) to Tulshi Ram, who thus became the owner of the 7½ biswas, and continued to be the mortgagee of the 3¾ biswas of Mulchand No. 1. The share of Mulchand No. 1 remained unaffected. Tulshi Ram, who owned another 5 biswas in the same mahal, died, leaving a son Mulchand No. 2. Mulchand No. 2, who was in possession of the 11¼ biswas and his 5 biswas, on the 3rd January 1887, executed a mortgage purporting, as full owner, to mortgage the entire 16¼ biswas to Musammat Kaunsilla and Bishan Lal. The mortgagees, Musammat Kaunsilla and Bishan Lal, brought a suit upon their mortgage against Mulchand No. 2 only, and obtained a decree for sale, and under that

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* Second Appeal No. 29 of 1898, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 10th December 1897, reversing a decree of Pandit Bishambar Nath, Munsif of Aonla, Faridpur, dated the 19th April 1897.

(1) 13 A. 432. (2) 14 C. 18. (3) 26 C. 734 (737).

decree the property was sold on 20th June 1895, and purchased by Musammat Kaunsilla for Rs. 7,000 odd. This sale was confirmed, and she obtained possession on the 24th September 1895.

On the 22nd February 1897, the plaintiff-respondent Chandar Sen, who had previously, on the 24th May 1897, purchased Mulchand No. 1's 3¾ biswas, sued to eject the defendant Musammat Kaunsilla. He was given an opportunity of redeeming, but he declined to accept it. The lower appellate Court has given the plaintiff a decree for his claim as made.

It has been contended that, having regard to the Full Bench decision in the case of *Matadin Kasodhan* v. *Kazim Husain* (1), **[379]** Kaunsilla took nothing under her purchase. That case has no reference to a sale which has actually taken place and been confirmed, as in the case before us. It merely deals with the right of the mortgagee who has not made prior or subsequent mortgagees parties to his suit to bring the property to sale. That case, in our opinion, therefore, has no application to the circumstances of the present case. It has been contended that Kaunsilla and Bishan Chand being subsequent mortgagees in respect to the one-third share of Mulchand No. 1 were not entitled to bring the mortgaged property to sale under the decree which they obtained in their suit. But, as a matter of fact, the property has been sold under that decree, and the sale has been confirmed and possession given. It is not necessary, as has been held by the Privy Council, for an intending purchaser at a sale under a decree to go behind the decree, to see whether the decree has been rightly made. In *Rewa Mahton* v. *Ram Kishen Singh* (2) their Lordships of the Privy Council say:—"To hold that a purchaser "at a sale in execution is bound to inquire into such matters would "throw a great impediment in the way of purchasers under executions. If "the Court has jurisdiction, a purchaser is no more bound to inquire into "the correctness of an order for execution than he is as to the correctness "of the judgment upon which the execution issues." There seems to be no real distinction between a sale which takes place under a decree which directs a sale, as in the case of a mortgage, and a sale in execution held under an order made after a decree for money. See *Mukhoda Dassi* v. *Gopal Chander Dutta* (3). We have also been referred to two cases, one *Hargu Lal Singh* v. *Gobind Rai* (4) and the other an unreported case in Second Appeal No. 637 of 1897 recently decided by a Bench of this Court. Neither of these cases deals with the case of a sale which has actually taken place, and they are therefore not in point. The plaintiff in this case is the representative of the mortgagor, and we are unable to see how, under the circumstances of this case, he can be entitled to get possession without redeeming an admittedly existing lien on the property held by the defendants.

[380] We therefore allow the appeal, set aside the judgment of the lower appellate Court and restore that of the Court of first instance, dismissing the claim with costs in all Courts.

Appeal decreed.

(1) 13 A. 432. (2) 14 C. 18. (3) 26 C. 734 (737). (4) 19 A. 541.

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JUNE 7.

APPEL-LATE CIVIL.

22 A. 380=20 A.W.N. (1900) 125.

22 A. 380=20 A.W.N. (1900) 125.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

MOTIRAM AND ANOTHER (*Defendants*) *v.* KUNDAN LAL AND OTHERS (*Plaintiffs*).* [7th June, 1900.]

Civil Procedure Code, ss. 372, 588—*Assignment pending suit—Application by Assignees to be allowed to appeal against the decree—Order rejecting application—Appeal.*

A defendant, pending the suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal, claiming that they were entitled to file an appeal under the circumstances set forth in their memorandum. The Court, apparently treating this memorandum as an application under s. 372 of the Code of Civil Procedure, dismissed it. *Held* that an appeal would lie from this order of dismissal as from a decree. *Indo Mati* v. *Gaya Prasad* (1) followed.

[Overruled, 24 A. 532=22 A.W.N. (1902) 112; **R.**, 57 P.R. 1903=126 P.L.R. 1903*; **D.**, 24 A. 342=22 A.W.N. (1902) 84.**]**

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal* and Babu *Durga Charan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom Munshi *Gulzari Lal*), for the respondent.

JUDGMENT.

BURKITT and HENDERSON, JJ.—This is an appeal from a decree of the District Judge of Meerut, which in words directs the appeal before him to be dismissed. The case was one in which in a pending suit the present appellants purchased the interest of one Dalip; they made this purchase on the 5th July 1897. No application was made by the assignees or assignor to have the assignees brought on the record, and the suit was decided *ex parte* on the 13th July. The decree given in that suit was injurious to the present appellants, in that it debarred them from redeeming the mortgage. Thereupon the present appellants put in a memorandum of appeal before the Judge, and in that **[381]** memorandum claimed distinctly that they were entitled to file an appeal under the circumstances set forth in their memorandum. This application was supported by the assignor who disclaimed all interest in the subejct of the suit. The District Judge treated the application for leave to appeal as if it were an application properly made under s. 372 of the Code of Civil Procedure, and adopted the procedure prescribed by that section. Eventually the District Judge in his final order, after setting forth the facts, records that these appellants applied to be allowed to appeal under no section whatever. And because they had taken no steps to have their names entered (apparently before decree was passed) the learned Judge held "they have no *locus standi* now." Having come to this conclusion the District Judge dismissed the appeal. This order is evidently a clerical blunder, and what the learned Judge meant, no doubt, was that the application for leave to appeal was rejected.

* Second Appeal No. 966 of 1897, from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated 13th September 1897, confirming a decree of Babu Jai Lal, Officiating Subordinate Judge of Meerut, dated the 13th July 1897.

(1) 19 A. 142.

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In our opinion the District Judge was wrong in refusing the application. Section 372 clearly does apply to such a case. The assignment here was an assignment which took place pending the suit, in the sense in which the word suit has been interpreted in many cases in the Privy Council. There was a suit pending when the assignment took place, and that being so, we think s. 372 is applicable, even though no application to have the assignees brought on the record was made till after the decree.

22 A. 380=20 A.W.N. (1900) 125.

It is then contended that no appeal lies. Clearly s. 588 does not give an appeal, as the appeal given by that section is an appeal against an order disallowing objections raised under s. 372. Here objections were raised and they were allowed; consequently sub-s. 21 does not apply. But it was held in the case of *Indo Mati* v. *Gaya Prasad* (1) in which an application to be brought on the record under s. 372 had been refused, that the order rejecting the application was an adjudication on the representative right claimed by the applicant, and therefore amounted to a decree as that word is defined in s. 2 of the Code. Applying that case, it appears to us that an appeal does lie to us, and we are of opinion that that appeal should be allowed. The facts are perfectly clear. There can be no doubt that the **[382]** assignment did take place, and, as we held above, the application to have the assignees brought on the record was made, and properly made, under s. 372 of the Code.

We therefore set aside that which we conceive to be the order of the Court below, *i.e.*, the dismissal of the appellants' application to be brought on the record. We direct that the appellants be now brought on the record, and we remand the record to the Court of the District Judge with orders to decide whether the memorandum of appeal, dated the 23rd August 1897, should or should not be admitted; and if admitted, to hear and decide the appeal according to law. Costs of this appeal will follow the event.

Appeal decreed.

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22 A. 382=20 A.W.N. (1900) 118.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

CHHIDDU SINGH AND OTHERS (*Plaintiffs*) *v.* DURGA DEI AND OTHERS (*Defendants*).* [12th June, 1900.]

Hindu law—Hindu widow—Reversioners entitled to suceeed successively on death of Hindu widow—Suit by some of such reversioners to set aside alienations made by widow in possession—Res judicata.

Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female in possession will not necessarily constitute *res judicata* in respect of a similar suit brought by other reversioners. *Bhagwanta* v. *Sukhi* (2), *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (3) and *Isri Dut Koer* v. *Mussamat Hansbutti Koerain* (4) referred to.

[R., 32 A. 33=6 A.L.J. 931=3 Ind. Cas. 725=6 M.L.T. 348; 27 M. 588 (590); 58 P.R. 1905=59 P.L.R. 1905; D., 6 C.W.N. 178 (180).]

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* Second Appeal No. 912 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 8th September, 1897, reversing a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 27th August, 1894.

(1) 19 A., 142. (2) 22 A. 33. (3) 3 I.A. 72. (4) 10 I.A. 150.

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22 A. 382 = 20 A.W.N (1900) 118.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindra Nath Chaudhri* (for whom Babu *Satish Chandar Banerji*), for the appellants.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*), for the respondents.

JUDGMENT.

HENDERSON, J. (BURKITT, J., concurring).—In this case the plaintiffs, who were the nephews of one Balu Singh, sued the defendants to recover possession of certain property which **[383]** had been transferred to them or their predecessors in title by Rukmin Kunwar, the widow of Balu Singh. Balu Singh died in 1856, and Rukmin Kunwar died in 1890. It appears that in 1865, some of the brothers and nephews of Balu Singh brought a suit claiming as reversioners to set aside certain alienations, including the alienations now the subject of the present suit, on the ground that they were not made for legal necessity. This suit was heard by the Munsif of Gorakhpur. He decided as to a portion of the claim that the alienations were invalid. As to the alienations now the subject of this suit, he found that they were good, and this decision was upheld in appeal. In the present case the decision of the Munsif in the suit to which we have referred was relied on as being *res judicata* on the question whether the alienations were good or bad. It has been held by a Full Bench of this Court in *Bhagwanta* v. *Sukhi* (1) that where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. Now in the present case the plaintiffs are the now reversioners of Balu Singh, being nephews of Balu Singh, other than the nephews who joined in the previous suit, and in our opinion they are not bound by the decision in the previous suit. In *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (2) their Lordships of the Privy Council doubted whether a decree in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding on any reversioner except the plaintiff, and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later case, *Isri Dut Koer* v. *Musammat Hansbutti Koerain* (3), their Lordships expressed a strong opinion that such a decision would not be binding as *res judicata* in the case of a new reversioner. Having regard to these expressions of opinion by their Lordships of the Privy Council and to the decision of the Full Bench of this Court, we are of opinion that the Judge **[384]** was wrong in dismissing the suit on the plea of *res judicata*. We therefore reverse his finding on that point, and setting aside his decree, remand the case under s. 562 of the Code of Civil Procedure to the lower appellate Court to be restored to the file of pending appeals and disposed of according to law. Costs of this appeal will follow the event.

Appeal decreed and cause remanded.

(1) 22 A. 33. (2) 3 I.A. 72. (3) 10 I.A. 150.

22 A. 384=20 A.W.N. (1900) 119.

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22 A. 384=20 A.W.N. (1900) 119.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PIRYA DAS (*Plaintiff*) *v.* VILAYAT KHAN AND OTHERS (*Defendants*).* [12th June, 1900.]

Execution of decree—Civil Procedure Code, s. 335—Silit by unsuccessful auction-purchaser for a declatation of right and for possession—Court-fee—Act No. VII of 1870 (Court Fees Act), s. 7.

A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under s. 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was one for a declaratory decree and consequential relief and Court-fee was payable under Clause IV (*c*) of s. 7 of the Court Fees Act. *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* and Munshi *Haribans Sahai*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—We are of opinion that the lower appellate Court improperly dismissed the appeal before it. The plaintiff was the auction-purchaser of certain property, of which formal possession was delivered to him by the officer of the Court. The defendant No. 1 complained that the plaintiff was not entitled to possession, and that he, the defendant, had been improperly dispossessed. An inquiry was held, and an order was made by the Court under s. 335 of the Code of Civil Procedure, declaring the defendant to be entitled to possession, and ordering **[385]** him to be restored to possession. The plaintiff thereupon brought the present suit on the allegation that Miran Sakka, whose rights he had purchased at auction, was the owner of the property in question, and that he, the plaintiff, was consequently entitled to the possession of it. He prayed that his right to the property should be declared, and that possession should be restored to him. He also included in his prayer for relief a prayer to have the order under s. 335 set aside. He valued the relief sought by him at Rs. 62, but paid a Court-fee of Rs. 10 as in a suit for a declaratory decree only. The defendant objected to the amount of the Court-fee paid as insufficient. That objection was overruled by the Court of first instance which, however, dismissed the suit on the merits. The plaintiff appealed and paid on his memorandum of appeal a Court-fee of Rs. 10. The officer of the Court reported that the memorandum of appeal and the plaint were insufficiently stamped, and on that report the learned District Judge made the following order :—"Appellant to

* Second Appeal No. 923 of 1897, from a decree of Maulvi Saiyid Akbar Husain, Judge of Small Causes exercising the powers of a Subordinate Judge of Agra, dated the 31st August, 1897, confirming a decree of Pandit Bishan Lal Sarma, Munsif of Agra, dated the 4th June 1897.

(1) 9 B. 20.

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22 A. 384 = 20 A.W.N. (1900) 119.

"make good the deficiency in both Courts within four days or show cause." The learned Subordinate Judge, who decided the appeal in this case, says in his judgment that the appellant neither paid the required amount nor showed any cause But this statement is clearly wrong. It appears that within the time allowed by the Court the appellant's pleader appeared to show cause, and did show cause apparently to the satisfaction of the District Judge, because we find that on the 16th July, 1897, the District Judge ordered the appeal to be admitted subject to any objection as to Court fees that might be raised at the hearing. At the hearing the objection was renewed on behalf of the respondents. The learned Judge of the lower appellate Court, without assigning any reasons for his opinion, held that the amount of Court-fees was insufficient, and thereupon dismissed the appeal. Even if it be assumed that the Court-fees paid on the plaint and the memorandum of appeal were insufficient, the Court was wrong in dismissing the appeal without giving the appellant an opportunity to make good the deficiency. Further, we are of opinion that there was no deficiency of Court-fee on the plaint in this case or on the memorandum of appeal. If the suit be treated as a suit for a declaration of the plaintiff's right to present possession of the property within **[386]** the meaning of the last paragraph of s. 335 of the Code of Civil Procedure, it was properly stamped with a Court-fee of Rs. 10, and this was the view taken by the Bombay High Court in *Dhondo Sakharam Kulkarni* v. *Gobind Babaji Kulkarni* (1). In that case there was a distinct prayer for possession, and the Bombay Court held that, notwithstanding such prayer, the amount of Court-fee paid, *i.e.*, Rs. 10, was sufficient. We are, however, not called upon to decide this point, because if the suit be treated as a suit for possession, the plaint was properly stamped under clause V, s. 7 of the Court Fees Act. Further, as the claim sought not only a declaration of right but possession also, there was a prayer for a declaratory decree and consequential relief, and therefore the Court-fee was payable under clause IV (*c*) of s. 7 of the Court Fees Act. In any aspect of the case the amount of Court-fee paid was sufficient or more than sufficient. The fact of the plaintiff asking for a declaration of his title and also to have the order passed under s. 335 set aside was not asking for several declarations or reliefs, inasmuch as the order sought to be set aside negatived his right, and the effect of the declaration of his right would necessarily be the setting aside of that order. We think that the Subordinate Judge was wrong in dismissing the appeal. We set aside his decree and remand the case under s. 562 of the Code of Civil Procedure to the lower appellate Court with directions to try the appeal before it on the merits. The appellant will have his costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.

(1) 9 B. 20.

22 A. 386=20 A.W.N. (1900) 120.

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APPELLATE CIVIL.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

CHAJJU (*Defendant*) *v.* UMRAO SINGH AND OTHERS (*Plaintiffs*).*

[12th June, 1900.]

22 A. 386=20 A.W.N. (1900) 120.

Civil Procedure Code, s. 13—Res judicata—*Under what circumstances a decision may be* res judicata *as between defendants*—*Civil Procedure Code*, s. 544.

Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this [387] effect to arise there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim made against them as a group. *Ramchandra Narayan* v. *Narayan Mahadev* (1), *Ahmad Ali* v. *Najabat Khan* (2), and *Madhavi* v *Kelu* (3), followed. *Bishnath Singh* v. *Bisheshar Singh* (4) referred to.

Section 544 of the Code of Civil Procedure does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants and to reverse the decree of the Court below in favour of all the defendants. *Puran Mal* v. *Krant Singh* (5) referred to.

[F., 36 C. 196 (214)=5 C.L.J. 611=1 Ind. Cas. 913; 7 Ind. Cas. 67; U.B.R. (1907) 2nd Qr., C.P.C., s. 13; R., 15 C.P.L.R. 116 (118); 16 C.P.L.R. 42 (44).]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chandar Banerji*), for the respondents.

JUDGMENT.

HENDERSON, J.—In 1870 one Sheo Singh died leaving a widow, Musammat Golab, and two grandsons, by a deceased daughter, named Ganga and Jamna. In 1875 his widow died. It was alleged that Sheo Singh at the time of his death was possessed of a portion of a house in which he, and after him his widow, resided.

In 1877 his nephews, the sons of a deceased brother, instituted a suit in which they alleged that they had been joint with Sheo Singh and claimed to eject Chajju, the appellant before us, from the portion of the house said to have been Sheo Singh's. Chajju was the brother of Musammat Golab, and the plaintiffs in that suit, while admitting that he was in possession, averred that he had merely been allowed out of grace by Sheo Singh and Musammat Golab to live in the house.

Chajju, in his written statement, in the first place, pleaded that the plaintiffs had no right to sue, as the two grandsons, and not the plaintiffs, were the heirs of Sheo Singh. He further pleaded that the property in suit was his ancestral property, and that it had been in the possession of himself and his predecessors in title for upwards of a hundred years.

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* Second Appeal No. 854 of 1897 from a decree of Babu Jai Lal, Additional Subordinate Judge of Meerut, dated the 31st July 1897, confirming a decree of Babu Udit Narain Singh, Additional Munsif of Meerut, dated the 26th November 1895.

(1) 11 B. 216. (2) 18 A. 65. (3) 15 M. 264.
(4) 11 A.W.N. (1891) 34. (5) 20 A. 8.

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[388] Upon that written statement being filed Ganga and Jamna were added as defendants. They in their written statement alleged (1) that they, and not the plaintiffs, were entitled to the property in suit as the heirs of Sheo Singh, as Sheo Singh had never been joint with the plaintiffs; and (2) that the property in suit belonged to Sheo Singh. They also stated that when the suit was instituted they had themselves been about to take proceedings against their co-defendant to obtain possession of the property.

Having regard to the manner in which Chajju put forward his defence and to the fact that he was the brother of the grand-mother of his co-defendants, it is difficult to avoid the suggestion that he was really colluding with them to defeat the plaintiffs' suit, and that his claim to the property in suit was put forward to meet the plaintiffs' case if the other ground should fail.

The defendant Chajju being in possession, the only real and substantial issues were whether the plaintiffs had a title better than that of the defendants, and if so, whether they had been in possession within 12 years from the institution of the suit.

The Munsif on the 24th November 1877, gave the plaintiffs a decree, having by his judgment found (1) that the plaintiffs had been joint with Sheo Singh and were therefore entitled to the property in suit in preference to his grandsons, (2) that the property in suit belonged to Sheo Singh, and (3) that Chajju's possession had been merely permissive. Against that decree Ganga and Jamna appealed, but, pending the hearing, Jamna withdrew from the appeal. Chajju did not appeal and was not made a party to the appeal preferred by his co-defendants.

The appeal was decided on the 20th May 1878, when the appellate Court, being of opinion that the plaintiffs had never been joint with Sheo Singh and were therefore not entitled as against Ganga and Jamna to the property of Sheo Singh, set aside the decree of the Munsif and dismissed the suit.

On the 20th February 1895, Ganga and Jamna having in the meantime died without leaving issue, the present plaintiffs-respondents who are the representatives of a deceased brother of the father of Ganga and Jamna, instituted the present suit against Chajju to recover possession of the property which had been the subject-matter of the previous suit on the ground that it [389] belonged to Sheo Singh, whose heirs they claimed to be. A description of the portion of the house claimed is given in the prayer of their plaint. The plaint alleged that Chajju had continued to remain in permissive possession or occupation until a short time before the institution of the suit, when the plaintiffs called upon him to give up possession and he refused to do so.

Chajju set up the defence that the property was his ancestral property and had been in his possession for more than 12 years adversely to the plaintiffs.

In the lower Courts various issues were raised, but not determined, as both Courts were of opinion that Chajju not having appealed against the decree of the 24th November 1877, in the previous suit, was not bound by the decree of the 20th May 1878, which, setting aside that decree, dismissed the suit. They considered that Chajju was still bound by the decree of the 24th November 1877, against which he had not appealed, and that as between Chajju and his co-defendants Ganga and Jamna, and through them the plaintiffs-respondents, the findings (1) that the property in suit belonged to Sheo Singh and not to Chajju, and (2) that Chajju

had merely been in permissive possession were *res adjudicata*. The first Court accordingly made a decree dismissing the suit and the lower appellate Court confirmed that decree.

In my opinion the lower Courts were wrong in treating these as *res adjudicata*.

We were referred to a Full Bench decision of this Court in S. A. 830 of 1886, in which it was broadly laid down by Edge, C.J., that there can be no *res adjudicata* as between co-defendants. For the purposes of that case it was unnecessary to lay down any principle in terms so very general. It was sufficient for the Court to have held that in the case before it the plea of *res adjudicata* was a bad plea, and I am not disposed to accept the broad proposition laid down by the Full Bench. Moreover, I find in a later case *Bishnath Singh* v. *Bisheshar Singh* (1) Edge, C. J., admitted that in exceptional cases there might be *res adjudicata* between co-defendants. We are therefore not precluded by the Full Bench decision from considering the only [390] question raised before us, namely, whether the appellant Chajju was precluded from going into the defence raised by him by reason of s. 13 of the Code of Civil Procedure.

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In *Ramchandra Narayan* v. *Narayan Mahadev* (2) the rule as to *res adjudicata* between co-defendants was thus stated :—"Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group" (p. 220). The rule so laid down was accepted by this Court in a recent case—*Ahmad Ali* v. *Najabat Khan* (3) and by the Madras Court in the case of *Madhavi* v. *Kelu* (4).

It has been contended that that rule applies in the present case. It is said that in the former suit there was a conflict of interests between Chajju and his co-defendants, and that it was necessary for the adjudication of the plaintiffs' rights to adjudicate upon the rights and interests of the defendants *inter se*. Now it must be borne in mind that Ganga and Jamna were added as defendants in consequence of the first plea raised by Chajju himself to the effect that they were the real heirs of Sheo Singh, and not the plaintiffs. It was therefore common ground with all the defendants that if the property in suit belonged to Sheo Singh, Ganga and Jamna, and not the plaintiffs were entitled to it. The plaintiffs were admittedly out of possession, and the defendants who challenged their title were entitled to remain quiet and put them to proof of that title. It is true that the Munsif found, not only that the plaintiffs had proved their title to the property, but also that Chajju had merely been in permissive possession or occupation. The former finding was a complex finding amounting to a finding that the plaintiffs were heirs of Sheo Singh and [391] that the property belonged to Sheo Singh, and no doubt it involved the further finding that the claim set up by Chajju that the property was his ancestral property failed, but the finding as to Chajju having been in permissive possession or occupation was only necessary when the further question, namely,

(1) 11 A.W.N. (1891). 34. (2) 11 B. 216. (3) 18 A. 65. (4) 15 M. 264.

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whether Chajju, as alleged by him, had been in adverse possession for upwards of 12 years had to be considered. That question in a sense was only material when the plaintiffs' title to the property had been ascertained, inasmuch as an answer in the affirmative to the question would have afforded a complete defence to the plaintiff's suit. Now the moment it appeared that the plaintiffs, and not Ganga and Jamna, were the heirs of Sheo Singh, and it was necessary to go into Chajju's defence, Ganga and Jamna were no longer interested in the adjudication of the issue whether the property was Sheo Singh's or Chajju's, or whether the latter had or had not been in adverse possession for upwards of 12 years. The Munsif having come to the conclusion that Ganga and Jamna had no interest in the property in suit, I am unable to see how it was necessary to adjudicate upon the rights and interests of the defendants *inter se*. I would therefore hold that the decree of the Munsif is no bar to Chajju, the defendant in the present case, pleading and being allowed to prove, that the property in suit is his ancestral property, and has been in his possession for upwards of 12 years adversely to the plaintiffs-respondents.

Apart from these considerations, it has also been contended that the decree of the Munsif of the 24th November 1877, in the former suit no longer exists, and doubtless as between the plaintiffs in that suit and the plaintiffs in the present suit it certainly does not exist, as the former and the predecessor in title of the latter were all parties to the decree which set it aside.

Chajju did not appeal, but the appeal preferred by his co-defendants was based upon a ground common to all the defendants, namely, that assuming the property in suit to have been Sheo Singh's the plaintiffs were not entitled to succeed. The appeal prevailed upon that ground, and had Chajju joined in, or been made a party to, the appeal, it is impossible to conceive that the finding of the appellate Court could have been otherwise than it was. The appellate Court finding that the plaintiffs had **[392]** failed upon a ground common, not only to the defendants who appealed, but also to the other defendant who had not appealed, set aside the decree of the Munsif entirely and dismissed the suit. It has been urged that, having regard to the terms of s. 544 of the Code of Civil Procedure, the Court ought not to have dismissed the suit. That section applies where the decree against several defendants proceeds on any ground common to all the defendants and only some of such defendants appeal. It does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants, and to reverse the decree of the Court below in favour of all the defendants—see *Puran Mal* v. *Krant Singh* (1). We must see, therefore, whether the decree of the Munsif proceeded upon a ground common to all the defendants. That decree in so far as it proceeded upon the ground that the plaintiffs in the former suit were entitled to the property of Sheo Singh, proceeded upon a ground common to all the defendants, because it was the case of all the defendants that if the property was Sheo Singh's the plaintiffs were not entitled to succeed. But it is said that the decree necessarily proceeded also upon the further ground, namely, that the property was Sheo Singh's, and not Chajju's as

(1) 20 A. 8.

claimed by him. That seems to be so, and that ground is one which certainly was not common to both sets of defendants, and I am therefore inclined to think that s. 544 of the Code of Civil Procedure was not applicable to the case, though, having regard to the first plea of Chajju in the lower Court, it is not easy to see how the appellate Court, when it found that the plaintiffs were not the heirs of Sheo Singh, could logically do otherwise than dismiss the suit. The point is not free from difficulty, but it is not necessary for the purposes of this judgment that I should decide the point, as I have already come to the conclusion that even if the decree of the 24th November 1877, be treated as subsisting *quoad* the defendant Chajju, it cannot be put forward as a bar to the defence pleaded by him.

[393] In dealing with the question of *res adjudicata* the lower Courts, as I have already shown, have treated the decree of the 24th November 1877, as *res adjudicata*, not only as to the property in suit being Sheo Singh's, but as to the possession of the defendant Chajju being permissive, and they have not allowed the question of adverse possession to be gone into. They have held that that decree shows that the possession of Chajju was permissive, and inasmuch as they considered nothing had been proved to show that that possession had since become adverse, they held that this suit was not barred by limitation.

Both Courts seem to have lost sight of the fact that in the former suit in 1877, Chajju in his written statement distinctly put forward an adverse claim to the property now in suit, claiming it as his ancestral property, and that Ganga and Jamna in their written statement stated that owing to an adverse claim made by Chajju, they had been about to bring a suit against him for possession when the former suit was instituted. Both of these written statements have been put in evidence in the present case, and in the face of them it would be hard to say that Chajju's possession, if it has continued since 1877, was not adverse to Ganga and Jamna and to those who now claim through them.

Under these circumstances, I would set aside the decree appealed against and remand the case to the first Court, to try the case generally on its merits.

BURKITT, J.—I concur. The appeal is allowed and the record is remanded under s. 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance to be placed on the file of pending suits and decided according to law. The costs of the two lower Courts and of the appeal in this Court will abide the event.

Appeal decreed and cause remanded.

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22 A. 394=20 A.W.N. (1900) 125.

[394] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

LACHHMAN DAS (*Plaintiff*) *v.* DALLU AND OTHERS (*Defendants*).*

[12th June, 1900.]

Hindu Law—Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.

A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 59, satisfied the mortgage debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad* v. *Kallu* (1) referred to. *Dharam Singh* v. *Angan Lal* (2) followed.

[R., 25 A. 162 (164); 5 C.L.J. 315=11 C.W.N. 403 (406); 6 C.L.J. 612 (617)=12 C.W.N. 107; 7 O.C. 137 (140); D., 18 Ind. Cas. 904 (905).]

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. *Sinha* and Munshi *Gobind Prasad*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondents.

JUDGMENT.

BURKITT, J.—It is unnecessary for me to state the facts in the case. They have been fully dealt with in the judgment about to be pronounced by my brother Henderson, which I have had an opportunity of perusing. I concur in holding, as was done in the case of *Dharam Singh* v. *Angan Lal* (2), that the lien can be enforced by sale of the respondents' interest in the mortgaged property by reason of the pious duty incumbent on them of paying their father's lawful debts.

The amount for which they are liable is Rs. 275, with interest as set forth by my brother Henderson. I concur in the order proposed by him. A decree will be drawn up accordingly, giving the respondents six months from to-day, within which they can avoid sale by paying the sum now decreed against them. The appellant is entitled to proportionate costs in all Courts.

[395] HENDERSON, J.—On the 5th January 1877, one Data Ram, the father of a Mitakshara joint family, executed a mortgage in respect of 114 bighas in mauza Pular, in favour of the plaintiff-appellant to secure the sum of Rs. 99-8 with interest. That sum, it was stated by the plaintiff in his plaint in the present suit, was required for the purpose of paying

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* Second Appeal No. 864 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th September 1897, reversing a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 31st March 1897.

(1) 17 A. 537.

(2) 21 A. 301.

Government revenue, and this statement, though not admitted, was not denied in the written statements of the defendants.

On the 16th August 1887, the plaintiff, in a suit brought by him on the mortgage against Data Ram alone, obtained a decree for sale of the mortgaged property, and on the 22nd November 1888, after the death of Data Ram, the property was sold under the decree and purchased by the plaintiff himself for Rs. 1,100, and the sale was confirmed on the 8th January 1889.

It is important to note that the decree of the 16th August 1887 was for Rs. 1,129, including costs, to which was added interest at 6 per cent. per annum on Rs. 1,000 for six months, as ordered by the decree, making a total of Rs. 1,159. It has been found in the present suit, that after giving credit for the Rs. 1,100, the price fetched by the mortgaged property when sold, the balance of Rs. 59 was actually paid off. The decree of the 16th August 1887 was therefore satisfied, as has been found by the lower appellate Court.

On the 28th July 1896, however, the defendants-respondents, who are the sons of Data Ram, brought a suit against the plaintiff-appellant, alleging that as they were not parties to the decree of the 16th August 1887, they were not bound by that decree, nor was their one-fourth share in the mortgaged property affected by the sale under that decree, and on the 15th September 1896 they obtained a decree for possession of their one-fourth share on the sole ground that they were not parties to, and therefore not bound by, the decree of the 16th August 1887.

It appears that the sale of the mortgaged property on the 22nd November 1888, was made in proceedings in execution had against the respondents, Data Ram having died in the meantime, and that in such proceedings they did not object that the mortgage-debt was one for which they were not liable, or that they were not bound by the decree, but, in my opinion, an objection [396] of this nature could not have been entertained by the Court executing the decree, as the duty of that Court was confined to giving effect to the decree as it stood, and did not justify it in taking into consideration the question whether it was valid or binding upon the sons of the judgment-debtor or affected their interests in the property directed to be sold.

The decree of the 15th September 1896 was one of many decrees obtained under somewhat similar circumstances in this Province on the strength, it is said,-of a decision of a Full Bench of this Court in the case of *Bhawani Prasad* v. *Kallu* (1) in which it was held that a mortgage decree in a suit upon a mortgage against a mortgagor who is the father of sons in an undivided family governed by the Mitakshara, is not binding upon the sons, of whose existence and interest the plaintiff mortgagee had notice, unless joined as parties to the suit, and that the sons if not made parties may sue for a declaration that the decree-holder is not entitled to sell, in execution of his decree for sale, the interest of the sons in the property comprised in the mortgage, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. The decision in that case turned mainly, if not entirely, upon the interpretation which the Full Bench put upon s. 85 of the Transfer of Property Act.

As in the case of *Bhawani Prasad* v. *Kallu* (1) it was not alleged in this suit or in the suit brought by the respondents against the appellant that the debt of the father was tainted with immorality or impiety.

(1) 17 A. 537.

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22 A. 394 = 20 A.W.N. (1900) 125.

Before the passing of the Transfer of Property Act, a decree upon a mortgage against a Hindu father passed in the absence of his sons was a good and valid decree, and it was always considered, and by some of the High Courts in India it is still considered, that a sale under such decree was so far good against the sons that it could only be impeached in a suit brought by them if it could be shown that the debt did not exist or had been incurred for immoral or impious purposes. According to the decision in the case of *Bhawani Prasad* v. *Kallu* (1) the sons may sue to have it declared that their interests were not affected by the decree, and in the present case, where the property was sold and purchased by [397] the decree-holder himself, the sons have obtained a decree for possession of their shares of the mortgaged property.

The decree of the 15th September 1896 has never been impeached, and apart altogether from the fact that this Court is bound by the decision of the Full Bench so far as it goes, it must be taken to have been rightly made.

The present suit, which is a suit by the mortgagee against the sons of Data Ram, was instituted on the 24th September 1896, and, except for the fact that the plaint recites the former suits and proceedings to which I have referred, the suit in form is an ordinary mortgage-suit against the sons of Data Ram upon the original mortgage. Notwithstanding the decree obtained by him upon the mortgage and the proceeding and sales had thereon, the plaintiff treats the mortgage as still subsisting and claims that there is due upon an account being taken on the mortgage in the usual way the sum of Rs. 7,777. Against that sum he gives credit for the sum of Rs. 1,100 paid by him for the property when sold under his decree, and he claims to be entitled in consequence of his having been deprived of one-fourth of the property purchased by him to a one-fourth share of the balance, or Rs. 1,669 after giving credit for Rs. 150, the amount of profits which he admits having realized while the defendant's one-fourth share was in his possession. He, however, relinquishes a small sum, and the actual amount which he now claims is Rs. 1,500, and he seeks to enforce the payment of this sum by the sale of the one-fourth share of the defendants.

I have already drawn attention to the finding that previous to the suit by the respondents, the mortgage decree had been fully satisfied, and it is only because the plaintiff has since been deprived of a one-fourth share of the mortgaged property which he himself purchased for Rs. 1,100, that he is now able to say that any portion of the debt has not been discharged. In my opinion the original mortgage no longer exists, and if there is still outstanding a portion of the debt due upon the decree against Data Ram, then the respondents as sons of Data Ram are liable to that extent for the debt of their father, as they do not allege that the debt was one from which they could claim to be relieved. It is clear, I think, that but for the whole mortgaged property, including the [398] interests of the respondents, having been sold, the mortgage decree could not be taken to have been satisfied. It would not be unfair to deduct one-fourth from the Rs. 1,100 which was paid for the whole property and take the balance Rs. 825 as the amount for which credit should have been given, leaving Rs. 275 still outstanding as a debt, for which the respondents are still liable. The plaintiff is not entitled, as he has sought to do, to treat the mortgage as if it were still subsisting, and to take the

(1) 17 A. 537.

account upon it from the beginning and after giving credit for the Rs. 1,100 paid by him on the 22nd November 1888, and the sum of Rs. 150, the profits alleged to have been realized by him from the share of the defendants while it was in his possession, to say that the balance found upon the account on the footing of the mortgage as if subsisting is still due.

The sum of Rs. 275 became an outstanding debt as from the date of the respondent's decree declaring them entitled to possession of their one-fourth share, and it will carry such interest, if any, as was allowed on the principal amount of the mortgage decree. For this amount the respondents are undoubtedly liable to the plaintiff. Their father had full power to charge their interest in the mortgaged property for the debt, and nothing has taken place to discharge their interest from the mortgage lien.

The only point which remains to be determined is whether in this suit the lien can be enforced, and on this point we have been referred to the case of *Dharam Singh* v. *Angan Lal* (1), where such a lien was enforced. The facts of the case are not distinguishable from those of the present case, but the point now before us did not directly arise, as no objection was raised as to the form of the decree of the lower appellate Court which directed the property of the defendants to be sold to meet the claim. This appears from the following observations in the judgment of the Court:—"The plaintiffs are therefore entitled to claim the amount decreed "to them. No objection was taken in argument to the form of the decree "in the Court below." There is nothing in the decision of the Full Bench which prevents a mortgagee who has sued a Hindu father in the absence of his sons from subsequently bringing a suit to enforce his mortgage against the interests of the [399] sons in the ancestral property, and I am unable to see why the plaintiff here should not be entitled to enforce the lien against the respondents' interest in the mortgaged property on the ground of their pious obligation to pay their father's debts.

The decree of the lower appellate Court dismissing the plaintiff's claim ought, I think, to be set aside, and there ought to be a decree in favour of the plaintiff for Rs. 275, with such interest, if any, thereon, as may have been given by the decree of the 16th August, 1887, from the 15th September, 1896, and in default of the respondents paying the same by a day to be fixed, their one-fourth share in the mortgaged property should be sold in satisfaction of the claim.

Appeal decreed.

(1) 21 A. 301.

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22 A. 399 = 20 A.W.N. (1900) 129.

22 A. 399 = 20 A.W.N. (1900) 129.

APPELLATE CIVIL.

Before Mr. Justice Knox, Ag. Chief Justice, and Mr. Justice Blair.

DALEL SINGH AND OTHERS (*Judgment-debtors*) *v.* UMRAO SINGH AND OTHERS (*Decree-holders*).* [15th June, 1900.]

Civil Procedure Code, s. 294—*Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), sch. ii, art.* 179 (4)—*Execution of decree.*

Held, that an application for leave to bid at a sale in execution under s. 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of art. 179 (4) of the second schedule of the Indian Limitation Act, 1877. *Bansi* v. *Sikree Mal* (1) followed. *Raghunundun Misser* v. *Kally Dut Misser* (2) dissented from.

[R., 3 C.L.J. 240 = 10 C.W.N. 209; 12 C.W.N. 621; 8 O.C. 161.]

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Harendra Krishna*, for the appellant.

Mr. *W. M. Colvin*, for the respondent.

JUDGMENT.

KNOX, Acting C. J., and BLAIR, J.—The sole point with which we have to deal in this appeal is, whether the application for execution which was passed on the 19th November 1889, is or is not barred by limitation. The Court below taking in aid an application by the judgment-creditor, dated the 8th January 1896, has decided that it was not so barred. The contention **[400]** before us on behalf of the appellant is that the application just named is not an application which saves the running of time against the decree-holder. The application was one made by the decree-holder asking for permission under s. 294 of the Code of Civil Procedure to bid for or purchase the property put up for sale. This Court has already held in the case of *Bansi* v. *Sikree Mal* (1) that the making of such an application is a step in aid of execution within the meaning of clause 4, No. 179, sch. ii of Limitation Act No. XV of 1877. The lower appellate Court acted therefore perfectly rightly, and was bound to follow that precedent. The learned vakil for the appellant asks us to lay down the opposite of this ruling on the ground, firstly, that this decision is the decision of a single Judge which he alleges has not been followed; secondly, on the ground that the Calcutta High Court in the case of *Raghunundun Misser* v. *Kally Dut Misser* (2) have ruled otherwise. There is no authority for the allegation that the ruling of this Court in I.L.R., 13 All., 211, has not been followed; the presumption is the other way. It is undoubtedly a matter to be regretted that different views should be taken on this point by different High Courts, but the question we have to decide is whether an application put in under s. 294 of the Code of Civil Procedure is or is not an application in accordance with law to the proper Court to take some step in aid of execution of the decree. With the utmost respect for the learned Judges who have held otherwise, we fail to see how such an application can be held to lie

* First Appeal No. 18 of 1900, from a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 6th January 1900.

(1) 13 A. 211.

(2) 23 C. 690.

outside the words we have just quoted. The fact that a decree-holder is prepared to bid for property and is anxious to purchase is, in the absence of a fraud which cannot be presumed, distinctly an act which modifies the conditions of the sale to the obvious benefit both of the decree-holder and the judgment-debtor, and brings the decree within nearer distance of complete execution and satisfaction. In many cases it does make the difference between complete satisfaction and partial satisfaction. There are indeed three steps There is the step of the application which the decree-holder makes ; there is the step taken by the Court of granting permission, and there is the [401] further step which the decree-holder again takes of availing himself of such permission by bidding at the sale.

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The application before us was an application in accordance with law to the proper Court to take the step of granting permission which step, in ordinary circumstances, would be a distinct step taken forward in aid of execution of the decree. For these reasons we give our approval, and adhere to the view which has hitherto been the view of this Court. We dismiss the appeal with costs.

Appeal dismissed.

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22 A. 401 = 20 A.W.N. (1900) 131.

APPELLATE CIVIL.

Before Mr. Justice Knox, Ag. Chief Justice, and Mr. Justice Blair.

PAHALWAN SINGH AND OTHERS (*Judgment-debtors*) *v.* NARAIN DAS (*Decree-holder*).* [28th June, 1900.]

Execution of decree—Civil Procedure Code, s. 230—Decree for payment of money—Hypothecation decree—Construction of document.

A decree was passed on the 5th March 1884, based on a compromise between the parties. The decree was for the payment of certain sums of money by instalments, and further went on to declare that "The property in the bond "remains hypothecated as before. The defendants have no power to transfer "it. If any other person brings to sale the hyothecated property in satisfication "of the debt due by the defendants, the plaintiff shall have power to take out "execution of the decree without waiting for the instalments, and to cause the "hypothecated property to be sold by auction." *Held*, that this was not a simple decree for the payment of money such as would come within the purview of s. 230 of the Code of Civil Procedure. *Janki Prasad* v. *Baldeo Narain* (1) distinguished. *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (2) and *Lal Behary Singh* v. *Habibur Rahman* (3) referred to.

[R., 32 A. 499 (501) = 7 A.L.J. 420 = 6 Ind. Cas. 188 ; 9 A.L.J. 79 = 13 Ind. Cas. 187 (188) ; 14 C.L.J. 639 = 16 C.W.N. 132 (135); D., 34 A. 636 (640) = 10 A.L.J. 256 = 16 Ind. Cas. 190 (191).]

THE respondents in this appeal held a decree against the appellants, dated the 5th March 1884. The decree had been passed on a compromise, and was, in the first instance, a decree for the payment of certain sums of money by instalments; but it further contained a provision, quoted *verbatim* in the judgment of the Court, as to the maintenance of a lien on certain property and a power to the decree-holder to sell the hypothecated property by auction. On the 5th December 1896, an application for execution was made, which proved infructuous, and was struck off on

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* First Appeal No. 82 of 1900, from a decree of Pandit Rai Inder Narain, Subordinate Judge of Farrukhabad, dated the 20th January 1900.

(1) 3 A. 216. (2) 22 C. 813. (3) 26 C. 166.

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APPELLATE CIVIL.

22 A. 401 = 20 A.W.N. (1900) 131.

[402] the 1st April 1897. The present application for execution was made on the 30th November 1899, and was resisted on the ground that execution of the decree was barred by limitation, regard being had to s. 230 of the Code of Civil Procedure. The lower Court disallowed the objection and ordered execution to proceed. The judgment-debtors appealed to the High Court.

Munshi *Gobind Prasad*, for the appellants.

Babu *Sital Prasad*, for the respondent.

JUDGMENT.

KNOX, Acting C.J., and BLAIR, J.—The sole question which we have to consider is whether the decree, which was under execution in the Court below, is a simple money decree, or whether provision is made in it for something more. The appellant relies upon a Full Bench ruling of this Court, *Janki Prasad* v. *Baldeo Narain* (1) and contends that it is a simple money decree and no more. The circumstances under which the decree was obtained in *Janki Prasad* v. *Baldeo Narain* (1) and others and the case before us are very similar. In both cases the plaintiff had sued for a decree for sale. In both cases the dispute between them terminated in a compromise. In this case it was agreed that the plaintiff should realize his debt from his debtors by payment of a special sum within a special period and of the remainder by instalments. It further provided that if, after the payment of the first sum within the specified period, two successive instalments should remain in default, the plaintiff would be entitled to take out execution of the decree in a lump sum. After this follow the words which have given rise to this dispute and which we therefore quote here *verbatim* :—"The property "hypothecated in the bond remains hypothecated as before. The defend- "ants have no power to transfer it. If any other person brings to sale the "hypothecated property in satisfaction of the debt due by the defendants "the plaintiff shall have power to take out execution of the decree without "waiting for the instalments, and to cause the hypothecated property to "be sold by auction." If this decree be compared with the decree which was before this Court in *Janki Prasad* v. *Baldeo Narain* (1), it will be found that the terms hardly differ, and do not differ in any material point, beyond this, perhaps, that the decree before us is [403] a little more positive in granting the right to enforce execution by sale. There is however, this very important difference between the present case and the case of *Janki Prasad* v. *Baldeo Narain* (1), that while in the latter, the terms of compromise were not embodied in the decree, and all that the decree did was to refer back to it and provide for payment by instalments only, in the present case the terms of compromise have been incorporated into the decree and made part and parcel of it. In *Janki Prasad* v. *Baldeo Narain* (1) the learned Judges held themselves constrained by the terms of the decree and refused to look at what they considered might well have been the intention of the parties. In the present case we are under no such constraint. The terms of the decree before us undoubtedly go beyond the terms of an ordinary simple money decree and provide for sale under certain contingencies. It is true that the decree differs from a decree formally drawn up under s. 88 of the Transfer of Property Act. But we are satisfied that it was the intention of the parties and of the Court that if default was

(1) 3 A. 216.

made in payment of instalments, or if any other contingency mentioned in the decree arise, the decree-holder should be entitled to proceed to sell upon the decree as it stands. Reference was made to the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (1). That case has been distinguished in *Lal Behary Singh* v. *Habibur Rahman* (2). We do not agree with the Court below in the view it took of the Allahabad case cited before it. We are, however, of opinion that in spite of this, the Court below came to a right conclusion.

We dismiss the appeal with costs.

Appeal dismissed.

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22 A. 401 = 20 A.W.N. (1900) 131.

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22 A. 404 = 20 A.W.N. (1900) 132.

[404] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BADRI DAS (*Decree-holder*) *v.* INAYAT KHAN AND ANOTHER (*Opposite Parties*).* [29th June, 1900.]

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 90—*Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—S.* 90 *not applicable.*

In order to make the remedy provided by s. 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under s. 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar* v. *Munshi Ram* (3) followed.

[**F.**, 31 A. 373 = 6 A.L.J. 451 = 1 Ind. Cas. 799 (800); 16 C.L.J. 318 = 17 Ind. Cas. 263 (264); **R.**, 28 A. 660 = 3 A.L.J. 445 = A.W.N. (1906) 167; 9 Ind. Cas. 403 = 14 O.C. 217 (219, 220); **D.**, 26 A. 25 = A.W.N. (1903) 179.]

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellant.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for a decree under s. 90 of the Transfer of Property Act, which has been refused by the Court below. The appellant obtained a decree under s. 88 of the Transfer of Property Act for the sale of certain houses and zamindari property. He has caused the houses to be sold by auction, but not the zamindari property. He alleges that the zamindari property has been sold in execution of a decree obtained by another mortgagee upon a prior mortgage, and on this ground he asks for a decree under s. 90. This case, in our opinion, is fully governed by the ruling of this Court in *Muhammad Akbar* v. *Munshi Ram* (3). As was pointed out in that case, a condition precedent to an application under s. 90 is that the mortgaged property has been sold, that the proceeds of the sale are insufficient to discharge the mortgage and that there is a balance due to the mortgagee. Here the mortgaged property, by which we must understand the whole of the mortgaged

* Second Appeal No. 353 of 1898 from a decree of Kunwar Jwala Prasad, Additional Judge of Aligarh, dated the 4th February 1898, confirming a decree of Munshi Ganga Prasad, Munsif of Bulandshahr, dated the 26th June 1897.

(1) 22 C. 813. (2) 26 C. 166. (3) 19 A. W. N. (1899) 208.

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property, has not been sold at the instance of the decree-holder, and therefore he is not entitled to obtain a decree under s. 90. It is not enough [405] that a prior mortgagee has caused the zamindari property to be sold by auction. That such a sale has taken place is apparently due to the fault of the appellant himself. If he was a party to the suit in which the prior mortgagee obtained his decree, he ought to have redeemed the prior mortgage so as to make the mortgaged property available for the realization of the amount of his own mortgage If, on the other hand, he was not made a party to the prior mortgagee's suit, it is still open to him to redeem that mortgage, and having done so, he would be entitled to bring the zamindari property to sale for the realization of his own money. In any case, as the appellant has not caused the whole of the property mortgaged to him to be sold, he cannot apply for a decree under s. 90 of the Transfer of Property Act. This appeal must fail and is dismissed with costs.

Appeal dismissed.

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22 A. 405=20 A.W.N. (1900) 157.

MISCELLANEOUS CIVIL.

Before Mr. Justice Knox, Ag. Chief Justice, and Mr. Justice Blair.

HAFIZ ABDUL RAHIM KHAN (*Applicant*) *v.* RAJA HARI RAJ SINGH (*Opposite Party*).* [14th June, 1900.]

Scheduled Districts Act (No XIV of 1874), s. 6—Rule 17 of the Kumaun Rules, 1894—Code of Civil Procedure, ss. 562, 564—Right of appeal against order under s. 562—Order of remand where decision of first Court was not confined to preliminary point.

Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under s. 562 of the Code of Civil Procedure.

Held that under Government Notification No. $\frac{628}{\text{VII—569 B}}$, dated 27th June, 1894, Rule 17, an appeal lies from such an order of remand. *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi* (1) referred to.

Held further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under ss. 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under s. 562.

THE facts appear sufficiently from the judgment of the Court.
[406] Pandit *Sundar Lal*, for the applicant.
The Government Advocate (Mr. *E. Chumier*), as *amicus curiæ*.

JUDGMENT.

KNOX, Acting C. J., and BLAIR, J.—The Government on the application of Hafiz Abdul Rahim Khan, a party to the suit—*Raja Hari Raj Singh* v. *Hafiz Abdul Rahim Khan*—has referred to this Court for report and opinion an order passed by the Commissioner of Kumaun

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* Miscellaneous Reference No. 302 of 1899.
(1) 17 A. 112.

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on the 25th October 1897, on the ground that it seems open to objection. The objection is thus stated :—"The judgment of the Commis- "sioner, dated the 25th October 1897, after deciding various points in "the plaintiff's favour, remanded the case under s. 562 of the Code of Civil "Procedure." "The Government is advised that this is a most material irregularity." Upon the reference coming up for hearing it was brought to our notice that Raja Hari Raj Singh, the opposite party, had long been dead and that no one had been substituted on the record of the case. Under these circumstances we directed the Registrar to ascertain from the Government whether they still require any report and opinion. As the Government still requires a report and opinion, we have no alternative but to furnish it : no doubt the legal advisers of the Government will certify to the Government how far our opinion and report under these circumstances can form the basis of an effective order. With that we are not concerned and we express no opinion. We have heard the counsel for Hafiz Abdul Rahim Khan ; we have heard the learned Government Advocate who has kindly appeared as *amicus curiæ* in the case. The suit between the parties is described in the Court of first instance as a suit for cancellation of so much of a sale-deed as injuriously affected the plaintiff and for possession over one acre of land. In the Deputy Commissioner's judgment the pleadings are set out, and five issues are framed. One of those issues, namely, the third, raises the issue of law as to whether the suit was or was not time-barred. The decision of the Deputy Commissioner was to the effect that the suit was time-barred. The remaining issues in this case were, however, considered, and a definite decision pronounced upon each one of them. In appeal the learned Commissioner dealt with the case in what was certainly a rather extraordinary way. He called for further information, and **[407]** himself inspected the area in dispute. After this he remanded the case under s. 562 of the Code of Civil Procedure, evidently setting aside the judgment of the lower Court upon the preliminary point as to whether the suit was or was not time-barred. It is from this order under s. 562 of the Code of Civil Procedure that the present reference is made. Two questions arise for decision. The first as to whether it was the intention of the Government in the rules made by them in exercise of the provisions of s. 6, Scheduled Districts Act, that an appeal should lie from an order of this description. Government Notification No. $\frac{628}{\text{VII—569 B.}}$ dated 27th June, 1894, Rule 17, in its language is wide enough to include such an order as this. Any final decree which may seem open to objection may be referred, and we have the authority of the Privy Council in the case of *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi and another* (1) for holding that a remand order comprising the decision of a Court upon a cardinal issue of the suit, that issue being one which goes to the foundation of the case and which can never, while the decision stands, be disputed again, is a final decree. The next question is whether the decision of the Deputy Commissioner was one only upon a preliminary point, or whether it decided the other matters in issue. After reading the decision we have no doubt left. The suit between the parties was not confined by the Deputy Commissioner to the preliminary point of law, judgment was given on all the issues, and under these circumstances, looking to the language of s. 562 and the imperative language of s. 564, it was not open to the Commissioner to make the order

(1) 17 A. 112.

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he did under s. 562 of the Code of Civil Procedure. Our opinion is that that order was a bad one, and under ordinary circumstances should have been set aside. If we had been dealing with the case as an appeal before us, it would have been so set aside, and the case would have been returned for disposal by the Court corresponding to that of the Commissioner for disposal according to law.

Appeal decreed.

22 A. 405 = 20 A.W.N. (1900) 157.

22 A. 408 = 20 A.W N. (1900) 158.

[408] APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

HARI RAM (*Defendant*) *v.* BISHNATH SINGH (*Plaintiff*).*

[27th June, 1900.]

Hindu law—Liability of member of joint family though not made a party to the suit—"Personal" decree, meaning of.

Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally: *Held* that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *Beni Madho* v. *Basdeo Patak* (1) and *Bhawani Prasad* v. *Kallu* (2), referred to.

[R., 14 C.L.J. 530 (534) = 12 Ind. Cas. 155 (157).]

THE facts appear sufficiently from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chundra Mukerji*) for the appellant.

Munshi *Jwala Prasad* (for whom Munshi *Kalindi Prasad*), for the respondent.

JUDGMENT.

BURKITT and HENDERSON, JJ.—In this case the plaintiff-respondent before us, sought to have it declared that he was entitled to a one-fourth share of the ancestral property of the family, and further to have it declared that his one-fourth share in certain property which had been attached and advertised for sale was not liable to be sold.

It appears that in 1885, a decree was obtained by the defendant-respondent upon a bond by which two houses of the joint family had been hypothecated. This bond was executed by the plaintiff's father and uncle and other younger members of the family, not including the plaintiff, who was very young at the time, to secure a debt which had been incurred many years before by the plaintiff's deceased grandfather, and a small sum advanced at the time of the execution of the bond. In a suit upon the bond to which the plaintiff was not made a party, a decree was given for Rs. 1,363, for principal and interest and costs, and it directed that this amount should be realized in the first instance by the sale of the two houses hypothecated, and that, in the event of the proceeds of sale not being sufficient to satisfy the [409] amount of the decree, the balance should be realized from the defendants personally.

* Second Appeal No. 230 of 1898 from a decree of R. Greeven Esq., District Judge of Benares, dated the 17th December 1897, reversing a decree of Babu Nilmadhab Roy, Subordinate Judge of Benares, dated the 4th August 1897.

(1) 12 A. 99.

(2) 17 A. 537.

The two houses were sold, and, after the application of the sale proceeds towards payment of the decree, there remained a considerable balance. To recover that balance certain property of the joint family has been attached. The plaintiff objected to the attachment, but his objection having been disallowed, he filed the present suit, claiming that his one-fourth share in the property attached was not liable to be sold. The lower appellate Court has found that the original debt was contracted for the benefit of the family, and not for immoral purposes, and that according to Hindu law the plaintiff was under a pious obligation to pay the same. Having so found, the learned District Judge, after referring to the case of *Beni Madho* v. *Basdeo Patak* (1) in his judgment, goes on to say:—"If, therefore, I had "to decide this matter upon principles of Hindu common law, I should "dismiss this appeal without hesitation. In perusing the terms of the "decree under s. 90 (of the Transfer of Property Act), however, I notice "that the relief granted in the event of non-realization by sale of "the hypothecated property is specifically worded as *personal* against "the then existing defendants. It is perfectly true that by refer-"ence to the plaint and the language of s. 90, there does not appear to be "sufficient reason for the limitation of the decree to a purely personal "relief against the defendants;" and again he says:—"This case is "limited to the enforcement of a specific decree against the defendants, "and I am compelled to hold that under its explicit wording it cannot be "enforced against them." In our opinion the District Judge in his interpretation of the effect of a *personal* decree is wrong. The decree, so far as it provides for the recovery of the balance after the sale of the property hypothecated, is a personal decree as distinguished from a decree which directs that the amount decreed is to be realized by the sale of specific property. Under such a decree any property of the judgment-debtors may be attached and sold.

The lower appellate Court rightly held, as a matter of law, that to be liable for the original debt it was not necessary that the plaintiff should have been a party to the suit in which the [410] decree was made; but taking an erroneous view of the effect of the personal decree, it held that the plaintiff's one-fourth share was not liable to be attached and sold. Having regard to the finding, however, that the original debt was not contracted for immoral purposes, and to the fact that the decree for the balance due after the sale of the hypothecated property, though a personal decree, might have been enforced against other property of the joint family belonging to the judgment-debtors, we think that the plaintiff's one-fourth share in the property attached is liable, with the shares of the other members of the joint family, to be sold in execution of the decree.

Another question was raised in the lower appellate Court based upon the decision in the case of *Bhawani Prasad* v. *Kallu* (2). That case has no application to the circumstances of the present case. It was not alleged that plaintiff in the original suit upon his bond had any notice of the existence or interest of the plaintiff who, at the time when the suit was instituted, could not have been more than one or two years old.

We set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant before us will have his costs in all Courts.

Appeal decreed.

(1) 12 A. 99.

(2) 17 A. 537.

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22 A. 410=20 A.W.N. (1900) 139.

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APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

THE MUIR MILLS COMPANY, LIMITED, OF CAWNPORE (*Opposite Party*) *v.* T. H. CONDON AND A. BUTTERWORTH (*Applicants*).*

[29th June, 1900.]

Act VI of 1882 (*Indian Companies Act*), *ss.* 29, 58, 92—*Application to compel registration of transfers of shares—Discretionary power of Directors to refuse registration—Articles of Association—Interference of the Courts.*

Where the Directors of a Company (the Muir Mills) refused to register the transfer of shares and relied on art. 21 of the Articles of Association which empowered the Directors to "decline to register any transfer of shares to any "person of whom they may for any reason disapprove"—

(1) *Held*, that it is not necessary under s. 58 for the applicants to join their vendors in their applications. *Ex parte Penney* (1) distinguished; *Skinner* v. *City of London Marine Insurance Company* (2); *London Founders'* [411] *Association* v. *Clarke* (3); *Paine* v. *Hutchinson* (4); *Ex parte Gilbert* (5); referred to. *Ex parte Shaw* (6) followed.

(2) Where it was found that there was a defect in the constitution of the Board of Directors, which was not cured by the Articles of Association; *Held*, that the Court was not bound to dismiss the application under s. 58 on the ground of its being premature, there having been no refusal to register by a properly constituted Board, but might treat the defence set up as a refusal, and deal with the application on the merits.

(3). Where it was found that the real objections entertained by the Directors to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert (the Managing Director of the Cawnpore Woollen Mills) and the personal animosity existing between Johnson (the Managing Director of the Muir Mills) and McRobert, and (2) the desire of the Directors (of the Muir Mills) that McRobert should not add to his voting power at the meetings of the Company, and (3) that therefore the objections were not personal to the applicants themselves. *Held*, that where the Articles of Association give a discretionary power to the Directors to refuse to register a transfer, and it appears that the Directors have *bona fide* considered the matter, the Courts will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence is produced as to their reasons, the Courts will consider whether those reasons proceeded on a right or wrong principle. *Held* further, applying the principles of English cases, that objections not personal to the transferees do not constitute legitimate reasons. *Poole* v. *Middleton* (7); *In re Bell Bros.* (8); *Ex parte Penny* (1); *Moffat* v. *Farquhar* (9); *Kaikhosro* v. *Coorla Spinning and Weaving Co.* (10); *In re Coalport China Co.* (11), referred to.

THIS and five other similar appeals arose out of six applications under s. 58 of the Indian Companies Act to compel the registration of the applicants as members of a Company.

The facts appear fully from the judgment of HENDERSON, J.

Messrs. T. *Conlan* and *Arindell*, for the appellant.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the respondents.

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* First Appeal from Order No. 88 of 1899, from an order of J. Sanders, Esq., District Judge of Cawnpore, dated the 18th July, 1899.

(1) (1872) L.R. 8 Ch. 446.
(2) (1885) 14 Q. B. D. 882.
(3) (1888) 20 Q.B.D. 576.
(4) (1868) L.R. 3 Ch. 388.
(5) 16 B. 398.
(6) (1877) 2 Q.B.D. 463.
(7) (1861) 29 Beav. 646, 650.
(8) 7 Law Times Reports, 689.
(9) (1877) L.R. 7 Ch. D. 591.
(10) 16 B. 80.
(11) (1895) L.R. 2 Ch. 404.

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JUDGMENT.

BURKITT, J.—In this case I have had an opportunity of perusing the judgment which is about to be delivered by my brother Henderson. I fully concur in it, and have but little to add.

As to the preliminary points, in discussing which so much time was, I think unnecessarily, spent at the hearing of these [412] appeals, I fail to see why they should have been raised at all by the applicants in the Court below (respondents here), where most of them were incidentally raised during the hearing of the applications. Though the proceedings before the lower Court were in form applications under s. 58 of the Indian Companies Act, they were tried most elaborately as regular suits. Regular pleadings were filed on both sides and issues joined on them. By their pleadings the Muir Mills Company admitted that the respondents had formally applied to have the shares registered in their names, and that the Company had refused to allow registration. The applicants in fact said that the Company had improperly refused to register the transfers. The Company, in reply, admitted the refusals and justified their action by relying on art. 21 of their Articles of Association. It is difficult to understand why on such pleadings the applicants should during the hearing below, have endeavoured to prove that in some of the cases, there had not been any refusal to register owing to a legal defect in the constitution of the Board by which the refusals in those cases purported to have been made. In those cases if the contention of the applicants had been sustained, they would have succeeded in showing that they had come into Court without any substantial cause of action. But anyhow as to all these preliminary matters, I think my learned brother has come to a right conclusion.

On the merits it is abundantly clear that, though the appellant Company was not by law bound to disclose the reasons which actuated the Directors in declining to register the transfers which form the subject of these appeals, those reasons have been very fully disclosed. The question we have to consider is, whether those reasons are legitimate or are arbitrary and unjustifiable. Those reasons succinctly put are that the Directors of the Muir Mills Company knew the transferees, the applicants, to be employes of Mr. McRobert of the Woollen Mills; that Mr. McRobert had not long previously been a Director of the Muir Mills; that he quarrelled with Mr. Johnson, the Managing Director of the Muir Mills, saying he "distrusted the management;" that he had prosecuted one of the other Directors for a technical offence under the Companies Act, and refused to seek [413] re-election as a Director; and that the Directors of the Muir Mills Company therefore feared that these transferees being his employes would support him by their votes as shareholders at shareholders' meetings of the Muir Mills Company, that they would be "litigious and cantankerous", and would "harass the management", the meaning of which phrase no doubt is that they would support Mr. McRobert's views as to the advisability of making a change in the management. There was evidence given to show that the managing Director, Johnson, threatened to resign if McRobert had anything to do with the management, and that the Directors believed that the loss of Johnson's services would be injurious to the interests of the Company. Shortly put, the Directors were apprehensive that any increase in McRobert's voting power would assist him in enforcing his views as to the management, and as the transferees were McRobert's subordinates in another Mill, the Muir Mill Directors refused to register the transfers to them. It should be mentioned here (1) that McRobert was, at the time when these

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transfers were made, the largest shareholder in the Muir Mills Company; (2) that he did not, for the purpose of increasing his own voting power, transfer any of his own shares to his subordinates as his nominees, but on the contrary assisted them in purchasing the shares in open market; (3) that the Cawnpore Woollen Mills Company is in no way a rival in business to the Muir Mills Company which is a Cotton Mill; and (4) that admittedly there is no personal objection to any of the transferees; they are acknowledged to be perfectly proper persons to become members of the appellant Company, and to be unobjectionable in all respects except in that they are subordinates of McRobert at the Woollen Mills.

The principles of law applicable to a case of this kind will be found most exhaustively laid down by Mr. Justice Chitty in the case of *In re Bell Brothers, Ld., Ex parte Hodgson* (1), where that learned Judge cites as his authority a large number of reported cases, most of which were referred to in the argument before us. In that case arts. 18 and 34 of the Articles of Association of Bell Brothers, Ld., somewhat resembled art. 21 of the Articles of Association in the present case, but conferred on the Directors the **[414]** power of disapproving and rejecting intending shareholders in stronger language than that used in art. 21 of the appellant Company here.

The learned Judge held that the right of transfer conferred on every shareholder was subject to the discretionary power conferred on the Directors by arts. 18 and 34. So in the present case a right to transfer is assumed by art. 19 to belong to every holder of shares in the Company, subject to the discretionary power given to the Directors by art. 21 of declining to register any transfer of shares to any person of whom they may for any reason disapprove.

As to the manner in which that discretionary power is to be exercised, the learned Judge says that it is of "a fiduciary nature and must be "exercised in good faith, *i. e.*, legitimately, for the purpose for which it is "conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a "collateral purpose. In exercising it the Directors must act in good faith "in the interests of the Company, and they must fairly consider the "question of the transferee's fitness at a Board Meeting." Then as to the power of the Court to interfere with the Directors' decision, the judgment lays down that the Court will not review the Directors' decision when they have in good faith "rejected a transfer on the ground "that the transferee is not a fit person to become a member of the "Company"; that the Court will not draw unfavourable inferences against the Directors merely because the latter have declined to assign their reason for disallowing the transfers, but that if the Directors do disclose their reasons, "the Court must consider the reasons assigned "with a view to ascertain whether they are legitimate or not, or in "other words, to ascertain whether the Directors have proceeded "on a right or a wrong principle." The judgment then states that the Court will not overrule the Directors' decision merely because the Court itself would not have come to the same conclusion, and then follows this most important passage:—"But if they" (*i. e.*, the reasons assigned by "the Directors) are not legitimate, as for instance, if the Directors state "that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them up among

(1) 7 Law Times Reports 689.

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"[415] his nominees, the Court would hold that the power had not been "duly exercised. So also if the reason assigned is that the transferees' "name is Smith and is not Bell."

Now in applying the above principles to these appeals, I find in the voluminous evidence adduced on both sides that the reason, and the only reason, which actuated the Directors in disallowing the respondents' transfers is because the latter were subordinates of McRobert, and the Directors believed that these transferees would at shareholders' meetings vote with McRobert in opposing the directorate, and especially the Managing Director Johnson; that they would "harass the management." Can such a reason be considered to be a legitimate reason for refusing to allow the respondents to become members of the Muir Mills Company. The Directors say their action was taken in good faith in the interests of the Company. They say that if McRobert was able to interfere in the management of the Mills the Managing Director Johnson would resign, and that, they say, would injure the Company. The Directors consider Johnson to be a good man of business, an opinion which Johnson also shares, but it is quite open to McRobert honestly to hold a different opinion, and from his saying that he "distrusted the management," he apparently does not concur with the Directors. Even if McRobert's object in procuring shares for his subordinates was with their assistance to enforce his views on and so interfere with the management, and even if he transferred some of his own shares to his nominees for that purpose, it is not intelligible how such action on his part should be considered to be injurious to the interests of the Muir Mills Company, though no doubt it would be unpleasant to the existing Board of Directors. I can see no pretence for supposing that the acquisition by McRobert of an increased voting power could be injurious to the Company, in which he is the largest shareholder, but in which under art. 55 of the Articles of Association his voting power is not commensurate with his holding.

It seems to me that all through these cases the interests of the Muir Mills Company have been too much mixed up with the personal interests of the Directors. The Directors may well think that unless they continue on the Board the Company will [416] suffer. Other shareholders may legitimately entertain a different opinion, and may, like McRobert, "distrust the management," and desire to make a change in the Board of Directors. Can then that Board legitimately refuse to pass transfers made to persons who, the Board believe, will act in conjunction with a prominent shareholder who "distrusts the management." On the authority of the passages from the judgment cited above, I am of opinion that such a reason is not legitimate. It practically amounts to this, that the Board will not admit any new shareholder who, they believe, will not support or will oppose their management. It is impossible, in my opinion, to regard such an exercise of the Directors fiduciary discretionary power as being other than one of the most arbitrary and unjustifiable nature, exercised for a collateral purpose, namely, to safeguard the Directors' personal interests against McRobert, and not in the interest of the Company as such. The transfers were refused, not in good faith in the interests of the Company, but to prevent McRobert having at his disposal an increased voting power which the Directors apprehended he might use to "harass" their management. For that reason the Directors' objections, though to that extent personal to the transferees, are not legitimate objections. The constitution of the

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Company is not such as would justify the Directors in excluding from membership all persons who, they feared, would oppose their management.

For the above reasons I am of opinion that the District Judge was right in allowing the applications and in directing the registration of the shares purchased by the applicants respondents.

Therefore, in concurrence with my learned brother, I direct that these appeals be dismissed.

* [As to costs, we allow to the respondents the fees certified to have been paid to their advocates or vakils in each of these appeals.]

HENDERSON, J.—These appeals have arisen out of six applications which were made under s. 58 of the Indian Companies Act, to compel the registration of the applicants as members of the Muir Mills Company, Ld. There were five applicants claiming to be registered, but one of these, Butterworth, sought to have his name registered in respect of two sets of shares purchased by him at different times, and he made a separate application in respect of each set. In his first application his [417] vendor, Dr. Condon, joined. The other applicants were James Scott, the dyeing master; W. Vickers, the accountant; P. Scott, the weaving master; and H. Thomson, the engineer of the Cawnpore Woollen Mills, and none of them joined in their applications the persons from whom they had purchased the shares in respect of which they sought to be registered. Butterworth was the Mill Manager of the Cawnpore Woollen Mills. One Mr. McRobert was then, and now is, the Managing Director of those Mills.

The following particulars with regard to the purchases of the various shares and the refusal to register may here be conveniently noted:—

(1) Butterworth purchased three shares from Dr. Condon, the transfer deed was dated the 3rd April 1897, and application for registration was made on the 20th April 1897. On the 23rd April 1897, the application was refused by the Directors, the Directors being Newcomen, Smith, and Arindell.

(2) James Scott purchased three shares from Mrs. Wilson; payment being made on the 17th June and the deed of transfer, dated 23rd June, 1897. Application was made for registration of the transfer on the 16th July, 1897, and refused by the same Directors on the 11th August, 1897.

(3) W. Vickers purchased five shares from one Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated 14th September, 1897. Application was made for registration on the 14th September, 1897, and refused by the same Directors, on the 15th September, 1897.

(4) P. Scott purchased three shares from Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated the 1st November, 1897. Application was made for registration on the 2nd November, 1897, and refused by the Directors, Beer and Newcomen, on the 5th November, 1897.

(5) H. Thompson purchased five shares from Gillespie, payment being made on the 31st August, 1897, and the deed of transfer dated 1st November, 1897. Application for registration was made on the 15th November, 1897, and refused by the Directors, Beer, Newcomen, and Johnson, on the 18th November, 1897.

[418] (6). Butterworth purchased five shares from Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated

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* The portion in rectangular brackets forms a part of the judgment of Burkitt, J. But it does not find a place in the I.L.R. Series.

1st November, 1897. Application for registration was made on the 15th November, 1897, and refused on the 18th November, 1897, by Beer, Newcomen, and Johnson.

It should be mentioned that on the 5th January, 1898, Butterworth made a second application for registration of the two sets of shares purchased by him, and this application was refused by the Directors Beer, Newcomen, and Johnson on the 28th January, 1898.

In refusing to register the various transfers the Directors acted under art. 21 of the Articles of Association of the Company. That article is as follows :—"The Directors may decline to register any transfer of shares to "any person of whom they may for any reason disapprove, or of any "share upon which the Company has a lien"; and in refusing to register the transfers, except in the case of Butterworth, they gave no reasons for their refusal except that they did so under art. 21 of the Articles of Association. In Butterworth's case certain correspondence took place on the subject. In that correspondence the reason first given was that the Directors acted under art. 21 of the Articles of Association. In a letter of the 27th May, 1897, to Butterworth, it was alleged that the reason for the Directors' refusal to register was that they did not consider it would be in the interests of the Company to register Butterworth as a member; and in a letter of the 28th May, 1897, to Dr. Condon, in reply to a letter from him, they stated that they were "taking every precaution to avoid "having any shareholders who are, in their opinion, likely to prove ill-"disposed towards the management of the Company, or of a litigious or cantankerous disposition."

In the applications under s. 58 of the Indian Companies Act, it was alleged, as the ground upon which such applications were based, that the Directors had acted arbitrarily and without sufficient cause, and in a wrongful exercise of their powers in refusing to register the different applications for registration. The Company in answer to the several applications filed written statements, in which it contended that it was not necessary for the Directors in refusing under art. 21 of the Articles of Association **[419]** to register transfers of shares, to give any reasons, and alleged that the refusals to register had been made *bona fide* in the interest of the Company, after due consideration and for reasons which were legitimate and sufficient. Upon this the following issue was framed, *viz.*—Whether the Company had arbitrarily and without sufficient cause refused to register the transfers.

By consent all the applications were heard together.

Before proceeding to deal with the main contentions raised in these appeals it will be well to dispose of certain questions which were raised during the argument. The first question was as to the competency of the applicants who had not joined their vendors in their applications to apply under s. 58 of the Indian Companies Act. It was contended that they had no *locus standi* as they were not, and could not be, members of the Company until the transfers to them had been registered. *Exparte Penney* (1) was relied upon as showing that the transferor, should make the application, or at all events join in it. In that case the application was made by both transferor and intended transferee, but a reference to the Articles of Association of the Company concerned makes it clear that there could be no *transfer* without the approval of the Directors. The articles provided that "no person not already a shareholder shall be entitled to become

(1) (1872) L.R. 8 Ch. 446.

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" the transferee of any share unless approved of by the Board." In the cases before us art. 21 deals merely with the right of the Directors to decline to register any transfer of shares already made, if they disapprove for any reason of the transferee. The transfers were otherwise complete as between the transferors and the transferees, the purchase money had been paid, and the transfer deeds in each case executed by both transferor and transferee. On a sale of shares the seller contracts to execute a valid transfer and to hand the same to the transferee. *Skinner* v. *City of London Marine Insurance Co.* (1). He does not contract that the Company will register the transfer. *London Founders Association* v. *Clarke* (2). It is the duty of the transferee to get himself registered. *Paine* v. *Hutchinson* (3). Section 29 of the Indian Companies Act, which corresponds *verbatim* with s. [420]26 of the English Companies Act, 1867, assumes the right of the transferee to apply for registration and enables the transferor, where the transferee fails to do so, to apply to get the transfer registered. In *ex parte Shaw* (4) an application by the transferee alone under s. 35 of the English Companies Act, 1862, was allowed on the ground that the transfer was complete. The reasoning in that case was accepted by Farran, J., in *ex parte Gilbert* (5). In my opinion *ex parte Shaw* is an authority for our holding that it is not necessary in the present cases for the transferors to join in the applications.

No question was raised as to whether the summary procedure apparently intended by s. 58 of the Indian Companies Act was the proper procedure here. It is sufficient to say that these applications have not been tried summarily. They have practically in all respects been treated as if the parties had proceeded by suit.

The second question, which it will be convenient to deal with before discussing the main grounds of appeal, turns upon the constitution of the Board of Directors which refused the applications for registration made by James Scott, Vickers and P. Scott.

[His Lordship having pointed out in regard to the applications of James Scott and Vickers that the proper forms had not been complied with in the appointment of Arindell and Smith to act for Cooper and Beer, and that, if the appointments of the two former were to be held valid, there would have been six Directors instead of a maximum of four allowed by the Articles of Association, held that the defect was cured by art. 86 of the Articles of Association which ran as follows :—

" All acts done by any meeting of Directors * * * or by
" any person acting as a Director, shall be valid and effectual notwith-
" standing that it be afterwards discovered that there was some defect in
" their appointment or qualifications respectively."

His Lordship then continued :—]

* [In the case of James Scott and Vickers the applications for registration were refused by a Board consisting of Newcomen, Smith and Arindell, and it was contended that Smith and Arindell were not in fact and could not, having regard to the Articles of Association, be Directors at the time. On the 27th March, 1897, the Directors of the Company were Cooper, Beer, Newcomen and Johnson, the last mentioned being styled the Managing Director. According to art. 66, " the number of

* [Here commences that portion of the Judgment of Henderson, J., which has been omitted in the I.L.R. Series.—ED.]

(1) (1885) 14 Q.B.D. 882.
(2) (1888) 20 Q.B.D. 576.
(3) (1868) L.R. 3 Ch. 388.
(4) (1877) 2 Q.B.D. 463.
(5) 16 B. 398.

Directors shall never be less than three nor more than four, including the Managing Director." From the proceedings of the Directors of the 27th March, 1897, it appears that Cooper and Beer contemplated being absent for about 7 months, and applied for leave of absence. Under art. 73 leave of absence was sanctioned, and it was resolved that during their absence Arindell and Smith " should be asked to take a seat on the Board during the absence of Cooper and Beer respectively." Arindell and Smith were accordingly asked, and they accepted seats on the Board, and during the absence of Cooper and Beer respectively they acted as if they had been duly appointed Directors, and it was during the absence of Cooper and Beer that they sat upon the Board and refused the applications for registration made by James Scott and Vickers.

It may be mentioned that Johnson had previously, on the 2nd January, 1897, applied for leave for 7 months as from about the 1st April, 1897, and this leave was granted, no one being appointed to take this seat.

It is clear from the Articles of Association that none of the Directors who thus obtained leave of absence ceased to be Directors. If therefore Arindell and Smith be treated as Directors, there were from the time of their taking their seats on the Board and at the time they refused the application for registration, six Directors instead of a maximum of four allowed by the Articles. Article 76 provided that any casual vacancy in the Board other than that of Managing Director might be filled up by the Board subject to the approval of the next Ordinary General Meeting; but any Director so chosen should retain office so long only as the vacating Director would have retained the same if no vacancy had occurred. This article clearly did not apply. It enables the Directors to fill up casual vacancies, but no vacancy, casual or other, had occurred on the Board. Article 71 (*k*), amongst other powers and authorities, gave the Directors power and authority "to authorise or empower the Secretary of the Company, or such other person or persons as the Directors may think fit, to exercise and perform all or any of the powers, authorities or duties conferred upon the Directors by these Articles of Association," and reliance was placed upon this article as showing that Arindell and Smith under this article might be treated as havign been authorised or empowered to perform all the powers and duties of Directors. But the Board on the 27th March, 1897, did not purport to give them any power or authority under that article. It undoubtedly professed to appoint them as Directors. In my opinion that appointment was *ultra vires* of the Directors and therefore bad. Article 86, however, provides: " All acts done by any Meeting of Directors * * * or by any person acting as a Director, shall be valid and effectual notwithstanding that it be afterwards discovered that there was some defect in their appointment or qualifications respectively."

This article is based upon art. 71 of Table A. which is the same in both the Indian and English Companies Acts. S. 92 of the Indian Companies Act (which corresponds with s. 67 of the English) of 1862 provides that " until the contrary is proved every * * * meeting of Directors or Managers * * * * and all appointments of Directors * * * shall be deemed to be valid, and all acts done by such Directors * * * shall be valid notwithstanding any defect that may be discovered in their appointments or qualifications." While, on the one hand, it was contended by counsel for the company that the effect of art. 85 was to validate the acts of the Board of which Arindell and Smith professed to act as members, it was argued, on the other hand, by the advocate for the applicants that that article could

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not validate the acts of individuals appointed to act as Directors by persons who had themselves no power to make the appointment, and we were referred to the cases of *Howbeach Coal Co.* v. *Teague* (5 H. and N. 151) and *Garden Gully Co.* v. *McLister* (L.R. 1 Ap. Ca. 39) (referred to in Buckley's Companies Acts, 6th edition, 219). As pointed out by Mr. Buckley, those were) cases in which a Company was seeking to enforce against a member duties purporting to be imposed upon him by persons to whom he and his co-shareholders had never delegated the authority of imposing such duties. Here the applicants were not members of the Company, and their position is very different from the case of persons objecting, as in the cases quoted, to the making of calls or the forfeiture of shares by persons who were not in fact Directors. I see no reason therefore why the acts of the Board, consisting of Newcomen, Arindell, and Smith, should not, having regard to the terms of art. 86 of the Articles of Association, be treated as valid as if every one of such persons had been validly appointed.] *

In the case of P. Scott, the position is somewhat different. There the Board which rejected the application for registration consisted of Beer and Newcomen, who were both qualified **[421]** Directors, but they formed less than a quorum as required by art. 67 of the Articles of Association. Under that article "the number of Directors to form a quorum for the "transaction of business shall be three, including the Managing Director, "or such substitute as may be acting for him." It seems to me that the action of a Board so constituted is not validated by art. 86, and that P. Scott is entitled now to say that their action was not binding upon him. What then is the result? His application is in all respects the same as the other applications under s. 58 of the Indian Companies Act. He has treated their refusal as an improper refusal, and has alleged that it was made arbitrarily and without sufficient cause, and the answer to the application by the Company, as in the other cases, was that the Directors had *bona fide* after due consideration and for sufficient reason refused to register, and the matter has been tried out on that basis. Either there has been no refusal in law and his application, which is based solely and entirely on the allegation that there has been an improper refusal, is premature, or it may be taken that the defence set up on the application under s. 58 of the Indian Companies Act is a refusal, and the matter dealt with on its merits. I think it is open to us to adopt the latter course rather than dismiss the application as premature. This disposes of the questions which have been raised, other than the questions which go to the merits of the application.

I have already referred to the issue raised by the lower Court. Evidence was adduced by both sides upon that issue. Of the applicants, Butterworth was the only one who was examined on their behalf in support of the applications under s. 58 of the Companies Act. They, however, called one Cave who had been in the service of the Muir Mills Company when the registrations had been refused, but who had since left, Beer, one of the Directors already mentioned of the Company, and Dr. Condon. Butterworth admitted that the first 3 shares purchased by him were offered to him by McRobert, the Manager of the Cawnpore Woollen Mills, that he did not inquire if he had money to pay for shares; that his account with the Mills was at debit; that he asked McRobert for permission to further overdraw, and that permission was given; that McRobert directed **[422]** the accountant to make out

* [Here ends the portion of the judgment of Henderson, J., omitted in the I.L.R. Series—ED.]

a cheque for the shares on the Mussoorie Bank in favour of Dr. Condon, to pay for the shares; that he (Butterworth) eventually paid back the purchase-money by instalments, and that his debit was still from Rs. 2,000 to Rs. 3,000; that most probably McRobert wrote for the shares and sent them to him; that when the transfer deed came McRobert sent it back for alterations to Dr. Condon; that on receipt of the letter intimating that the Directors declined to register, he consulted McRobert, who advised him in his correspondence with regard to the refusal. As to the second lot of 5 shares he admitted that they had been paid for on the 31st August, 1897; that McRobert had caused his account to be debited with Rs. 1,300, the price; that he could not say why two months had elapsed between the date of his being so debited and the date of the transfer-deed; that he had nothing to do with the seller; that he was not sure whether McRobert or he himself had applied for registration; that it was possible that the scrip remained with McRobert up to the time of the application to the Court. He then went on to say that he could not swear that the Directors had not *bona fide* considered his application for registration. He also said that he knew that McRobert's relations with the Company (The Muir Mills Co.) were not amicable.

Cave, who had left the Company's service because he had been superseded by another employee, stated that the refusal to register the transfer to Butterworth was because he was employed in the Woollen Mills. The reasons he said were contained in the letter of the 28th May, 1897, to Dr. Condon, to which reference has been made. It was thought that a gentleman in the Cawnpore Woollen Mills might be influenced by McRobert to the detriment of the Company. Cave had been present at the meetings at which the different applications had been considered, and he referred to the minutes of such meetings which showed that all the applications had been considered, and in some instances remitted to subsequent meetings for further consideration. "I certainly swear," he said, "that the Directors gave *bona fide* consideration to the question of registration," and again "whether they acted in an arbitrary manner is a matter of opinion. I think they had some grounds for what they did. In my opinion they did not act in an **[423]** arbitrary manner." Cave was apparently called with a view to proving that the refusal to register the transfers was solely on account of Johnson, the Managing Director, and at his instance. This I think he failed to do. Examined on this point by the counsel for the applicants, he said: "I am not aware that Johnson had any voice in the refusal to register Butterworth's and the other shares."

Beer who was present at the meetings of Directors which refused to register the transfers to P. Scott, Thompson, and Butterworth, was examined as to the reasons which guided the Directors in their refusals. From his evidence it is clear that the reason was the fear that the transferees being employees of the Mills of which McRobert was Manager, would be under his influence, and would vote just as he wished them to. He stated that while McRobert had been a Director of the Muir Mills, there had been various stormy meetings, and he had evinced hostility on more occasions than one to Johnson, the Managing Director, who had threatened to resign, and start a mill of his own. He said that he believed that McRobert was at the bottom of the transfers; that he would use the transferees for his own ends, and that they would do what he told them; that he (Beer) had been a Director of the Cawnpore Woollen Mills, where there was always a preponderance of votes

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amongst the staff of that Mill, and he wanted to prevent a similar preponderance of votes on McRobert's part in the Muir Mills. "I considered," he said, "if McRobert gained that preponderance, Johnson "(the Managing Director) would sever his connection with the Muir Mills, "and it was thus that I considered it was not to the interest of the Com- "pany that the shares should be registered. I considered that "McRobert evidently wanted to gain that preponderance * * *. I don't "think McRobert would hesitate to harass the management in order to "gain his point. I considered harassment to the management would "harm the Company."

The evidence of Dr. Condon, the only other witness called by the applicants, is not important. He speaks of a conversation with Johnson, which is denied by the latter.

Now although Butterworth was the only one of the applicants who gave evidence in support of their case, the counsel for the [424] Company called the others apparently with a view to show that in purchasing their respective shares they were acting on the suggestion of and through McRobert. None of them had previously purchased shares in the Muir Mills Company, and with one exception all were at the time indebted to the Cawnpore Woollen Mills but were allowed to further overdraw their accounts to meet the purchase money, and 7 per cent. was charged on the over-drafts. In each case the shares were offered to the purchaser by McRobert, were purchased by him, and paid for through him. Except in the case of Vicker's, application for registration was made by McRobert, who was advising them throughout. Each of them stated that he was not prepared to say that the Directors did not fairly and properly consider the matter of their fitness to become members of the Company, but Thompson went so far as to say that while he believed they had not fairly and properly considered his application, he was not prepared to swear it. In the case of Thompson his shares were purchased during his absence in England for him by McRobert, who without consulting him, had caused his account to be debited with the purchase money. Vickers in his evidence stated that he knew that there was great antagonism between Johnson and McRobert, and that before he bought his shares he was aware of their hatred.

These matters which I have just mentioned, or most of them, only came to light in the course of this litigation, and therefore cannot be said to have influenced the Directors in their refusal to register the transfers. To my mind, however, they show almost conclusively that McRobert was taking much more than an impersonal interest in getting his employees to purchase shares in the Muir Mills Company. What his real object was there is nothing to show, though it may be that the view said to have been taken by the Directors as to his object was correct. It may be noted here that Beer was unable to specify, except in the vaguest terms, in what way McRobert was likely to be able to harass the management of the Company. It is admitted that at the time he was the largest shareholder in the Company, and it is to be presumed therefore that he would be the last person to do anything which would be likely to injure the interests of the shareholders. He had been a Director of the Company, but in February, 1897, he [425] ceased to be a Director, and though he was proposed and seconded for re-election as a Director at the Annual General Meeting of shareholders on the 27th February, 1897, he declined to submit himself for re-election. It is difficult to see how, as an ordinary shareholder, he could have interfered with or harassed the management, and he could not

have submitted himself again for election as a Director until the next Annual General Meeting. Having regard to the constitution and views of the Board, and temporary Board, it was not likely that had a casual vacancy occurred on the Board, he would have been asked to join the Board in the meantime.

In his cross-examination Beer referred to a prosecution which had been instituted against him as a Director of the Company under s. 55 of the Indian Companies Act, 1882, this being done apparently with a view to show how in one respect McRobert had harassed the management. The prosecution was instituted under the following circumstances. After an Extraordinary General Meeting of the shareholders which took place in March 1897, it appears McRobert asked to see the register of shareholders, and was told by Beer, who was the Chairman of the Meeting, that he could not be allowed to see it then, as it was required at once at an adjourned meeting of the Directors, but that he could see it the next day. McRobert thereupon left the meeting, but in the course of half an hour was informed that the register was available for his inspection. Notwithstanding this information McRobert instituted the prosecution referred to, alleging that he had been refused inspection of the register. The Magistrate who tried the case acquitted Beer. McRobert thereupon first directly, and then through the Chamber of Commerce, of which he was President, moved the Local Government to appeal to the High Court against the acquittal, which it did. In the result Beer was fined 8 annas, the High Court being of opinion that technically an offence had been committed.

The only other evidence which is material is that of Johnson, the Managing Director. He referred to various meetings which he described as stormy meetings at which there had been a difference of opinion between him and McRobert, when the latter was a Director, and especially to a particular meeting when McRobert **[426]** had expressed distrust of the management of the Company. He also referred to the prosecution of Beer. As to the reasons for the refusals to register the transfers he said there was a belief that the transferees would in all probability prove themselves cantankerous and litigious, just as their employer (McRobert) had proved himself to be. It was considered that as they were his employees, he could rely on them to do whatever he wished them to do; that they would therefore act in any manner he wished or directed because of the ill-will he bore against him (Johnson) personally; and that the Directors wished to guard against anything of this sort. He further said "after that (the criminal prosecution against Beer) all these applications came in. It appeared "to me they could only mean one thing, namely, that McRobert was "determined to follow up these different incidents by bringing in as "shareholders his own nominees to work in whatever way circumstances might direct."

The evidence of Johnson leaves no doubt in my mind that the real objections to the various transferees were (1) their connection as employees of the Cawnpore Woollen Mills with McRobert, and the personal animosity existing between Johnson and McRobert, and (2) the desire of the Directors that McRobert should not add to his voting power at the meetings of the Company. It was very candidly admitted by Mr. Moti Lal Nehru who appeared for the applicants that they were under the influence of McRobert, but he denied that they would necessarily vote as he might direct them.

The objections, it is to be observed, were not personal to the applicants

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themselves, and we have to see whether, under the circumstances, they were legitimate objections.

In the absence of any such provisions as art. 21 of the Articles of Association in this case, Directors have no discretionary power of refusing to register a transfer of shares—See *Poole* v. *Middleton* (1), but where the power of rejecting proposed transferees is reserved to the Directors of the Company, they must exercise it reasonably and in good faith, and with due regard to the interests of the Company and to the right of a shareholder to transfer his shares, and the question of the fitness of the [427] transferees must be fairly considered at a meeting of the Board. The principles to be gathered from the cases in England are summed up *in re Bell Bros.*: (2). In that case Chitty, J., said:—"According "to the constitution of this Company, every shareholder is entitled to "transfer his shares to any person not being infant, lunatic, married "woman or under any legal disability. This right, which is a right of "property, is subject to the discretionary power conferred on the Directors "by arts. 18 and 34, of approving of the persons to whom the transfer is "made, and of rejecting the transfer on the ground that they do not approve "of the transferee. The discretionary power is of a fiduciary nature and "must be exercised in good faith, that is, legitimately for the purpose for "which it is conferred. It must not be exercised corruptly or fraudulently or "arbitrarily or capriciously or wantonly. It may not be exercised for a "collateral purpose. In exercising it the Directors must act in good faith in "the interest of the Company and with due regard to the shareholder's "right to transfer his shares, and they must fairly consider the question of "the transferee's fitness at a Board meeting. When the Court once arrives "at the conclusion that the Directors have in good faith rejected a transfer "on the ground that the transferee is not a fit person to become a mem-"ber of the Company, it will not review the Directors' decision. The "Directors are not bound out of Court to assign their reasons for dis-"approving. If they decline to do so, or if their decision is challenged in "Court and they refrain from giving evidence, upon which a cross-exami-"nation may take place as to their reasons, or if, giving such evidence, "they refrain from stating their reasons, the Court will not, merely on "that account, draw an unfavourable inference against them. In these "articles there is an express provision protecting the Directors against "any liability to disclose their reasons. They are, however, at liberty, if "they think fit, to disclose them, and if they do, the Court must consider "the reasons assigned with a view to ascertain whether they are legitimate "or not, or, in other words, to ascertain whether the Directors have pro-"ceeded on a right or a wrong principle. If the reasons assigned are legiti-"mate, the Court will not overrule the Directors' decision merely because "the Court itself would not have [428] come to the same conclusion. But "if they are not legitimate, as, for instance, if the Directors state that they "rejected the transfer because the transferor's object was to increase the "voting power in respect of his share by splitting them among his nominees, "the Court would hold that the power had not been duly exercised. So, "also, if the reason assigned is that the transferee's name is Smith, or is not "Bell. Where the Directors do not assign any reason it is still competent "for those who seek to have the transfer registered to show affirmatively, "if they can, by proper evidence, that the Directors have not duly exercis-"ed their power." In the same judgment, Chitty, J., said:—"In my

(1 (1861) 29 Beav. 646 (650).

(2) 7 Law Times Reports 689.

"opinion, the power conferred on the Directors by the articles of this "Company does not justify them in rejecting a transfer on the ground "that the transferee, against whom they entertained no objection, is the "nominee of some person whom they consider objectionable."

In *Ex parte Penney* (1), where the Articles of Association provided *inter alia* that "no person not already a shareholder shall be entitled to "become the transferee of any share unless approved by the Board," it was said that the Directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the Board, and that in the absence of evidence to the contrary, the Court would take it for granted that they had acted reasonably and *bona fide*. But if there was evidence to show that the Directors had exercised their power capriciously or unfairly, the Court would interfere; and Mellish, L. J., pointed out that it would be an abuse of their power to object to register a transfer on any ground not applying personally to the transferee.

In *Moffat* v. *Farquhar* (2), the Articles of Association provided:— "No share in the Company shall be transferred by any proprietor to any "person who has not been first approved of by the Board of Directors or "the Committee of Directors appointed as aforesaid; and if any transfer "of any share or shares shall be made or attempted to be made to any "person who has not been approved, the same shall be void." There was a difference of opinion amongst the shareholders as to the mode in which the Company should be managed, and the plaintiff, who was a large **[429]** shareholder, transferred shares to his own nominees to strengthen his voting powers. The Directors refused to approve the transferees, not from any personal objection to them, but on the ground that the transfers were colourable and were intended to increase the plaintiffs voting power. It was held the Directors had no power to refuse to allow the transfers except upon objections personal to the transferees. That case was followed by Farran J., in *Kaikhosro* v. *Koorla Spinning and Weaving Co.* (3).

In the applications before us, the lower Court has found and in that finding I agree, that due consideration was given by the Directors to the matter of the various transfers, but I am prepared to hold further that in rejecting the applications for registration they acted *bona fide* and as they believed in what they considered to be the interest of the Company. On the authorities quoted they were not bound on rejecting the applications to give their reasons, and as I have said, except in one case, they did not give their reasons. Evidence, however, has been gone into, and it now appears that the reasons upon which they acted were not personal to the applicants. It was in fact admitted that there was no objection to them personally, apart from their connection with McRobert. The objection was to McRobert, who, it was feared, would, from his position in the Cawnpore Woollen Mills Company, be likely to influence them to vote as he might wish. It should be here mentioned that the Muir Mills and the Cawnpore Woollen Mills were in no way rivals in trade, the one being a Cotton and the other a Woollen Mill. McRobert was not transferring his shares to his own nominees with a view to increasing his voting power in the Company, which, apparently on the authorites, he might have been justified in doing. He was merely influencing his subordinates to take shares which

(1) (1872) L.R. 8 Ch. 446. (2) (1877) L. R. 7 Ch. D. 591. (3) 16 B. 80.

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were being offered in the market. As the Directors have now disclosed their reasons, we are entitled to consider those reasons with a view to ascertain whether the Directors have proceeded on a right or wrong principle. The objections, as I have said, were not personal to the applicants, and applying the principles of the English cases, I think we must hold that the reasons now given for refusing to [430] register the transfers were not legitimate. If their reasons had been legitimate, we should not be justified in sitting "as a Court of "appeal" to use the words of James, L J., in *Ex parte Penney* (1) "from "the deliberate decision of the Board of Directors to whom by the "constitution of the Company the question of the determining the "eligibility or non-eligibility of new members is committed."

In *In re Coal-port China Co.* (2) where the Court refused to interfere, there was no evidence to show that the Directors had exercised their power improperly or with want of *bona fides*.

Although, as I have said, I consider that the Directors of the Muir Mills Company duly considered the applications before them and in rejecting the applications for registration acted *bona fide*, and as they believed in the interests of the Company, yet the reasons upon which they based their refusal not being legitimate reasons, the Court has power to interfere, and I therefore think that the Court below was right in directing the Company to register the names of the applicants.

I would accordingly affirm the decrees of the Court below with costs in this Court in each case.

Appeal dismissed.

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Before Mr. Justice Henderson.

HEM KUNWAR AND ANOTHER (*Plaintiffs*) *v.* AMBA PRASAD AND ANOTHER (*Defendants*).* [5th July, 1900.]

Civil Procedure Code, ss. 368, 582, 591—Abatement of appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, r. 9.

Where one of four respondents (plaintiffs) in the lower appellate Court died, and no application was made within six months to put the legal representative on the record, and in the application that eventually was made the wrong person was named as legal representative: *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances s. 368 read with s. 582 of the Code applied, and the proper order was to have directed the suit to abate: *Held* further, that where the order of the lower Court as to abatement was embodied in the judgment and decree, [431] objection was properly taken thereto by way of second appeal against the decree. *Sheo Nath Singh* v. *Ram Din Singh* (3); *Sher Singh* v. *Dewan Singh* (4); *Dhari Upadhia* v. *Raushan Chaudhri* (5); *Sant Lal* v. *Sri Kishen* (6); *Chandarsang* v. *Khimabhai* (7) referred to.

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* Second Appeal No. 40 of 1900, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Aligarh, dated the 26th September 1899, modifying a decree of Munshi Anant Prasad, Munsif of Etah, dated the 6th January 1898.

(1) (1872) L.R. 8 Ch. 446 (449).
(2) (1895) L.R. 2 Ch. 404.
(3) 18 A. 19.
(4) 20 A.W.N. (1900) 109.
(5) 19 A.W.N. (1899) 136.
(6) 14 A. 221.
(7) 22 B. 718.

[F., 85 P.L.R. 1913=89 P.W.R. 1913=62 P.R. 1913=18 Ind. Cas. 182 (183); R., 5 C.L.J. 393=11 C.W.N. 504; 3 L.B.R. 168; 104 P.R. 1913 85 P.W.R. 1913 =107 P.L.R. 1913=18 Ind. Cas. 256; D., 38 C. 580 (582).]

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22 A. 430=20 A.W.N. (1900) 136.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* and Pandit *Madan Mohan Malaviya*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

JUDGMENT.

HENDERSON, J.—In this case four plaintiffs, Raj Bahadur, Musammat Mohni, Musammat Lachha Kunwar and Hem Kunwar, sued the defendants to recover possession of certain property to which they claimed to be jointly entitled. The Court of first instance gave the plaintiffs a decree from which the defendants appealed, making all four plaintiffs-respondents.

Before the appeal came on for hearing, the appellants alleged that Musammat Mohni and Musammat Lachha Kunwar were dead, and upon their application Hem Kunwar was added a respondent, as the legal representative of the two respondents said to have died. When the appeal came on for hearing, Hem Kunwar satisfied the Court that Musammat Mohni was alive, and that he was not the legal representative of Musammat Lachha; and further, that the application to place him as their representative on the record was made more than 6 months after the death of the latter. No notice of the appeal had been served on Musammat Mohni, and upon that ground the lower appellate Court held that as against her the appeal could not proceed. With regard to Musammat Lachha, he set aside the order, which was an *ex parte* order, by which Hem Kunwar had wrongly been placed on the record as legal representative of Musammat Lachha, and went on to say:—"The result is that under s. 368 read with s. 582 of the Code of Civil Procedure, the appellants' appeal as against Lachha Kunwar, the deceased respondent, will fail." Thereupon, in the same judgment, he proceeded to deal with the appeal on the merits, and in the result made the following decree, namely, "that the appeal of the defendants-appellants be decreed as against the [432] plaintiffs-respondents, Raj Bahadur and Hem Kunwar only, and the Munsif's decree so far as it concerns them be set aside, and in place thereof it is decreed that the claim of the plaintiffs-respondents, Raj Bahadur and Hem Kunwar, be dismissed with costs, that the appeal of the defendants-appellants be dismissed with costs as against the plaintiffs-respondents Nos. 2 and 3 (*i.e.*, Musammat Mohni and Musammat Lachha Kunwar), and the Munsif's decree so far as it concerns them be upheld as it is." There was a further order as to costs which is immaterial in this case.

Against the decree of the lower appellate Court, Raj Bahadur and Hem Kunwar appealed on the following grounds, namely—(1) because the appeal should have abated as the representatives of the deceased respondent Lachha Kunwar were not brought upon the record within the period of six months allowed by the Statute, (2) because the trial of the appeal was contrary to the express provisions of s. 368 of the Code of Civil Procedure. A preliminary objection was taken that these grounds were not directed against the decree of the lower appellate Court, and that the appeal was really an appeal against an order of the lower appellate Court under s. 368, in effect, if not in terms, directing that the appeal should abate so far as

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Musammat Lachha Kunwar was concerned and not against the decree. I think there is no ground for this objection. The appeal, in my opinion, was against the decree. There was no separate judgment upon the matter of the death of one of the respondents who died. That matter and the merits of the appeal were dealt with in the same judgment, and the finding of the Court as to both was embodied in the decree. In substance the appellants before the Court impugned the decree on the ground that the trial of the appeal upon the merits was contrary to the provisions of s. 368 read with s. 582 of the Code of Civil Procedure, and that the decree made was therefore bad.

I think s. 591 of the Code applies to this case. The decree of the lower Court was appealed against. This Court was asked to set aside the decree of the lower appellate Court on the ground that the trial on the merits was contrary to law; but even if the order that, by reason of the death of Lachha Kunwar, the **[433]** appeal against her failed, be treated as an order in the suit separate from the findings upon which the decree is based (which I do not think it is), then there is an objection which is taken and set forth as in the memorandum of appeal, that the appeal to the lower appellate Court ought to have abated altogether and not partially.

My attention has been drawn to the following cases:—*Sheo Nath Singh* v. *Ram Din Singh* (1); *Sher Singh* v. *Diwan Singh* (2); *Dhari Upadhia* v. *Raushan Chaudhri* (3); and to a Full Bench decision referred to in the first of these cases; but in the view I take of the present case I do not think that any of these cases apply, as I consider that in the present case there is an appeal directed against the decree of the lower appellate Court. Here no application was made within the time limited to place the legal representatives of Lachha Kunwar, the deceased respondent, on the record. The appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died, and under these circumstances, s. 368 read with s. 582 of the Code applied, and the proper order was to have directed the suit to abate.

In any case, in my opinion, there is no substance in the preliminary objection. Under the Rules of the Court (Rule 9) every memorandum of appeal must be headed "First Appeal," or "Second Appeal," as the case may be, and it was contended that this appeal, though headed "Second Appeal" as being an appeal from the decree of the lower appellate Court, dated the 26th September, 1899, was in reality a first appeal from an order made on the same date and embodied in the decree. I see no reason why, if that contention were right, the memorandum of appeal should not be amended. The misdescription was not one which could have taken the respondents by surprise, or otherwise prejudiced them. The stamp on the appeal, as a second appeal, is more than that required in an appeal from order. Moreover, I find I am supported in this view by a case reported in *Sant Lal* v. *Sri Kishen* (4). In the view which I take, however, it is not **[434]** necessary to amend the memorandum of appeal, as in my opinion the preliminary objection fails.

It was not suggested that if the decree of the lower appellate Court should be set aside, an opportunity should be given to the appellants in that Court to bring the representatives of the deceased respondent on the

(1) 18 A. 19.
(2) 20 A.W N. (1900) 109.
(3) 19 A.W.N. (1899) 136.
(4) 14 A. 221.

record, as was suggested by the Court in *Chandarsang* v. *Khimabhai* (1). They had, it was found, by a mistake put a person on the record as representative, who was not in fact the legal representative of the deceased respondent, but even then the application to amend the record was made too late.

For the reasons which I have given, I think the proper order for the lower appellate Court to have made was to have directed the appeal to abate. I therefore allow this appeal and set aside the decree of the lower appellate Court. The result will be that the decree of the first Court will be restored. The appellants are entitled to their costs in this Court and the lower appellate Court.

Appeal decreed.

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22 A. 434 = 20 A.W.N. (1900) 152.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GANGA BAKSH AND OTHERS (*Plaintiffs*) *v.* RUDAR SINGH (*Defendant*).* [7th July, 1900.]

Civil Procedure Code, ss. 294, 317—Indian Trusts Act (No. II of 1882), ss. 82, 88—Purchase by alleged agent of decree-holder at sale in execution.

Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

[435] *Held*, that under such circumstances the second paragraph of s. 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section.

Held further, that ss. 82, 88 of the Indian Trusts Act (No. II of 1882) did not apply.

Sankunni Nayar v *Narayanan Nambudri* (2) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (3) distinguished. *Monappa* v. *Surappa* (4) referred to.

THE facts are fully set forth in the judgment of Mr. Justice Banerji.

Babu *Jogendro Nath Chaudhri* and *S. C. Banerji*, for the appellants.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondent.

JUDGMENT.

BANERJI, J.—Sujan Singh, the father of the plaintiffs, held a decree against Hira Singh and Sahib Singh, which the plaintiffs put in execution. It is alleged by the plaintiffs, but denied by the defendant, that the defendant Rudar Singh was the agent and general attorney of the plaintiffs for the purpose of supervising the proceedings connected with the

* Second Appeal No. 997 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 22nd September 1897, reversing a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Aligarh, dated the 30th June, 1896.

(1) 22 B. 718. (2) 17 M. 282. (3) 18 M. 436. (4) 11 M. 234.

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execution of the decree. It is further alleged that an application was made on behalf of the decree-holders under s. 294 of the Code of Civil Procedure, for permission to purchase the property which was advertised for sale in execution of the decree, and that the application was refused on the ground that other decree-holders had taken out execution against the same property. This allegation is not traversed on behalf of the defendant. The plaintiffs further state in their plaint that after the refusal of the Court to grant them leave to bid at the sale, the defendant purchased the property in his own name, and made the deposit required by s. 306 of the Code of Civil Procedure by raising money on the plaintiffs' credit; that subsequently the plaintiffs paid that money and the remainder of the purchase-money, and that the defendant agreed to convey the property to them after the confirmation of the sale. Objections were taken to the sale on behalf of the judgment-debtors but they were overruled, and the sale was confirmed, and a certificate of sale was granted to the defendant under s. 316 of the Code of Civil Procedure. The sale took place on the **[436]** 20th August, 1891. It was confirmed on the 5th March, 1892, and the certificate of sale was granted to the defendant on the 11th March, 1892. The plaintiffs state that after the confirmation of the sale the defendant was asked to execute a sale deed, but he refused to do so, and that in April, 1895, he applied for partition of the property. It is thus clear that between the date of confirmation of sale and the date of the suit the defendant was admittedly in possession. In the 9th paragraph of the plaint the plaintiffs assert that they were the real purchasers of the property, and that the name of the defendant was entered as purchaser "*farzi*," that is, nominally. Upon these allegations the plaintiffs ask for a declaration that they are the real purchasers and that the defendant has without their permission got his name entered as purchaser, and they pray to be put into possession. The defendant denied that the purchase had been made by him on the plaintiffs' behalf and with the plaintiffs' money. He also pleaded the bar of s. 317 of the Code of Civil Procedure. The Court of first instance granted the plaintiffs a decree, but the lower appellate Court has dismissed the suit on the ground that s. 317 precluded the plaintiffs from maintaining it. The question we have to determine in this appeal is whether s. 317 is a bar to the maintenance of the suit.

It is admitted that the defendant is the certified purchaser, but it is alleged that the plaintiffs are the real purchasers, and that the purchase by the defendant was made on their behalf. If that is so, the case clearly comes within the first paragraph of s. 317, and by reason of the provisions of that paragraph the plaintiffs are precluded from maintaining the suit. It is contended on the plaintiffs' behalf that this is a case to which the second paragraph of s. 317 applies, and for this contention reliance is placed on the words used in the prayer for relief, where the plaintiffs ask the Court to declare that the defendant has got his name entered in the sale certificate without the permission of the plaintiffs. No doubt in the prayer in the plaint the plaintiffs do ask the Court to make the declaration referred to above, but the case set out by them in the plaint is wholly inconsistent with the allegation that the name of the defendant was entered without **[437]** the plaintiffs' consent. As has already been stated, I take the plaintiffs to assert that the purchase by the defendant was made without reference to them, that subsequently when the plaintiffs were informed of the purchase, they supplied the purchase-money, ratified what the defendant had done, and consented to take a conveyance of the property from

the defendant after the sale had been confirmed in his name. They do not say in the plaint that when the defendant's name was entered in the sale certificate it was entered without their consent. On the contrary, they assert that it was entered nominally, that is, as *benamidar* for them. Upon such allegations it is not open to the plaintiffs to contend that the second paragraph of s. 317 applies to the case. As they had been refused permission to bid, they could not possibly have said that their own name should have been entered in the sale certificate.

It is next contended on behalf of the plaintiffs-appellants that this is not a case of a *benami* purchase at all, and therefore s. 317 has no application. This contention is not borne out by any of the allegations contained in the plaint, but is, on the contrary, opposed to what is stated in the 9th paragraph of the plaint. It is, however, urged that the plaintiffs have stated all the facts in the plaint, and that upon those facts the case which arises is that the defendant is the plaintiffs' agent, and has purchased the property as such with the plaintiffs' money, that this is therefore a case of a constructive trust, and that the plaintiffs are entitled to the benefit of the purchase made by the defendant, and must be deemed to be the purchasers of the property. Reliance is placed upon the provisions of s. 88 of the Indian Trusts Act, 1882. That section contemplates the case of a person clothed with a fiduciary character, who by availing himself of his position, gains an advantage for himself. The foundation for the rule laid down in that section is that a person should not place himself in such a position that his duty may conflict with his interest. It is not asserted that the defendant was employed for the purpose of purchasing the property in question on behalf of the plaintiffs, and it is not alleged that it was within the general scope of his duty to make such a purchase. According to the plaintiffs, the defendant was employed as their agent for supervising the execution [438] proceedings. In the performance of his duties as such agent, he was competent to purchase property on behalf of the plaintiffs in execution of that particular decree. But this he could not do unless the leave of the Court to bid and purchase had been obtained under s. 294 of the Code of Civil Procedure. In this case leave was refused, and therefore neither the plaintiffs themselves nor the defendant as their agent could buy the property. It could not be said that it was the duty of the defendant to purchase the property in violation of the specific provisions of s. 294, which forbids a purchase by the decree-holder without the express permission of the Court. When, therefore, the defendant purchased the property, no conflict could arise between his duty and his interest. He was in no different position from any other purchaser. Section 88, therefore, has no application. If the plaintiff's allegation be true that the money with which the purchase was made was their money, s. 82 would have applied but for the proviso appended to that section. That proviso saves the operation of s. 317 of the Code of Civil Procedure. Although, therefore, the plaintiffs may have paid the money with which the sale consideration was paid, since the certified purchaser was the defendant, it was not open to the plaintiffs to sue the defendant on the allegation that they were the real purchasers, and that the defendant had purchased the property on their behalf. It is a suit of this description which is contemplated by s. 317, and it is the policy of that section to preclude the institution of such a suit. The analogy of a purchase by one member of a joint Hindu family in his own name on behalf of the other members of the family does not, in my opinion, apply in

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22 A. 434 = 20 A.W N. (1900) 152.

this case. In the case of a joint Hindu family the purchase itself is made by all the members of the family, including the person in whose name the purchase is made, and it is not a case of a purchase by a person who is not the real purchaser. The learned vakil for the appellants relied upon the ruling of the Madras High Court in *Sankunni Nayar* v. *Narayan Namburi* (1). With what was said by Mr. Justice Best in his judgment in that case it is not easy to agree; but Mr. Justice Muttusami Aiyar based his judgment upon the ground that the [439] purchaser in that case was the agent of the plaintiffs, and had been employed as agent for the purpose of making the purchase on behalf of the plaintiff. That was not a case in which the real purchaser was the decree-holder himself who had not obtained the permission of the Court to buy, and consequently would have infringed the provisions of the law if he had bid at the sale and purchased the property. That case is therefore clearly distinguishable from the present. Section 88 of the Trusts Act might be applicable to the case which was before the Madras High Court. The case of *Kumbalinga Pillai* v. *Ariaputra Padiachi* (2), is also distinguishable. That was a suit for the specific performance of a contract by the auction-purchaser to convey the property to the plaintiff. Had this suit been a suit for the specific performance of the contract which the plaintiffs alleged the defendant had made with them to convey the property to them after confirmation of the sale, that ruling might possibly have been applicable. Even if the suit had been one for the specific performance of the alleged contract, it would still have been a matter for consideration whether such a suit would not be a suit the object of which was to defeat the provisions of law. But we need not consider the point, as the present suit is not one for the specific performance of a contract. The ruling in *Monappa* v. *Surappa* (3) has no bearing on the present case. In that suit the auction-purchaser had delivered possession to the real purchaser, and had subsequently dispossessed him, and it was held that there was a waiver of right, and that the delivery of possession might amount to a transfer of title. For the above reasons the decree of the lower appellate Court is, in my opinion, right. I would dismiss the appeal with costs.

AIKMAN, J.—I am entirely of the same opinion. The plaintiffs, who were decree-holders, had tried to obtain permission of the Court to bid for the property advertised for sale in execution of their decree. That permission was refused. The property was then, it is said, purchased by the defendant as agent of the plaintiffs, and the sale was confirmed in his name. He therefore became a certified purchaser. The plaintiffs come into Court, alleging that the purchase was made with their funds, that they are the [440] real purchasers, and that the defendant's name was entered in the sale certificate fictitiously. It follows from this statement that the plaintiffs' suit is one which s. 317 of the Code of Civil Procedure declares not to be maintainable unless the entry of the name of the certified purchaser was made fraudulently or without the consent of the real purchaser. In this case no allegation of fraud is made. In the relief the plaintiffs, it is true, ask for a declaration that the defendant's name was entered in the certificate without their consent; but in the body of the plaint they lay no foundation for such a case. In fact, the statement in paragraph 6 of the plaint is quite opposed to the theory that the entry of the defendant's name in the sale certificate was made without the consent of the real purchasers, for in that paragraph the plaintiffs state that

(1) 17 M. 282. (2) 18 M. 436. (3) 11 M. 234.

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the agreement between them and the defendant was that after the sale had been confirmed in his name, he would execute a sale-deed of the property to them. In the face of this allegation it is impossible for the plaintiffs to maintain that the entry of the defendant's name was made without their consent. Further, such a contention on their behalf would at once have been met by a reference to the first paragraph of s. 249 of the Code of Civil Procedure, which precludes a decree-holder from bidding for or purchasing a property sold in execution of the decree without the express permission of the Court. I entirely agree also with my learned brother in holding that the provisions of s. 88 of the Indian Trusts Act, No. II of 1882, will not help the plaintiffs. It cannot be said that there is any fiduciary duty on an agent towards his principal to assist him in evading the provisions of the law. It is, in my opinion, clear that the Legislature in framing the Trusts Act were careful that it should not in any way enable the provisions of s. 317 of the Code of Civil Procedure to be evaded. This appears from s. 4 and s. 82 of that Act. I agree in the order proposed.

[The order of the Court is that the appeal is dismissed with costs.]*

Appeal dismissed.

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22 A. 441 = 20 A.W.N. (1900) 151.

[441] CRIMINAL REFERENCE.

Before Mr. Justice Blair.

IN THE MATTER OF MADHO PERSHAD.† [13th July, 1900.]

Act No. XII of 1896 (Excise Act), s. 49—License to sell spirits retail—Death of licensee before expiration of period of license—Right of his heir and partner in business to continue sale—Personal nature of license.

Held, that a license for the retail sale of liquor under the Excise Act, No. XII of 1896, granted in the name of one man, does not on his death before the expiration of the period of the license descend to his heir and partner in business so as to justify the said heir and partner in business in continuing to sell during the unexpired portion of the period named in the license.

Where an order had been made for the sale of the liquor, part of which was, as above ruled, illegally sold by the accused: *Held*, that if the said liquor had by devolution or otherwise become the property of the accused, there was no reason why it should not be attached and sold.

[R., 32 B. 157 (160).]

THE facts of the case sufficiently appear from the judgment of the Court.

No one appeared.

JUDGMENT.

BLAIR, J.—The District Maigistrate of Mirzapur refers to this Court this conviction and sentence, by a Magistrate, inflicted under s. 49 of Act No. XII of 1896. He doubts the soundness of the conviction in point of law, and in the alternative suggests that as the offence is a purely technical one, the conviction and sentence should be set aside. I may add that an order has been made for the sale of the liquor, part of which has been held to be improperly retailed. The facts are that one Hira Lal, the uncle, as I understand, of the person convicted, whose name is Madho

* [The sentence in rectangular brackets forms a portion of the judgment. This is not given in the I.L.R. Series.—ED.]

† Criminal Reference No. 357 of 1900.

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Pershad, held a license for sale by retail of European spirits, which license would be in force up to some time in September of the present year. Hira Lal died in the month of April, and it was after his death that Madho Pershad having no license himself, made the illegal sale or sales of which he has been convicted. It is said, I know not with what truth, that Madho Pershad is Hira Lal's heir, and was his partner during his life. I do no think there is any doubt as to the technical soundness of the conviction. A license is a personal grant, largely made for personal reasons, [442] and it certainly does not, after the death of the licensee, attach itself in any way to his property or devolve upon his heirs. I do not think Madho Pershad or any man of ripe years who had any connection with the traffic, could have sold the liquor without, at all events, grave doubt as to whether such sale was in violation of the law. I do not think that a fine of Rs. 50 inflicted upon a substantial man can be anything but a very small sentence for an offence which is punishable by four months' imprisonment or fine of one thousand rupees, or with both. I set aside the order of the Magistrate for the sale of the confiscated liquor, and instruct him to reconsider that question with a view to his arriving at a conclusion whether the liquor confiscated and ordered to be sold is the property of Madho Pershad. In that case I see no reason why he should not order attachment and sale of such liquor. If it is not by devolution or otherwise the property of Madho Pershad, it ought not to be confiscated and sold. Let the papers be returned.

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22 A. 442=20 A.W.N. (1900) 155.

APPELLATE CIVIL.

Before Mr. Justice Knox, Ag. Chief Justice, and Mr. Justice Blair.

RAM CHANDER (*Defendant*) *v.* KONDO AND OTHERS (*Plaintiffs*).*

[13th July, 1900.]

Civil Procedure Code, ss. 13, 244—*Transfer of Property Act* (*No. IV of* 1882), *ss.* 88, 89 —*Decree not in accordance with judgment—Interepretation of decree.*

Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed and this fact was apparently overlooked by the defendant who defended the suit, and where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint."

Held, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither s. 13 nor s. 244 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint.

[F., 5 Ind. Cas. 935; R., 7 M.L.T. 191.]

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellants.

[443] Pandit *Moti Lal Nehru*, for the respondents.

JUDGMENT.

KNOX, Acting C.J., and BLAIR, J.—The suit out of which this appeal arises has reference to a certain share of property which will in this judg-

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* First Appeal from Order No. 112 of 1899, from an order of Babu Prag Dass, Subordinate Judge of Saharanpur, dated the 10th July 1899.

ment be referred to hereafter as share *A*. This share *A* is a share in mauza Gummawala, which belonged to Sri Ram, one of three brothers.

Sri Ram's brother, Nagar Mal, held a second share, which will be hereafter styled share *B*. A third brother, Sohan Lal, held a share, which will be described as $(\frac{c}{1}+\frac{c}{2})$

Sohan Lal was succeeded by his son, Shankar Lall. Nagar Mal and Shankar Lal borrowed monies from one Bansi Lal, and as security mortgaged in his favour share B and $(\frac{c}{1}+\frac{c}{2})$.

Shankar Lal died and his property passed by succession thus :—$\frac{c}{1}$ to Sri Ram, $\frac{c}{2}$ to Nagar Mal. In execution of a decree against Nagar Mal, $\frac{c}{2}$ was sold and purchased by Kondo Mal, one of the respondents to this appeal. Kondo Mal is heir to Sri Ram, and thus held both the shares *A* and $\frac{c}{2}+\frac{c}{1}$.

Bansi Lal, however, brought a suit upon his bond and impleaded only Kondo Mal as the representative of his original mortgagors. Kondo Mal defended the suit, but apparently overlooked the fact that share *A*, or a portion of it, was included among the property sued for. Share *A* is not, and never was, included in the bond upon which Bansi Lal sued, and was not therefore property over which the bond held by Bansi Lal and upon which he sued created any charge or lien of any kind.

The judgment which was given in favour of Bansi Lal ran thus in its concluding clause: "that a decree be given to the plaintiff for "Rs. 10,349-4-6 against the hypothecated estate, except that portion of it "which is in the hands of Murli Lal and Lachmi Chand—*i.e.*, share *B*."

"From the concluding words of the judgment and from other passages in it, it is evident that the intention of the Court was to grant a decree over the balance of the property hypothecated, and only that, *viz.*, $\frac{c}{1}+\frac{c}{2}$—share *B* being expressly excepted by name.

In the decree the property affected is described as the property specified in the plaint and as modified, to wit, by the **[444]** exception of share *B*. Bansi Lal died and was succeeded by Ram Chander, the present appellant. He applied for an order absolute, and into this order absolute came the order for sale of share *A*, or a portion of it, as well as of share $\frac{c}{1}+\frac{c}{2}$. Ram Chander purchased.

Kondo Mal then instituted the suit out of which this appeal has arisen to recover the portion of share *A* which has been sold, on the ground that as it was never hypothecated, it could not have been included in the decree and could not have been sold.

The Court of first instance dismissed the suit on the ground that it was barred by s. 13 of the Code of Civil Procedure. Kondo Mal should, in the judgment of the learned Munsif, have raised as part of his defence to the suit that no part of share *A* was ever hypothecated.

The learned Subordinate Judge overruling this decision, has remanded the case for a decision upon the merits, and it is from this order that the present appeal has been brought.

We agree with the learned Subordinate Judge that the Court which heard the first suit never intended to give a decree over any property other than that hypothecated, and that where the decree says "the property specified in the plaint" is meant, and must be held to mean, the hypothecated property mentioned in the plaint. The order absolute under s. 89 could not run against any property over and above that against which the

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decree under s. 88 ran. The present suit is concluded neither by s. 13 or s. 244 of the Code of Civil Procedure. To hold otherwise would not only be an act of injustice, but it would be permitting the plaintiff to take advantage of what he must know to be a piece of sharp practice, more than that, of fraud.

We dismiss this appeal with costs.

Appeal dismissed.

22 A. 442=20 A.W.N. (1900) 155.

22 A. 445=20 A.W.N. (1900) 169.

[445] APPELLATE CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Henderson.

QUEEN-EMPRESS *v.* NIRMAL DAS AND OTHERS.* [7th July, 1900.]

Criminal Procedure Code, s 288—*Previous statement to committing Magistrate retracted in Sessions Court—Use of such statement by Sessions Court as substantive evidence—Act No.* 1 *of* 1872 (*Indian Evidence Act*) s. 30—*Confession of co-accused—"Taking into consideration"—Finding of arms and stolen property in joint family house—Evidence—Act No. XLV of* 1860 (*Penal Code*), s. 412.

Where a witness who has made a statement before the committing Magistrate subsequently resiles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under s. 288 of the Code of Criminal Procedure to contradict the witness; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature.

The words "take into consideration" in s. 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress* v. *Khandia* (1) referred to.

The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.

[R., 28 A. 863=3 A.L.J. 852 (854)=A.W.N. (1907) 187=4 Cr. L.J. 61; 1 Cr. L.J. 483=2 L.B.R. 214; 8 Cr. L.J. 393 (395)=11 O.C. 328 (331).]

ONLY so much of the judgment is reported as is necessary to the points referred to in the head-note.

The Government Advocate (for whom Mr. *W. K. Porter*), for the Crown.

JUDGMENT.

BLAIR and HENDERSON, JJ.—After setting forth the facts of an ordinary dacoity, continued as follows:—

The police do not appear to have obtained any clue for nearly a fortnight. They then began to make arrests, and upon the 12th February last and the succeeding days confessions were made by three of the present appellants—Nathu, Bhola (of Nagla Gulal) and Darola (of Ratu). The police also, on or before the date mentioned, had got into communication with one Genda, who afterwards appeared under a tender of pardon, and came before the Magistrate to give evidence for the prosecution. Three persons, other than those here as appellants, were committed, and upon trial were acquitted by the Sessions Judge. Upon the hearing in the Sessions Court, Genda, who had appeared before the [446] Magistrate and given evidence for the prosecution, was called for the prosecution. He then said that he knew nothing about the dacoity, that

* Criminal Appeal No. 409 of 1900.

(1) 15 B. 66.

the Collector did not offer him a pardon, and that he had heard nothing about it. The statement made before the Magistrate was put before him, and he admitted making it, but he said that it was all false, and that he was forced to make it. Upon the hearing in the Sessions Court, the evidence given by him before the Magistrate, which was put in to contradict the statement that he knew nothing about the dacoity, was used as substantive evidence against the appellants here. Against many of them there is no sworn evidence delivered in the Sessions Court at all. * * * * * *

The cases of those appellants who have been convicted mainly upon what Genda swore before the Magistrate stand upon an altogether different footing, and the weight to be attached to the evidence of Genda requires careful consideration. He is the person who was called and accredited by the prosecution before the Magistrate. Upon being again called for the prosecution in the Sessions Court he flatly denied that he knew anything about the dacoity, and that he took any part in it. The Sessions Judge then confronted him with the statement he had made before the Magistrate, and he was compelled to admit that he had made such a statement, and alleged that he had done it under compulsion. It is that evidence before the Magistrate so repudiated by him that the prosecution has put forward as evidence to be believed and acted upon in the Sessions Court, and upon that evidence the Sessions Judge has thought it fair to act. As to the admissibility of that evidence to contradict his allegation that he knew nothing whatever about the dacoity, there can be no question; but the use of the allegations made by him before the Magistrate as substantial evidence of the facts alleged by him seems to us fraught with the gravest peril. The terms indeed of s. 288 of the Code of Criminal Procedure, which render the evidence of a witness taken before the committing Magistrate capable of being treated as evidence in the discretion of the presiding Judge, are couched in the widest possible language; but we entertain the strongest opinion, in common with Mr. Justice Straight, that it never was the intention of the Legislature that the substance of such a **[447]** statement before the Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence if it stood by itself; and indeed as far as what is properly called evidence is concerned, Genda's repudiated statement is all that there is on the record to justify the conviction in several of the cases before us. Taken with this confession upon oath are the confessions made by certain of the appellants which it is our duty not to treat as evidence but to "take into consideration." It is not perhaps necessary or easy to define precisely what is meant by these words "taking into consideration." This, at all events, it must mean, that they are not to have the force of sworn evidence. Indeed it has been most definitely ruled in the Bombay High Court in *Queen-Empress* v. *Khandia* (1), that a conviction resting on such a confession alone cannot be maintained. In our opinion, therefore, no conviction in these cases can be sustained, which rests only upon the repudiated evidence of Genda and the statements made by the co-accused. Among the persons who have been convicted on such evidence are :—Nirmal Das, Darola (of Nagla Gulal) and Sanwalia.

(1) 15 B. 66.

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22 A. 445=
20 A.W.N.
(1900) 169.

We allow the appeals of these three appellants. We set aside their convictions and order them to be released.

The case against Ram Chandar, Bhao Singh and Jhamman, in so far as it rests upon the statement of Genda, has, in our opinion, no secure foundation, and the discovery of property and arms in the house jointly occupied by them together with Nathu falls, in our opinion, short of evidence of possession. There is nothing to show that they took or dealt in any way with any part of the stolen property, and we think that the bare finding of the property in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. We may add that their brother Nathu has taken upon himself all the responsibility for the possession of the stolen articles; it was he who upon his own admission, took an active part in the dacoity and [448] brought the articles there: he expressly denied that his brothers had anything to do with the dacoity, and stated that the things found were his own share of the loot. We do not attach much importance to a statement of this kind, which would tend to exculpate his brothers, but we think that, apart from it, there is no evidence which would justify a conviction.

The Government have appealed against the acquittal of Narayan, the brother of Ram Chandar and Bhao Singh. Inasmuch as the evidence against him is limited to the discovery of property and arms in the family house, it is, in our opinion, impossible to support the appeal.

The appeal therefore against the acquittal of Narayan is dismissed, and the appeals of Ram Chandar, Jhamman and Bhao Singh are allowed. They will be at once discharged.

[WITH reference to s. 288 of the Code of Criminal Procedure, see further *Queen-Empress* v. *Soneju* (1) and *Queen-Empress* v. *Jeochi* (2), and as to s. 30 of the Evidence Act, *Empress* v. *Sundra* (3), *Empress* v. *Piria* (4) and an unreported case—Criminal Appeal No. 158 of 1900, decided on the 30th of April 1900—the material portions of the judgment in which are printed below.*—Ed.]

(1) 21 A. 175.
(2) 21 A. 111.
(3) 4 A.W.N. (1884) 38.
(4) 5 A.W.N. (1885) 320.

* This case has been submitted by the Sessions Court of Aligarh for confirmation of the sentence of death upon Dammar. There is also an appeal by Dammar. There are further appeals by Salig, Shibcharan, Behari and Param Sukh, who have been convicted of an offence under s. 302 of the Indian Penal Code, but sentenced to transportation for life. Dammar is not represented before us. The other four appear by counsel.

On the 30th of September 1899, Dan Sahai, mahajan, was undoubtedly murdered. The place where the murder happened was a mile distant from the village Lametha, where he lived. The medical evidence is that there were two wounds, one in front of the neck, the other on the back of the neck. Both wounds were caused by some heavy sharp-edged instrument, and could have been inflicted by the chopper produced in Court. There were two other wounds on the right side of the head. The Civil Surgeon states positively that there was no wound on the head, by which we understand on the skull. The police arrived on the spot on the 1st of October, and they lost no time in the investigation. The promptness with which the police action was taken in this case deserves commendation, and adds considerably to the value of the evidence which is the outcome of this investigation. One of the persons whom the police arrested was the convict Dammar. He made a long and detailed statement, which was duly recorded by the Magistrate on the 4th of October. From that statement he afterwards resiled and said that it was brought about by malpractices on the part of the police. Of any such malpractices there is no evidence whatever, and we do not believe the allegation. The statement is in full detail. We have studied it more than once, and each time that we study it we rise from it with a conviction that it is in the main, if not wholly, an accurate account of what took place. In addition to this statement there is evidence on the record which presses strongly against both the accused Dammar

22 A. 449=20 A.W.N. (1900) 170.

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22 A. 449=20 A.W.N. (1900) 170.

Before Mr. Justice Knox, Ag. Chief Justice, and Mr. Justice Blair.

DARAB KUAR AND OTHERS (*Appellants*) *v.* GOMTI KUAR (*Respondent*).* [13th July, 1900.]

Civil Procedure Code, s. 493—*Temporary injunction*—"*Other injury.*"

Held, that words "or other injury" in s. 493 of the Code of Civil Procedure do not include acts of trespass upon property.

THE application of the present appellant in the lower Court was headed "Application under s. 493, Civil Procedure Code," and concluded with the following prayer:—

"Therefore it is prayed that by an *ad interim* injunction under s. 493 of the Code of Civil Procedure the defendant be prohibited from realizing the amount of decree of rent of the villages in suit and from otherwise interfering in the management of the properties in dispute either by herself or through her mukhtar-ams and karindas."

[450] Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Babu *Satish Chandar Banerji*, for the appellants.

Babu *Durga Charan Banerji* and Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

KNOX, Acting C. J., and BLAIR, J.—This is an application for an injunction under s. 493 of the Code of Civil Procedure. S. 493 applies to suits for restraining a defendant from committing a breach of contract or other injury. It is admitted that the case is not concerned with a breach of contract, but it is sought to construe the words "other injury" as words which might have reference to acts of trespass upon property. There is no authority for such a construction.

We dismiss the appeal with costs.

Appeal dismissed.

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and Salig. There is further evidence which, as far as it goes, tends to the conviction of the other three appellants, but so far falls short of proof that it is insufficient to prove participation in the act of murder. We shall shortly allude to this evidence. * * * * * * * * It is at this point that we take into consideration the confession made by Dammar. The learned counsel for Shibcharan and other appellants contended that we could not use it unless there was evidence which, if believed, amounted to proof against his clients. We cannot accede to this contention. We are not prepared to define the exact extent to which and the circumstances under which, such a confession may be used. The Legislature in using the words which it has placed upon the Statute book obviously intended to confer a wide discretion upon Courts and to leave them to appraise the value of such a confession. We are not prepared to say that it might not have been used in the present case, and so far have supplemented the case against Shibcharan and Behari as to leave no room for doubt. * * * *

* First Appeal No. 41 of 1900, from an order of Munshi Sheo Sahai, Additional Subordinate Judge of Saharanpur, dated the 2nd March 1900.

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22 A. 450=20 A.W.N. (1900) 171.

APPELLATE CIVIL.

Before Mr. Justice Knox, Ag. Chief Justice and Mr. Justice Blair.

MAHABIR PRASAD (*Objector*) *v.* PARTAB CHAND (*Opposite party*).* [16th July, 1900.]

22 A. 450=20 A.W.N. (1900) 171.

Civil Procedure Code, s. 244—Parties to the suit or their representatives—Purchaser at auction sale.

Where a decree-holder who had obtained a decree and order under ss. 88, 89 of the Transfer of Property Act, over certain property, proceeded to attach it in execution of his decree : *Held*, that a third party who had bought the rights and interests of the judgment-debtors at an auction sale held in consequence of a money decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under s. 244 of the Code of Civil Procedure at the execution proceedings. *Sabhajit* v. *Sri Gopal* (1) followed. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2) distinguished.

THE facts appear sufficiently from the judgment.

Babu *Parbati Charan Chatterji*, for the appellant.

Pandit *Madan Mohan Malaviya*, Babu *Datti Lal* and Babu *Davendro Nath Ohdedar*, for the respondent.

JUDGMENT.

KNOX, Acting C. J., and BLAIR, J.—This appeal arises out of an application for execution of a decree. The decree-holder is one Rai Bahadur Partab Chand ; the judgment-debtors are persons with whose names we are not concerned. The rights and interests, however, of these judgment-debtors in certain property were purchased at an auction sale held in consequence of a **[451]** money decree. At that sale those rights and interests were purchased by Rai Bahadur Mahabir Prasad Narain Singh, the appellant. Upon Rai Bahadur Partab Chand attaching the same property over which he had obtained first a conditional decree under s. 88, and then an order absolute under s. 89 of the Transfer of Property Act, Rai Bahadur Mahabir Prasad Narain Singh intervened and asked to be heard as the representative of the judgment-debtors in Rai Bahadur Partab Chand's decree. His application has been rejected by both the Courts below ; it has also been rejected by this Court upon the ground that a Full Bench of this Court in *Sabhajit* v. *Sri Gopal* (1) held that a purchaser at an auction sale is not a representative of the judgment-debtor, whose interests he has purchased, within the meaning of s. 244 of the Code of Civil Procedure.

We should have thought the matter not open to any further question. The learned vakil, however, who appears on behalf of the objector, sought to establish that this Full Bench ruling was in derogation of what their Lordships of the Privy Council laid down in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2). We have carefully examined that case ; what was therein laid down was this—that when a question arises between the parties to a decree relating to its execution, discharge or satisfaction, the fact that the purchaser, who is no party in the suit, is interested in the result, has never been held as a bar to the application of s. 244. This in no way affects what was held by this Court in *Sabhajit* v. *Sri Gopal* (1). In this case the parties to the suit were the parties to the proceedings ; added to

* Appeal No. 10 of 1900, under s. 10 of the Letters Patent.

(1) 17 A. 222 (F.B.). (2) 19 C. 683 (P.C.).

them was the purchaser, not as a representative of one of the parties, but as a looker-on interested in the result. Here the question which has to be decided is not one in which the judgment-debtor is any longer interested ; in other words, it is not a question arising between the parties to the suit, and s. 244 has no application.

We dismiss the appeal with costs.

Appeal dismissed.

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22 A. 452=20 A.W.N. (1900) 170.

APPELLATE CIVIL.

[452] *Before Mr. Justice Burkitt and Mr. Justice Henderson.*

BENI MADHO DAS (*Plaintiff*) *v.* KAUNSAL KISHOR DHUSAR (*Defendant*).* [16th July, 1900.]

Act No. IX of 1872 (*Indian Contract Act*), *s.* 30—*Loan to facilitate gambling—Loan to aid in paying off gambling debt—Contract not tainted with immorality.*

Held, that the fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.

THE facts appear sufficiently from the judgment of the Court.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the appellant.

Mr. *Dwarka Nath Banerji*, for the respondent.

JUDGMENT.

BURKITT and HENDERSON, JJ.—In this case we are unable to concur with the decision of the lower appellate Court.

The facts briefly are that, on the 20th November 1896, several persons, including the defendant-respondent—persons described by the lower appellate Court as being men of high social standing and considerable wealth—met together at the house of the plaintiff-appellant, and gambling ensued ; but in that gambling the plaintiff-appellant took no part whatsoever. From time to time it would appear that the defendant-respondent lost certain sums of money, and in order to pay those he borrowed from the plaintiff up to Rs. 4,000, which he promised to repay. This fact is distinctly found by the lower appellate Court, which finds that the money was borrowed by respondent to pay his gambling debts. The lower appellate Court very properly finds that the agreement between the plaintiff and defendant was not by way of wager, and therefore not void under s. 30 of the Contract Act ; and it further finds that the agreement by the defendant-respondent to repay Rs. 4,000 was in consideration of that sum having been lent to him at his request by the plaintiff ; and the Court further found that that consideration as it stood was not in itself unlawful or immoral. On those findings one would have expected that the lower appellate Court would have given a decree to the plaintiff. The learned District Judge, however, came to the conclusion that **[453]** the general object of the plaintiff in lending money was to facilitate gambling, and that every loan had this object in view, and every agreement to repay carried the same taint ; and each contract had as its general

* Second Appeal No. 430 of 1898, from a decree of Mr. E. O. E. Leggatt, District Judge of Mirzapur, dated the 6th April 1898, reversing a decree of Babu Jai Lal, Officiating Subordinate Judge of Mirzapur, dated the 10th May, 1897.

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22 A. 452=20 A.W.N. (1900) 170.

defect the facilitation and promotion of gambling at the plaintiff's house.

In those remarks we are unable to concur with the learned Judge of the Court below. The object of the one series of transactions with which we are concerned here was to enable the respondent to pay off his gambling debt as is found by the Court below. The consideration for the agreement was the promise made by the defendant to repay the money on demand. We do not see how the remarks of the Judge as to the general object the plaintiff had in lending the money affects the case. The Judge finds that the object or the consideration—for they are only different names for the same thing seen from a different point of view—was not of itself unlawful or immoral. In our opinion to lend money for the purpose of paying off a gambling debt with a knowledge of it being applied for payment of such a debt cannot be considered to be an immoral act. We think the Court below ought not to have reversed the judgment given in favour of the plaintiff by the Court of first instance. We therefore allow this appeal and restore the decision of the Court of first instance. Appellant is entitled to his costs in this Court.

Appeal decreed.

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22 A. 453=20 A.W.N. (1900) 160.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

WAHID-UN-NISSA AND OTHERS (*Defendants*) *v.* GOBARDHAN DAS (*Plaintiff*).* [16th July, 1900.]

Mortgage—Puisne mortgagee not made party to suit by prior mortgagee—Subsequent suit by puisne mortgagee—Apportionment of redemption money—Third parties, purchasers.

A prior mortgagee, *K*, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, *G*, was not made a party, and subsequently one, *B*, attached the decree, and, having put up the property for sale, purchased it himself. *G*, the puisne mortgagee, having brought a suit for redemption of *K*'s mortgage and sale of the property, *K* sold his rights to *P*, who was thereupon added as a defendant. *G* obtained a decree for redemption and sale.

[454] *Held* per BANERJI, J., that *P* was entitled to the whole amount which *G* had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase money paid by *B* at the auction sale, which amount, and which amount only, would be due to *B* or his representatives. *Dip Narain Singh* v. *Hira Singh* (1) and *Baldeo Bharthi* v. *Hushiar Singh* (2) approved.

Held per AIKMAN, J., that the auction purchaser, *B* (or his representatives), was entitled to the whole amount to be paid by *G* for redemption of the first mortgage. *Dip Narain Singh* v. *Hira Singh* (1) dissented from, and *Baldeo Bharthi* v. *Hushiar Singh*, (2) distinguished.

[Affirmed, 25 A. 388; **R.**, 29 M. 491; 5 C.L.J. 315=11 C.W.N. 403.]

THE facts of the case sufficiently appear from the judgment of either of their Lordships.

Messrs. *Abdul Raoof* and *Karamat Husain*, for the appellants.

Mr. *D. N. Banerji*, Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondent.

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* Second Appeal No. 832 of 1897 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 6th August 1897, modifying a decree of Babu Anant Ram, Subordinate Judge of Aligarh, dated the 30th September 1896.

(1) 19 A. 527.

(2) 15 A.W.N. (1895) 45.

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22 A. 453 = 20 A.W.N. (1900) 160.

JUDGMENT.

BANERJI, J.—This appeal has been brought in a suit which arose out of the following facts :—

On the 19th April, 1878, Mussammats Habiban and Bina made a simple mortgage of 544 bighas 2 biswas in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan for Rs. 1,500, and on the 29th January 1886, Habiban alone mortgaged a fourth share of the same property to one Gobind Ram. She subsequently made two other mortgages, to which it is not necessary to refer.

The first mortgagees brought a suit upon their mortgage against one of the mortgagors and the heirs of the other, and obtained a decree for sale on the 1st August, 1889. The decree is No. 72 of 1889, and the amount of it was Rs. 3,306-14-6. The puisne mortgagees were not joined as parties to the suit.

Bansidhar, one of the defendants in the present suit, held a simple decree for money against Kaim Ali and others, the first mortgagees, and in execution thereof caused the aforesaid decree to be attached. As attaching creditor he took out execution of the decree, caused the mortgaged property to be sold by auction on the 24th March 1894, and purchased it himself for Rs. 1,050. On the 24th November 1894, he sold the said property to Wahid-un nissa and Jan Muhammad, defendants, for Rs. 4,400, and **[455]** those persons, on the same date, made a usufructuary mortgage of it to Dungar Singh and others, defendants, fourth party, for Rs. 6,000. These defendants are admitted to be in possession of the property.

Gobind Ram, the second mortgagee, brought a suit for sale upon his mortgage, and obtained a decree on the 23rd February 1892. When, in execution of that decree, he sought to bring the mortgaged property to sale, he was not permitted to do so by reason of the prior sale of the 24th March 1894. He thereupon assigned his decree to the present plaintiff, Gobardhan Das, on the 4th November 1894, and the latter, as the assignee of the decree, brought the present suit on the 7th December 1894.

The ground of his claim is that, as Gobind Ram was not made a party to the suit brought by the first mortgagees, the decree obtained in that suit, and the auction sale held in execution of the decree, are not binding on him ; that, as subsequent mortgagee of the property, he had still the right to redeem the first mortgage, and that by virtue of the assignment made to the plaintiff, the plaintiff is entitled to redeem the said mortgage. He prayed for a decree for redemption of the mortgage of 1878 upon payment of Rs. 1,050, the amount of sale consideration paid for the mortgaged property, or such other sum as the Court might declare to be payable, and for possession of the property comprised in the first mortgage.

On the 17th December 1894, that is, after the institution of the present suit, the first mortgagees, Kaim Ali and others, conveyed to Prasadi Lal all their rights under the mortgage of 1878, and the decree obtained upon that mortgage. Prasadi Lal was thereupon added as a defendant to the suit and is now arrayed as defendant, fifth party.

Wahid-un-nissa and Jan Muhammad denied the right of Gobind Ram and the plaintiff to redeem the first mortgage and asserted that as Gobind Ram was the mortgagee of only one-fourth of the property, the claim to redeem the remaining three-fourths was not maintainable and that redemption could take place, if at all, upon payment of the whole

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amount due under the mortgage of 1878, which they alleged to be Rs. 9,182-0-6, and not upon payment of the sale price.

[456] The defence of Dungar Singh and others, mortgagees from the above defendants, was very similar, the only difference being that they alleged a larger sum to be due upon the first mortgage.

Prasadi Lal urged that the plaintiff was not entitled to redeem except upon payment of the whole amount due upon the mortgage, and he claimed to be entitled to the whole of that amount with the exception of Rs. 1,050, the amount of consideration paid by Bansidhar.

The Court of first instance was of opinion that as Gobind Ram was the mortgagee of a fourth share of the property, the plaintiff was entitled to redeem that share only, on payment of a fourth part of the mortgage money, which the parties admitted amounted to Rs. 10,000 on the date of the decree of that Court. The claim for possession was dismissed, and a decree was made for sale upon payment of Rs. 2,500, to which it declared Prasadi Lal not to be entitled.

From this decree the plaintiff appealed, and Prasadi Lal preferred objections under s. 561 of the Code of Civil Procedure.

The lower appellate Court referred certain issues to the Court of first instance under s. 566 of the Code, and ultimately held that the plaintiff was entitled to redeem the whole of the property in suit upon payment of Rs. 10,000 admitted to be due upon the first mortgage on the 30th September 1896, and further interest on the said amount up to the date of the decree of the appellate Court. The learned Judge next proceeded to consider the respective rights of the rival defendants to the said amount, and came to the conclusion that the present appellants were entitled to Rs. 1,050 paid by Bansidhar and interest on that amount, and that Prasadi Lal, as representing the first mortgagees, was entitled to the balance. He also held that the plaintiff should be granted a decree for sale, and accordingly made the decree from which this appeal has been preferred.

Various pleas were taken in the memorandum of appeal, but most of them have been abandoned. The pleas which the learned counsel for the appellants has urged before us are the third, the sixth and the seventh.

[457] It is contended that, as the suit was one for redemption, a decree for sale should not have been made. This might have been a valid plea had the appellants not submitted to the decree for sale made by the Court of first instance. They did not appeal from that decree, and it appears from the judgment of the lower appellate Court that in the first Court they consented to a decree for sale being passed. Further, as the plaintiff, as representing the puisne mortgagee, is not entitled, according to the rulings of this Court, to sell under his mortgage without redeeming the prior mortgage, and as the ultimate object of his suit was that he might be in a position to sell under his mortgage, a decree for sale in the present suit would not prejudice any of the parties, and would prevent further litigation. I am not therefore prepared to accept this plea of the appellants.

The seventh plea, which is to the effect that Prasadi Lal, defendant, had no *locus standi* in the suit is, in my opinion, untenable. As has been already stated, the decree obtained by the first mortgagees, Kaim Ali Khan and others, on the 1st August 1889, upon their mortgage of the 19th April 1878, was for Rs. 3,306-14-6. Bansidhar, who caused that decree to be attached and the mortgaged property to be sold, realized Rs. 1,050 only out of the amount of that decree. This sum appears to have sufficed to satisfy his own decree, but a large amount was still due upon the

decree to which the first mortgagees, Kaim Ali Khan and others, were entitled. Both parties admitted in the Courts below that Rs. 10,000 was recoverable under the said decree. It cannot therefore be said that the first mortgagees had no right left which they purported to transfer on the 17th December 1894 to Prasadi Lal. After the sale, which Bansidhar caused to be effected on the 24th March 1894, the first mortgagees had subsisting rights under their decree of the 1st August 1889; and as they transferred those rights to Prasadi Lal, the latter has stepped into the shoes of the first mortgagees, and is now their representative in interest. This representative status of Prasadi Lal was, I may observe, never questioned in either of the Courts below, and no issue was raised on that point. The only question which was discussed in the lower appellate Court as affecting Prasadi Lal was, whether he was entitled, as the representative **[458]** of the first mortgagees, to any part of the mortgage money which the plaintiff was bound to pay for redeeming the first mortgage. That is the question to which counsel on both sides chiefly confined their able and elaborate arguments in this Court, and that is the principal question which we have to determine in this appeal.

In my opinion it was not necessary, for the purpose of granting the relief to which the plaintiff was entitled, to determine the rival claims of the persons who alleged that they were entitled to the mortgage money. It was enough for the plaintiff to pay that money into Court, leaving it to the claimants of that money to have their respective rights to it determined in a suit of their own. This would have obviated the necessity of following the ordinarily unusual course of determining the rights *inter se* of persons arrayed in the suit as co-defendants. However, as the lower appellate Court has apportioned the mortgage money between different sets of defendants, and as both parties desire that the matter should be determined in this suit so as to avoid further litigation, I do not think we should decline to decide the question of apportionment.

The learned Judge of the lower appellate Court has held that as the purchase of the mortgaged property by Bansidhar, whom the appellants before us represent, discharged the decree obtained by the first mortgagees upon their prior mortgage to the extent of Rs. 1,050 only, and as a large portion of the amount of that decree still remains unsatisfied, the present appellants are entitled only to the aforesaid sum of Rs. 1,050 and interest thereon, and that the balance of the mortgage money should be paid to Prasadi Lal, who now represents the first mortgagees. In support of that view he has referred to some observations made by my brother Aikman and myself in our judgment in the case of *Dip Narain Singh* v. *Hira Singh* (1). In that judgment we said:—"Had a third party purchased the property and had his purchase money discharged the prior mortgage in full, he would undoubtedly have been entitled to claim that a subsequent mortgagee who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior **[459]** mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption, by a puisne mortgagee, to the whole amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage; but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance

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of the mortgage money is due. When there are more purchasers than one, the apportionment should be made between them *pro ratâ*, and the balance should go to the mortgagee." These observations fully bear out the conclusion of the learned Judge, which is further supported by the ruling of Edge., C. J., and myself in *Baldeo Bharthi* v. *Hushiar Singh* (1). If the view expressed in the above cases is correct, the apportionment ordered by the Court below is unimpeachable, and this appeal must fail. It is, however, argued that the question before us did not directly arise in, at least, the first of the two cases referred to above, and being thus an open question, should be considered and decided by us again. This is no doubt true, but I consider it highly inexpedient that the decisions of the highest Court in the Province should be frequently altered, and title acquired on reliance on those decisions thus unsettled and shaken. Unless, therefore, it is established that a decision already given after careful consideration is grossly erroneous, I should be loath to depart from it, even if its correctness may be open to question, and even if the opinion expressed in it is only *obiter*. It is contended that the view taken in one of the two cases mentioned above by my brother Aikman and myself, and that taken by Sir John Edge and myself in the other, are erroneous and not warranted by law. No case, reported or unreported, has been cited to us in which this or any other High Court has held or expressed a different opinion, and no authority has been referred to which bears directly on the point and shows conclusively that this Court erred in making the observations contained in the judgments pronounced in the two cases mentioned above. Speaking for myself, I must say that I have heard nothing in the argument addressed to us which induces me to alter the opinion I [460] have already expressed on the point, and to think that it is contrary to any specific provision of law, or to any rule of justice, equity and good conscience, according to which the Courts in these Provinces are bound to act. And I may add that after an anxious consideration of all that has been said in this case I still adhere to that opinion.

I need hardly mention that in every suit for sale brought by a prior mortgagee a puisne mortgagee, of whose interests the plaintiff has notice, should, under s. 85 of the Transfer of Property Act, 1882, be joined as a party in order that he may be afforded an opportunity to exercise the right of redeeming the prior mortgage which, as subsequent mortgagee, he possesses. Where, therefore, a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct and he is entitled to exercise it even after a sale has taken place in execution of the decree obtained upon the prior mortgage. He must, according to the rulings of this Court, "be placed in the same position he would have held had he been a party to that litigation." Having been relegated to the position which he would have occupied had he been a party to the suit, he could redeem the prior mortgage only upon payment of the whole amount due upon the mortgage. This is conceded on both sides, and is what was held in *Dip Narain Singh* v. *Hira Singh* (2). When such payment is made after a sale has taken place under the first mortgagee's decree, the question arises—Who is entitled to the amount paid? That is the question which we have to decide in this appeal.

There can be no doubt that if the first mortgagee himself has purchased

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the mortgaged property, he alone is entitled to the mortgage money. It is also beyond question that if a stranger, *i. e.*, a person other than the mortgagee, becomes the purchaser, and the price paid by him fully satisfies the amount of the mortgage debt, the whole of the mortgage money should go to him alone, the mortgagee having no longer any right to that money. It is contended that he would be equally entitled to the whole of the mortgage money even if the price paid by him satisfied the **[461]** mortgage only partially. The reasons advanced in support of this contention are, that upon the making of an order for sale under s. 89 of the Transfer of Property Act, 1882, the mortgage security becomes extinct; that after an auction sale has taken place in pursuance of the order, the mortgagee ceases to have any right in respect of the property sold; that the rights of the mortgagor and mortgagee pass to the purchaser, and that therefore, upon redemption, the purchaser alone is entitled to the mortgage money. In the first place, this argument assumes that the purchaser is in substance an assignee of the mortgage, which he certainly is not. In the next place, it overlooks the very nature of a mortgage and the rights of the mortgagee. Every mortgage presupposes the existence of a debt, and it is for the purpose of securing the repayment of the debt that a mortgage of property is made. In every simple mortgage, unless there is a specific covenant to the contrary, there is a personal obligation upon the mortgagor to pay the debt, and there is also the liability of the mortgaged property for the debt. So that the security for the debt is two-fold, namely, first, the personal security of the mortgagor, and next, the security of the property. The liability of each kind of security is to the extent of the whole amount of the debt. It is for this reason that, when a person entitled to redeem seeks to redeem the mortgage, he must pay the whole amount due for the time being upon the mortgage. It is for the same reason that when the proceeds of the sale of the mortgaged property are insufficient to pay the amount due on the mortgage, the mortgagee is declared entitled to obtain under s. 90 of the Transfer of Property Act a decree for the balance, provided, of course, that his right to the balance has not been extinguished by the operation of limitation or for any other reason. The debt, that is, the principal money advanced by way of loan and interest thereon, called the mortgage money in s. 58 of the said Act, being the sum which must be paid in order to obtain redemption, the creditor, that is, the mortgagee, is the person who would ordinarily be entitled to get that sum. If a person other than the mortgagor entitled to make such payment, *e.g.*, a purchaser of the mortgaged property, has paid off the whole amount of the debt, he, and not the mortgagee, would be entitled to the whole of the **[462]** money paid for redemption. But if such other person has paid only a part of the debt due to and recoverable by the mortgagee, I fail to see under what principle of law or equity he would have the right to appropriate any sum in excess of the amount paid by him. If the appellants' contention is correct, such person would be entitled to the whole of the money paid for redemption. As, however, in the case supposed, a part only of the debt due to the first mortgagee had been discharged, the right of the first mortgagee to recover the balance due to him would still subsist. When, therefore, he realizes the amount of the balance, as he is entitled to do, the result will be that the amount of the same debt will have been recovered twice over—a result which no Court of Justice should countenance or sanction. Another and a more serious anomaly will arise if the appellants' contention be accepted. The subsequent mortgagee who redeems a prior mortgage is entitled to add

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to the amount of his own mortgage the amount of the prior mortgage and to recover the total sum from his mortgagor and the mortgaged property. If the proceeds of the sale of the mortgaged property prove insufficient for the realization of that sum, he will be able to recover the balance from the mortgagor by obtaining a decree under s. 90 of the Transfer of Property Act. If the whole amount of the prior mortgage be paid to the purchaser of the property, the first mortgagee, whose debt would remain unsatisfied, would, according to the learned counsel for the appellants, also have the right to realize, by means of a decree under s. 90, the balance due to him. This right, the learned counsel said, was a safeguard of the interest of the first mortgagee. So that the mortgagor may have to pay the same amount twice over, that is, once to the first mortgagee and again to the subsequent mortgagee. I need hardly say that I do not feel myself justified in adopting a view which will work such injustice.

If, again, we turn to the case of the mortgagee, similar injustice will be done to him in the event of the whole of the mortgage money being paid to the auction purchaser. When the subsequent mortgagee has redeemed the first mortgage by paying into Court the whole of the purchase money, the first mortgagee is not, in my opinion, entitled to obtain a decree under s. 90, on the ground that he has realized by the sale of the mortgaged property **[463]** only a part of the debt; for when the mortgage has been fully redeemed by payment of the mortgage money into Court, it cannot possibly be said that a balance is still due upon the mortgage. The consequence will therefore be that, although the first mortgagee to whom a portion of the debt is due has not actually realized it, he will be wholly without a remedy in respect of that portion.

Now, let us see whether the view adopted by the learned Judge will lead to similar injustice or anything approaching it. The learned Judge has directed that the appellants should get the amount which Bansidhar, their predecessor in title, paid for the property, and interest on that amount from the date of his purchase. He has thus awarded the sum by which the purchaser was actually out of pocket. The purchaser has suffered no loss, and his only loss, if it may be called a loss, is that of the gain which he expected to derive from an apparently speculative purchase. When property is purchased under circumstances similar to those of the present case, the purchaser makes his purchase subject to the risk of its being defeated by the second mortgagee who was omitted from the first mortgagee's suit, and to the risk of his having to surrender the property upon the first mortgage being redeemed by the puisne mortgagee. It is not likely that a purchaser under such circumstances would pay full value for the property. If he has to give up the property for which, in the ordinary course of things, he must have paid inadequate value, and he is compensated by the payment to him of the money which he paid as the value of the property, I do not see that any hardship is done to him. If the property is of large value, sufficient to cover the amounts payable under both the first mortgage and the second mortgage, and he prefers to retain it and for that purpose has to pay the amounts of the two mortgages, he suffers no loss, because he receives back the amount of the purchase money already paid by him, and for the balance he gets an adequate equivalent in the property itself. The present case appears to me to be an apt illustration in point. Bansidhar purchased the property in question after Gobind Ram, the second mortgagee, had obtained his decree. That decree was apparently in course of execution when the auction sale at which

Bansidhar [464] purchased took place, for we find that the said sale was confirmed after the postponement of the sale which had been ordered in execution of Gobind Ram's decree. Bansidhar, who, as attaching creditor, was himself executing the decree obtained on the first mortgage, must have known that in making the purchase he was undertaking a risk, namely, that of the sale being ignored by Gobind Ram, who was not a party to the first mortgagee's suit. He paid for the property a price which was evidently much below its proper value. He himself sold it immediately afterwards for more than four times the value he had paid for it, and it appears to have been admitted in this suit that the property was well worth Rs. 10,000. A person who purchased property of such value for Rs. 1,050 only cannot reasonably complain if he has to surrender the property upon getting back what he actually paid. And the appellants are in no better position than the person from whom they derive their title. It is true that if, under such circumstances, the purchaser has to surrender the property, he derives no benefit, but as he sustains no loss and as the benefit he expected to derive was that arising from a speculative purchase, he is not entitled to any sympathy. In my opinion the mode in which the Court below has apportioned the mortgage money is more in consonance with justice and equity than that contended for on behalf of the appellants.

It is strenuously argued on behalf of the appellants that after the sale under the first mortgage, the first mortgagee ceased to have any right to the property, that it is because the property has passed to the purchaser and he objects to its being sold in satisfaction of the second mortgage that the second mortgagee is under the necessity of redeeming the first mortgage, that the mortgage money paid by the second mortgagee is paid by him in order to make the property available to him for the realization of the amount of his mortgage, and that the person who holds the property is therefore the only person who is entitled to the mortgage money paid by the second mortgagee. It is further urged that when the mortgagee asks for any portion of that money he seeks to resort to a source which he has already exhausted by causing the property to be sold. This contention might probably [465] have been valid had the property been the only security for the mortgage debt, and the only source from which that debt could be recovered. But as has been already said, the security for the mortgage debt is, in the absence of a specific contract to the contrary, not only the security of the property, but also the personal obligation of the mortgagor to pay the debt, and the liability for the whole amount of the debt attaches to each of these securities.

A puisne mortgagee who was not a party to the first mortgagee's suit and had no opportunity of redeeming the first mortgage has to pay the full amount of the debt because he is bound to pay the amount which he would have had to pay had he been made a party, and there can be no question that he would have had to pay the full amount of the mortgage money due for the time being, inasmuch as that amount would have been recoverable from the property also. Where the first mortgagee has realized only a part of the debt by the sale of the property, that is, by enforcing the security of the property, there is still a balance due to him which he can realize by enforcing the other security. It follows that when the subsequent mortgagee pays the full amount of the debt, and thereby totally discharges the debt, the person to whom the balance is due, that is, the first mortgagee, is the person who has the right to appropriate that portion of the money paid by the subsequent mortgagee which

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represents the balance, the purchaser whose purchase money has satisfied the remainder of the debt being entitled to the remainder of the money paid by the subsequent mortgagee. There can be no doubt that if in such a case the purchaser cannot hold up the payment made by him as a shield for his protection to the full extent of the mortgage money, he is not entitled to the whole of that money. It is, however, said that such a purchaser is entitled to use the first mortgage as a shield to the extent of the whole amount of that mortgage, but no authority has been cited in support of this contention. The contrary view was held in *Baldeo Bharthi* v. *Hushiar Singh* (1). It does not appear to me to be reasonable that the purchaser should be awarded an amount which he never paid. The money paid by the second mortgagee does not **[466]** consist of the proceeds of the mortgaged property, nor is it paid as an equivalent of the value of the said property. That money cannot, therefore, be regarded as derived from the source which has already been exhausted by the auction sale which has taken place in execution of the first mortgagee's decree. This case is not a case in which, under the contract of mortgage, the property was the only security for the debt. The second mortgagee, it is true, pays the mortgage money because of his interest in the property, but, as has been already pointed out, he does not pay it as solely representing the value of the security of the property. The fact of his ignoring the auction sale and offering to redeem the first mortgage does not revive the debt, because the debt had never been extinguished, and it is not on the ground of the revival of the debt that the first mortgagee can get the balance due to him. A comparison of the provisions of s. 89 of the Transfer of Property Act with those of s. 87 shows that an auction sale of the mortgaged property does not extinguish the debt, although it extinguishes the security as between the mortgagor and the mortgagee. No doubt the first mortgagee cannot proceed against the mortgaged property any longer, but I see no reason why he should be deprived of the money which is undoubtedly due to him because the person who purchased the mortgaged property took with his eyes open a defeasible title, and evidently paid for the property a value much below the value which it would otherwise have fetched. For the above reasons I see no valid grounds for departing from the view which my learned colleague and myself expressed, after careful and mature consideration, in *Dip Narain Singh* v. *Hira Singh* (2). I am not aware of any ruling in which a different view was adopted, and, as I have already said, none was cited to us at the hearing. All the cases bearing on the point which I have been able to find in the reports are cases in which the purchaser had fully discharged the prior mortgage. I am unable to hold that upon considerations either of law or of equity the conclusion at which the Court below has arrived as to the apportionment of the mortgage money is erroneous. I would therefore dismiss the appeal with costs.

[467] The objections preferred under s. 561 of the Code of Civil Procedure by the plaintiff and by Prasadi Lal are, in my judgment, untenable. As the plaintiff in his claim distinctly asked for possession, to which, it is admitted, he was not entitled, the learned Judge was justified in refusing to allow him his costs of the suit.

I think the award of interest on the purchase money paid by Bansidhar which has been decreed to the appellants was under the circum-

(1) 15 A.W.N. (1895) 45.

(2) 19 A. 527 (534).

stances of the case, equitable. I would therefore also dismiss the objections under s. 561 with costs.

I would extend the time for payment to the 15th of January 1901.

AIKMAN, J.—The facts which gave rise to the suit out of which this appeal has arisen are somewhat complicated. On the 19th of April 1878, the owners of certain property situated in the village of Barka, in the Aligarh district, mortgaged it to Kaim Ali Khan and two others, described in the plaint as defendants, first party, as security for a loan of Rs. 1,500. On 29th January 1886, one-fourth of the same property was mortgaged to one Gobind Ram as security for a loan of Rs. 325.

On 1st August 1889, the first mortgagees got a decree for sale on their mortgage in a suit to which they had not made Gobind Ram a party.

On 23rd February 1892, Gobind Ram in a suit in which he impleaded Ganga Ram and Dungar Singh, in whose favour mortgages of portions of the property had been executed subsequent to his mortgage, obtained a decree for sale under his mortgage of the 29th January 1886.

The decree obtained by the defendants, first party, was attached by one Bansidhar, defendant, second party, in execution of a simple money decree he held against them. The mortgage decree was put in execution, and on the 24th March 1894, the mortgaged property was sold by auction and purchased by Bansidhar for the sum of Rs. 1,050.

Eight months afterwards Bansidhar sold the property for Rs. 4,400 to Jan Muhammad Khan and Musammat Wahid-un-nissa, defendants, third party, who forthwith executed a usufructuary mortgage of it in favour of Dungar Singh and others, defendants, fourth party.

[468] On 4th December 1894, Gobind Ram, the second mortgagee, sold his decree to Gobardhan Das, the plaintiff in the present suit, for Rs. 840-6-9. The plaintiff alleges that Gobind Ram not having been made a party to the suit in which the decree on the first mortgage was obtained, did not lose his right to redeem that mortgage, which right has passed to him, the plaintiff.

The relief which the plaintiff asked for in this suit was a decree for possession of the property covered by the first mortgage on payment of Rs. 1,050, the amount fetched at the auction sale, or any sum the Court might adjudge to be proper. To this prayer the words "and by redemption of the mortgage" are added. The plaintiff also adds a prayer for any other relief which, under the circumstances of the case, he might be held entitled to.

The present suit was instituted on the 8th December 1894. On the 17th December 1894, the defendants, first party, sold to one Prasadi Lal any rights they had under their mortgage deed of 19th April 1878, and decree of 1st August 1889, and Prasadi Lal was made a defendant to the suit. On 8th February 1894, he filed a written statement, alleging that the sum of Rs. 9,590-4-0 was due under the mortgage-deed, and that plaintiff was not entitled to redeem the mortgaged property until he had paid him (Prasadi) that amount.

The lower appellate Court has made a decree in favour of the plaintiff, declaring that if he pays into Court the sum of Rs. 11,020 in discharge of the first mortgage, he shall be entitled to bring to sale the property covered by the first mortgage in order to realize both this sum of Rs. 11,020 and the amount due under the decree of 23rd February 1892, which was passed in favour of plaintiff's predecessor in title,

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the second mortgagee. Out of the amount of Rs. 11,020 directed to be paid into Court in redemption of the first mortgage, the lower appellate Court has ordered that the representatives of the auction purchaser under the decree on the first mortgage shall receive only the amount paid at the auction sale with interest, and that the balance shall go to Prasadi, the assignee of the rights of the first mortgagees. The representatives in title of the auction-purchaser come here in second appeal.

[469] The main plea urged in this appeal is that the apportionment of the Rs. 11,020 made by the lower appellate Court is wrong. It is contended that the assignee of the first mortgagees is not entitled to any part of this amount, the whole of which, it is urged, should go to the representatives in title of the auction purchaser. The question as to who is entitled to the money to be paid in redemption of the first mortgage was the subject of long and able argument at the bar.

The learned District Judge refers in support of his decision to a passage in a judgment of this Court in case of *Dip Narain Singh* v. *Hira Singh* (1). The passage relied upon by the District Judge is as follows:—"If the purchase money paid by such a purchaser (*i.e.*, a third party buying at a sale in execution of a decree on a prior mortgage) did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole of the amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due." Now it must be admitted that the above passage fully supports the order which the District Judge has made as to the apportionment of the money to be paid in redemption of the first mortgage. But a reference to the rest of the judgment will show that the opinion expressed in the passage cited was not necessary for the decision of the case before the Court, and must therefore be looked upon as *obiter dictum*. I was a party to the judgment in *Dip Narain Singh* v. *Hira Singh* (1). The able argument of the learned counsel for the appellants has satisfied me that the opinion expressed in the passage cited as to how the money should be apportioned is erroneous.

In order to explain the reasons for the view I now take, I will state the present case as follows, disregarding the various devolutions of interest which have taken place, as they only complicate matters and do not affect the decision of the question at issue.

[470] There are on a certain property two mortgages. The holder of the prior mortgage obtains a decree on his mortgage in a suit to which he does not make the second mortgagee a party. This decree is put into execution, the property is sold and purchased by a third party. The puisne mortgagee, not having been made a party to the suit on the first mortgage, has not lost his right under his mortgage. The right is to bring the property to sale in order to realize the amount due on his mortgage. But, as held by this Court, he cannot bring the property to sale until he has redeemed the first mortgage. It has been decided in the case cited above and in other cases that what the puisne mortgagee has to pay, is not the amount which the property fetched at auction, but the amount which he would have had to pay had he been

(1) 19 A. 527 (534).

made a party to the suit brought by the first mortgagee, that is, the full amount of the mortgage money due on the first mortgage. The question is—Who is to get this amount? It appears to me that the first mortgagee can have no claim whatever to it, and for the following reasons. When the property was sold in execution of a decree passed on the first mortgage, the purchaser got a complete title to the property so far as the first mortgagee and the mortgagor were concerned. The rights of the mortgagor in the property entirely passed away with the sale, and, whatever rights the first mortgagee may have to proceed against the other property of the mortgagor, he has no right to get anything more out of the mortgaged property when once it has been sold in execution of the decree upon his mortgage. The only defect in the purchaser's title to the property is that the property is still liable for the amount of the second mortgage, owing to the second mortgagee not having been made a party to the suit on the first mortgage. When the second mortgagee pays the amount due under the first mortgage, that is only a condition precedent to his getting payment of his money by having the property sold if necessary. Supposing the amount due under the first mortgage is Rs. 10,000, and the amount due under the second mortgage Rs. 800, when the second mortgagee pays in Rs. 10,000 he is entitled to have the property sold, and out of the proceeds he gets Rs. 10,000 plus Rs. 800, the amount of his own debt. It is clear, therefore, that all that he has got is Rs. 800, the amount of his own debt. If he **[471]** is paid the amount of his own debt, he has no right to proceed against the mortgaged property. As said above, his redemption of the first mortgage is only a step towards getting in his own money. It is a remarkable fact that in this case the representatives of the auction-purchaser in their written statement distinctly said that they were willing to pay any amount found due to the second mortgagee, but no notice whatever is taken by the Courts below of this offer, and the fact that the Courts did not take notice of it is not made a ground of appeal in this Court.

Now, supposing the second mortgagee pays in the amount due under the first mortgage, from what source will this amount ultimately come? It is clear that it will come out of the property, for unless the property is of sufficient value to satisfy both the first and the second mortgagee, the second mortgagee will not, in order to recover a comparatively small sum, as in this case, risk the loss of a very large amount. Now, if the amount paid in by the second mortgagee on account of the first mortgage comes out of the property, what right has the first mortgagee to receive any portion of it? As said above, when the property was sold in execution of the decree on the first mortgage, the right of the first mortgagee to receive anything more *out of the property* came to an end. I have no hesitation in holding that the first mortgagee is not entitled to receive any part of the sum paid in by the second mortgagee in order to obtain the privilege of bringing to sale, in satisfaction of his own debt, a property in which the first mortgagee has ceased to have any interest, and which belongs solely to the auction purchaser, subject only to the liability to satisfy the second mortgage.

In the course of the argument stress was laid on the facts that the auction purchaser bought the property, when sold in execution of the decree on the first mortgage, for a very low price. I do not think this ought to affect the question we have to decide. He bought at a public auction—no fraud is attributed to him, and if he got a valuable property at a small price, that was his good fortune. For aught we know, Prasadi, who

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purchased the decree-holder's rights during the pendency of this suit, may have [472] paid a still smaller price, but what the price was we are unable to say, as the copy of the sale-deed filed by him has somehow disappeared from the record.

It was also urged in argument that payment of the whole amount to the auction purchaser would affect the first mortgagee's rights under s. 90 of Act No. IV of 1882. In my judgment the first mortgagee's rights under s. 90 would not be affected. But whether or not, he is not, in my opinion, entitled to get any further sum out of the mortgaged property than was realized when it was sold in execution of the decree on his mortgage.

For the respondent, Prasadi, reliance was placed on a decision of this Court in the case of *Baldeo Bharthi* v. *Hushiar Singh*, (1). The facts of that case differ from those of the present, for, as is observed in the judgment, the first decree was not a decree for sale.

In this case the plaintiff as assignee of a second mortgagee, who had lent a sum of Rs. 325 on the security of one-fourth of the property mortgaged in the first deed of mortgage, prayed to be put in possession of the whole of the mortgaged property on payment of the amount realized at the auction sale. The second mortgage was a simple mortgage, and the above relief was one to which it is clear the plaintiff was not entitled. But he also asked for any other relief to which, under the circumstances of the case, he might be found to be entitled. With reference to this prayer, I am of opinion that the Court below was justified in passing a decree for sale on redemption of the first mortgage. But, as set forth above, I differ from the lower appellate Court as to the manner in which the money to be paid by the plaintiff before he can sell the property in satisfaction, should be disposed of. I would sustain the 6th and 7th grounds of the memorandum of appeal to this Court, and hold that the money ought to go to the representatives of the auction purchaser, inasmuch as Prasadi by his sale-deed only acquired such rights as the first mortgagees may have to proceed under s. 90 of the Transfer of Property Act, and did not acquire any right to money which would come out of the mortgaged property, seeing that any rights [473] which his assignors had over that property, disappeared when it was sold in execution of their decree.

I would modify the decree of the lower Court by directing that the whole of the money to be paid by the plaintiff for redemption of the first mortgage shall go to the appellants, the representatives of the auction purchaser, and I would allow them the costs of their appeal.

There is an objection filed by the plaintiff-respondent to the order of the lower Court in regard to costs. I would not interfere with that order, which was within the discretion of the lower Court, and would dismiss the objection with costs.

BY THE COURT—

Under the second paragraph of s. 575 of the Code of Civil Procedure, the decree of the Court below is affirmed, and the appeal and the objections under s. 561 are dismissed with costs. The time for payment of the mortgage-money is extended to the 15th of January 1901.

Appeal dismissed.

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withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. THE BANK OF UPPER INDIA v. SHEO PRASAD, 19 A. 482 =17 A.W.N. (1897) 124 ... 311

(67) *Ss.* 285, 295, 4-A—*Execution of decree—Procedure—Act No.* XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 170, 171, 172—*Civil and Revenue Courts.—Held*, that the procedure prescribed by s. 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court.

Hence, where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was *held*, that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. RAGHUBAR DAYAL v. BANKE LAL, 22 A. 182=20 A.W.N. (1900) 37 ... 1152

(68) *S.* 287—*Execution of decree—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within the meaning of* s. 311.—The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-s. (*e*) of s. 287 of the Code of Civil Procedure.

An under-statement of the value of the property having been made in such a proclamation, which was calculated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all and the sale having resulted in a price altogether inadequate:—*Held*, that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation; and that the special remedy, provided in s. 311, was applicable, as substantial injury had resulted. SAADATMAND KHAN v. PHUL KUAR, 20 A. 412 (P.C.)=2 C.W.N. 550=25 I.A. 146=7 Sar. P.C.J. 380... 624

(69) S. 291—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 A. 302.

(70) Ss. 291, 310-A—See TRANSFER OF PROPERTYACT (IV OF 1882), 19 A. 205.

(71) S. 293—See EXECUTION OF DECREE, 19 A. 22.

(72) *S.* 294—*Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No.* XV *of* 1877 (*Limitation Act*), *sch.* II, *art.* 179 (4)—*Execution of decree.—Held*, that an application for leave to bid at a sale in execution under s. 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of art. 179 (4) of the second schedule of the Indian Limitation Act, 1877. DALEL SINGH v. UMRAO SINGH, 22 A. 399 =20 A.W.N. (1900) 129 ... 1302

(73) *Ss.* 294, 317—*Indian Trusts Act* (*No.* II *of* 1882), *ss.* 82, 88—*Purchase by alleged agent of decree-holder at sale in execution.*—Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance, the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

Held, that under such circumstances the second paragraph of s. 317 of the Code of Civil Procedure, did not exclude the application of the first paragraph of that section.

Held, further that ss. 82, 88 of the Indian Trusts Act (No. II of 1882) did not apply. GANGA BAKSH v. RUDAR SINGH, 22 A. 434=20 A.W.N. (1900) 152 ... 1327

(74) S. 310-A—See APPEAL, 19 A. 140.

Civil Procedure Code, 1882—(*Continued*).

peruse them, has no authority to issue a general order that in every case committed for trial to the Court of Session, and in every criminal appeal, the Police diaries shall be submitted to the Court simultaneously with the Magistrate's record of the case. Such an order is illegal.

In no case is an accused person entitled as of right to a copy of any statement recorded by a Police officer in the special diary prepared under the authority of s. 172 of the Code of Criminal Procedure.

The special diary may be used by the Court to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused; but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained.

The special diary may also be used by the Court for the purpose of contradicting the Police officer who made it, and the special diary may be used by the Police officer who made it, and by no witness other than such officer, for the purpose of refreshing his memory.

If the special diary is used by the Court to contradict the Police officer who made it, or by the Police officer who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person or his agent is entitled to see the particular entry which has been referred to and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of particular entry so used, but no more.

So *held* by the Full Bench.

Per EDGE, C.J., KNOX, BLAIR, and BURKITT, JJ.—A Police officer investigating a case may lawfully reduce into writing in the special diary the full and unabridged statement made to him by a person whom he is examining or has examined under s 161 of the Code of Criminal Procedure, and if he does so, his record of such statement is part of the special diary and is just as much privileged as any other entry in the diary.

All statements made under s. 161 of the Code of Criminal Procedure to a Police officer and reduced into writing by him should be reduced into writing in the special diary and not elsewhere.

Per BANERJI, J. and AIKMAN, J.— Statements recorded under s. 161 of Code of Criminal Procedure by a Police officer making an investigation were not intended by the Legislature to be entered in the special diary, and if they are so entered do not form an integral part of the diary and are not privileged, but the accused person or his agent is entitled to see them.

A mere summary, however, of facts ascertained by an investigating officer from persons examined by him, not being a report of their actual statements, may properly find a place in the special diary. QUEEN-EMPRESS v. MANNU, 19 A. 390=17 A.W.N. (1897) 174 ... 254

(17) *Ss.* 179, 185—*Jurisdiction—Place where consequenee of act ensued—Criminal breach of trust— Act* XLV *of* 1860, *s.* 408. — B., an employee of a Company, the office of which was at Cawnpore, was charged with the offience punisbable under s. 408 of the Indian Penal Code. The complainant alleged that B. being in charge on behalf of the Company at a place in Bengal, of certain goods belonging to the Company and being ordered to return the said goods to Cawnpore, never did so, and failed to account for the goods, or their value, to the loss of the Company. *Held* that on the statement of the case by the complainant the Courts at Cawnpore had jurisdiction to inquire into the charge, inasmuch as the consequence of B's acts, namely, loss to the Company, occurred in Cawnpore. QUEEN-EMPRESS v. O'BRIEN, 19 A. 111=16 A.W.N. (1896) 191. 72

(18) *S.* 188 — *Act XLV of* 1860, *s.* 363 — *Kidnapping from lawful guardianship — Offence committed outside British territory — Jurisdiction — Certificate of Political Agent.*—The absence of the certificate of the Political Agent required by s. 188 of the Code of Criminal Procedure is an absolute bar to the trial of a case to which the provisions of that section apply.

Criminal Procedure Code—(*Continued*).

Criminal Procedure Code—(*Continued*).

***Evidence Act (I of 1872)*—(*Continued*).**

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The Courts below having differed as to whether this prior possession had or had not been proved, an examination of the evidence led to the conclusion that the plaintiff had failed to prove that the title-deeds had been deposited before the date of the adjudication, as alleged by him.

On the question whether the Courts below should, or should not, have received in evidence the testimony of a witness who had been informed by the plaintiff before the adjudication that documents relating to land had then been deposited with him as security by the person, who was afterwards insolvent and who was the first defendant in this suit:—*Held*, that this being an admission by a party within s. 21 of the Indian Evidence Act, 1872, could not be used as evidence in the plaintiff's favour. And *held* that an erroneous omission to object to the admission of such testimony did make it available as a ground of judgment. MILLER v. BABU MADHO DAS, 19 A. 76 (P.C.)=23 I.A. 106=7 Sar. P.C.J. 73 ... 50

(2) S. 30—See CRIMINAL PROCEDURE CODE, 22 A. 445.

(3) Ss. 41, 44—See ACT IV OF 1869 (DIVORCE), 22 A. 270.

(4) *Ss.* 65, 90—*Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No.* LII *of* 1803, *s.* 37—*Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.—Held* that the presumption allowed by s. 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available.

The procedure prescribed by Regulation No. LII of 1803 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order that the disabilities incident to the status of a disqualified proprietor may ensue. It is incumbent therefore upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law. ISHRI PRASAD SINGH v. LALLI JAS KUNWAR, 22 A. 294=20 A.W.N. (1900) 82 ... 1227

(5) S. 68—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 A. 532.

(6) Ss. 74, 76, 78—See STAMP ACT (I OF 1879), 19 A. 293.

(7) *S.* 92 *Evidence—admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.*—The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in s. 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by a recital in the sale-deed to that effect, *held* that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them. SAH LAL CHAND v. INDARJIT, 22 A. 370 (P.C.)=4 C.W.N. 485=2 Bom. L.R. 553=27 I.A. 93=7 Sar. P.C.J. 702 ... 1281

(8) S. 92—See MORTGAGE—REDEMPTION, 22 A. 149.

(9) *S.* 105—*Act No.* XLV *of* 1860, *ss.* 96 et seqq—*Right of private defence—Presumption—Pleadings.—Held*, that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. QUEEN-EMPRESS v. TIMMAL, 21 A. 122=18 A.W.N. (1898) 208 ... 787

Execution of Decree—(*Continued*).

***Execution of Decree*—(*Concluded*).**

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(18) *Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code*, ss. 311, 312.—Certain immoveable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under s 311 of the Code of Civil Procedure, the sale was set aside. After the sale had been thus set aside, the same property was again sold in execution of another decree Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by Strachey, C. J., that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held*, further (by Strachey, C. J., and Banerji, J.) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale. BANKE LAL v. JAGAT NARAIN, 22 A. 168=20 A.W.N. (1900) 31 ... 1143

(19) *Sale in execution—Title of auction-purchaser—Purchaser not bound to enquire into the validity of the order under which the sale takes place.*—Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan* v. *Kazim Husain*, I. L. R., 13 All., 432, distinguished. *Rewa Mahton* v. *Ram Kishen Singh*, I. L. R. 14 Cal., 18 and *Mukhoda Dassi* v. *Gopal Chunder Dutta*, I. L. R., 26 Cal., 734, referred to. KAUNSILLA v. CHANDAR SEN, 22 A. 377=20 A.W.N. (1900) 123 ... 1286

(20) *Surety after passing of decree—Mode of realization of security—Civil Procedure Code*, s 253—*Jurisdiction.*—Where after the passing of a decree for arrears of rent, a friend of the judgment-debtor entered into a security bond whereby he rendered himself personally liable and hypothecated a share in certain zamindari property to secure the performance of the decree, it was *held* that the obligation created by such security bond could not be enforced by a Court of Revenue by the sale of the hypothecated property. BEHARI LAL v. JAGNANDAN SINGH, 19 A. 247=17 A.W.N. (1897) 29 ... 162

(21) See ACT XII OF 1881 (N.W.P. RENT), 19 A. 253.

(22) See APPEAL, 19 A. 140.

(23) See CIVIL PROCEDURE CODE, 1882, 19 A. 136; 19 A. 144; 19 A 183; 19 A. 194; 19 A. 296; 19 A. 480; 19 A. 482; 19 A. 499; 20 A. 8; 20 A. 129; 20 A. 254; 20 A. 337; 20 A. 379; 20 A. 383; 20 A 412; 20 A. 421; 20 A. 428; 20 A. 430; 20 A. 506; 21 A. 140; 21 A. 145; 21 A. 155; 21 A. 238; 21 A. 269; 21 A. 277; 21 A. 311; 21 A. 405; 22 A. 79; 22 A. 86; 22 A. 108; 22 A 121; 22 A. 182; 22 A. 222; 22 A 384; 22 A. 399; 22 A. 401; 22 A. 434.

(24) See LIMITATION ACT (XV OF 1877), 19 A. 308; 19 A. 477; 20 A. 124.

(25) See MESNE PROFITS, 20 A. 208.

(26) See TRANSFER OF PROPERTY ACT (IV OF 1882). 19 A. 174; 19 A. 180; 19 A. 186; 19 A 205; 19 A. 520; 20 A. 302: 20 A. 354; 21 A. 453; 22 A. 404.

Executor.

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Guardian and Minor.

(1) *Loans to a minor—Inquiries necessary to be made by lender—Burden of proof.*—A plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities he can advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt. KANDHIA LAL v. MUNA BIBI, 20 A. 135=17 A. W.N. (1897) 220 ... 448

(2) *Suit brought on behalf of a person alleged to be, but not in fact, a minor—Procedure on discovery that the plaintiff was of full age at the commencement of the suit.*—A suit was instituted on behalf of a person alleged to be a minor, through her next friend. The plaintiff obtained a decree. The defendant appealed, and on this appeal the alleged minor applied to be placed on the record in her own right as respondent, stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time when the plaint was filed. *Held* that the suit must be dismissed. SHEORANIA v. BHARAT SINGH, 20 A. 90=17 A.W.N. (1897) 203 ... 417

(3) See CIVIL PROCEDURE CODE, 1882, 20 A. 98, 20 A. 162.

(4) See GUARDIAN AND WARDS ACT (VIII OF 1890), 20 A. 400, 20 A. 433, 22 A. 332.

(5) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 A. 352.

Guardian and Wards Act (VIII of 1890).

(1) *S.* 34—*Joint Hindu family—Guardian and minor—Court not competent to appoint a guardian to the property of a minor who is a member of a joint Hindu family.*—It is not competent to a Court to appoint a guardian to the property of a minor when such minor is a member of a joint Hindu family and has no other property than his share in the joint family estate. BANDHU PRASAD v. DHIRAJI KUAR, 20 A. 400=18 A. W. N. (1898) 94 ... 616

(2) *S.* 41—*Guardian and Ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.*—*Held* that no suit would lie by a ward against the son of his late guardian for rendition of accounts. MANMOTHONATH BOSE MULLICK v. BASANTO KUMAR BOSE MULLICK, 22 A. 332=20 A.W.N. (1900) 98 ... 1254

(3) *S.* 47—*Appeal—Order refusing to direct the removal of a guardian.*—Where an applicant for a certificate of guardianship applied for a twofold relief, namely, that the existing guardian might be removed and that she herself might be appointed guardian, and her application was dismissed, it was *held* that no appeal would lie from the order of dismissal, such order being an order refusing to direct the removal of a guardian. IMTIAZ-UN-NISSA v. ANWAR-UL-LAH, 20 A. 433=18 A.W.N. (1898) 97 ... 637

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specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally : *Held*, that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. HARI RAM v. BISHNATH SINGH, 22 A. 408=20 A.W.N. (1900) 158 ... 1308

(5) *Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage — Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 85. Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt procured by a mortgage and a simple money debt.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. DHARAM SINGH v. ANGAN LAL, 21 A. 301=19 A.W.N. (1899) 78 .. 901

(6) *Maintenance—Right of illegitimate son to maintenance.*—In the regenerate classes of Hindus a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate:—a right personal to him and not inherited by his offspring.

An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent.

The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest or charge within the meaning of s. 91 of the Transfer of Property Act, 1882, to entitle him to redeem.

The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the Mitakshara in Chap. I, ss 11 and 12, was more consistent with a personal right of the illegitimate son. ROSHAN SINGH v. BALWANT SINGH, 22 A. 191 (P.C.)= 4 C.W.N. 353=2 Bom. L.R. 529=27 I.A. 51=7 Sar. P.C.J. 642 ... 1158

(7) *Mitakshara—Power of a member of a joint family to alienate—Self-acquired immoveables—Construction of words of a sanad granting an absolute estate of inheritance—Change of ancestral character of immoveables—Mortgage and foreclosure*—Bona fide *re-acquisition for value by mortgagor's descendant.* A father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his town discretion over immoveables which he has himself acquired, as distinguished from ancestral property.

The immoveables alienated by a father's gift, disputed by his son, partly consisted of zamindari rights in villages which had been, at one time ancestral in the family, but had been transferred to satisfy the debts of an ancestral, and had been acquired back by his descendant, the donor. As to one of these villages the Courts below had differed whether it was self acquired property in the donor's hands. It had been mortgaged by the ancestors; and the mortgage had been foreclosed under Regulation XVII of 1806, before having been re-acquired by the donor.

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———*1.—General.*

(1) *Construction of document*—Post diem *interest—Damages—Continuing breach of contract—Limitation—Act* XV *of* 1877, *sch. II, arts.* 115, 116.—No payment had been made on an agreement contained in a mortgage-deed for payment of the principal within a year, and interest thereon at a stated rate. The deed provided that the borrower would not transfer the mortgaged property until payment in full of the amount due for principal and interest, and that any money paid should by first credited to the latter.

In a suit brought more than seven years after the date fixed for payment, the Courts below gave effect to the defence that the creditor had no right under the contract to interest at the rate specified therein for the period after that date; and that limitation barred recovery of money by way of damages for a breach of the contract.

Held, that the Courts below had erred as to the effect of the contract, and that there had been a failure to regard the intention shown by the conditions in the mortgage deed above mentioned, the High Court appearing to have acted on a fixed rule of construction, laid down for transactions of this kind, instead of arriving at the meaning of the deed by an examination of its terms. By the true construction of the contract, when the whole of it was considered, the creditor was entitled to payment of the principal with interest at the rate stated in the deed for the entire period of non-payment. This should be down to the date of the decree of the first Court. In the decree should be added interest from its date till payment at six per cent. per annum.

Even supposing the construction put by the Courts below to have been correct, the creditor still might have recovered six years' arrears of interest by way of damages, notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid, and unbarred by time.

The judgment of the Full Bench in *Narindra Bahadur Pal* v. *Khadim Husain* was not approved; as it disregarded conditions in the mortgage deed (which in that case resembled the present deed) indicating the intention of the parties to it. MATHURA DAS v. RAJA NARINDAR BAHADUR, 19 A. 39 (P.C.) = 23 I.A. 139 = 1 C.W.N. 52 = 6 M.L.J. 214 = 7 Sar. P.C.J. 88 ... 25

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(1) *Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No.* IV *of* 1882 *(Transfer of Property Act), s.* 60.—A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced ; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness.

Held that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *prima facie*, a good covenant and enforceable by the mortgagee. BIMAL JATI v. BIRANJA KUAR, 22 A. 238=20 A.W.N. (1900) 49 ... 1190

(2) *Prior and subsequent incumbrancers, rights of*—Inter se—*Act No.* IV *of* 1882 *(Transfer of Property Act), s.* 85—*Sale in execution of decree obtained by first mortgagee in a suit to which the second mortgagee was not a party—Rights of auction purchaser and mortgagor as regards the second mortgagee.*—A prior mortgagee, *K*, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, *G*, was not made a party, and subsequently one *B*, attached the decree, and, having put up the property for sale, purchased it himself. *G*, the puisne mortgagee, having brought a suit for redemption of *K*'s mortgage and sale of the property, *K* sold his rights to *P*, who was thereupon added as a defendant. *G* obtained a decree for redemption and sale.

Held per BANERJI, J., that *P* was entitled to the whole amount which *G* had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by *B* at the auction sale, which amount, and which amount only, would be due to *B* or his representatives.

Held per AIKMAN, J., that the auction purchaser, *B* (or his representatives), was entitled to the whole amount to be paid by *G* for redemption of the first mortgage. WAHID-UN-NISSA v. GOBARDHAN DAS, 22 A. 453=20 A.W.N. (1900) 160 ... 1340

(3) *Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Suit for ejectment by one auction purchaser against the other—Form of decree.*—*B* mortgaged a house, first to *D* and subsequently to *M* and *C*. *M* and *C* brought a suit on their mortgage without making *D* a party to it obtained a decree, and put the house up to sale, and it was purchased by *ML*. Subsequently to the date of the decree in the above suit *D* brought a suit on his mortgage, without making *M* and *C* parties thereto, obtained a decree and put the house up to sale, and it was purchased by *BD*. *BD* then sued *ML* for ejectment and damages. *Held* that the plaintiff's suit must be dismissed ; and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant to redeem the mortgage upon which the plaintiff's title was ultimately based. MADAN LAL v. BHAGWAN DAS, 21 A. 235 (F.B.)=19 A.W.N. (1899) 41 ... 859

(4) *Prior and subsequent mortgagees—Redemption—Price to be paid by a subsequent mortgagee redeeming after the mortgaged property has been brought to sale and purchased by the prior mortgagee.*—A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as a party ; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage. DIP NARAIN SINGH v. HIRA SINGH, 19 A. 527=17 A.W.N. (1897) 147 ... 341

(5) *Sale of land and agreement for repurchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations* I *of* 1798, *and* XVII *of* 1806 *— Exclusion of extrinsic evidence to vary written instrument—Act No.* I *of* 1872—*Indian Evidence Act, s.* 92.—A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase

Mortgage—9.—Sale—(Concluded).

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mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree. CHUNNA LAL v. ANANDI LAL, 19 A. 196=17 A.W.N. (1897), 18 ... 129

(4) *Suit for sale—Pleadings—Purchaser of mortgaged property paying off prior incumbrances.*—The purchaser of a portion of certain mortgaged property paid off cretain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. MUHAMMAD NIAMAT ALI KHAN v. GHAFFAR MUHAMMAD KHAN, 21 A. 272=19 A.W.N. (1899) 62 ... 882

(5) See BENAMI TRANSACTION, 21 A. 380.

(6) See CIVIL PROCEDURE CODE, 1882, 19 A. 332; 20 A. 110.

(7) See EXECUTION OF DECREE, 21 A. 361, 356.

(8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 A. 543; 20 A. 322; 22 A. 404.

——10.—Simple.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 A. 386; 20 A. 512.

——11.—Simple and Usufructuary.

Construction of document—Mortgage of a mixed character partly simple and partly usufructuary—Decree for sale—Act No. IV *of* 1882 *(Transfer of Property Act), s.* 58.—In construing a mortgage-deed, the terms of which are of a doubtful character, the intention of the parties, as deducible from their conduct at the time of execution and other contemporaneous documents executed between them, is to be looked to.

Mortgage deeds of a mixed character and other than those expressly defined in s. 58 of the Transfer of Property Act, 1882, must be construed as far as possible in accordance with the covenants contained in them. Where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. JAFAR HUSEN v. RANJIT SINGH, 21 A. 4=18 A.W.N. (1898) 167 ... 713

——12.—Usufructuary.

(1) *Suit for redemption—Non-payment at the proper time of the whole mortgage money—Dismissal of suit—Second suit for redemption accompanied by payment in full*—Res judicata—*Act IV of* 1882 *(Transfer of Property Act), ss.* 92, 93.—*Held*, that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second. DONDH BAHADUR RAI v. TEK NARAIN RAI, 21 A. 251=19 A.W.N. (1899) 50 869

(2) See CIVIL PROCEDURE CODE, 1882, 20 A. 506.

(3) See LIMITATION ACT (XV OF 1877), 20 A. 115.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 A. 191.

Muhammadan Law. PAGE

——1.—*Custom.*

See MUHAMMADAN LAW—WAQF, 19 A. 211.

——2.—*Dower.*

(1) *Suit by heirs of Muhammadan widow for her dower—Alienation of property of the deceased husband by his heirs* pendente lite.—While a suit for the dower debt due to a Muhammadan widow was pending on behalf of her heirs, the heirs of her deceased husband mortgaged certain property which had been of the deceased in his life-time. The heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. *Held* that this decree took priority over the mortgagee's decree and a sale held in execution thereof. YASIN KHAN v. MUHAMMAD YAR KHAN, 19 A. 504=17 A.W.N. (1897) 135 ... 325

(2) *Widow's lien for dower personal and not heritable.*—The lien which a Muhammadan widow whose dower is unpaid may obtain on lands which have belonged to her deceased husband is a purely personal right and does not survive to her heirs. HADI ALI v. AKBAR ALI, 20 A. 262=18 A.W.N. (1898) 32 ... 529

(3) See CIVIL PROCEDURE CODE, 1882, 20 A. 81; 21 A. 17.

——3.—*Gift.*

(1) *Possession—Gift of property attached by Collector for arrears of revenue—Act* XIX *of* 1873 *(N.W.P. Land Revenue Act), s.* 154—*Held* that it was possible to make a gift, which should be valid under the Muhammadan law, of property which had been attached by the Collector for arrears of revenue under s. 154 of Act XIX of 1873. All that was necessary to a valid gift was that the donor should transfer possession of such interest as he had at the time of the gift; it was not necessary that he should transfer possession of the corpus of the property. ANWARI BEGAM v. NIZAM-UD-DIN SHAH, 21 A. 165=19 A.W.N. (1899) 8 ... 815

(2) See EVIDENCE, 19 A. 267.

(3) See SUIT, 20 A. 465.

——4.—*Marriage.*

Shias—Marriage between a Muhammadan and a Christian—Invalidity of such marriage.—A Muhammadan woman of the Shia sect cannot contract a valid marriage according to Muhammadan rites with a Christian. BAKHSHI KISHEN PRASAD v. THAKUR DAS, 19 A. 375=17 A.W.N. (1897) 91 ... 245

——5.—*Pre-emption.*

(1) *Invalid sale--Time when right of pre-emption arises.*—No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. NAJAM-UN-NISSA v. AJAIB ALI KHAN, 22 A. 343=20 A.W.N. (1900) 102. 1262

(2) *Suit by pre-emptor not entitled to claim the whole of the property sold—Plaintiff not obliged to frame his suit as a suit for the whole.—Held*, that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame his suit as a suit for the whole of the property

Negotiable Instruments Act (XXVI of 1881). PAGE

Ss. 64, 66 —*Promissory note not presented for payment at maturity—Effect of non-presentment.—Held*, that the non presentment for payment at maturity of a promissory note, the presentment of which is required by s. 66 of the Negotiable Instruments Act, 1881, has not the effect of relieving from liability the maker of the note. PHUL CHAND v. GANGA GHULAM, 21 A. 450=19 A.W.N. (1899) 167 ... 994

Non-joinder.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 A. 543.

Notice.

(1) See BURDEN OF PROOF, 21 A. 193.

(2) See REGISTRATION ACT (III OF 1877), 19 A. 145, 20 A. 252.

Notification.

See ACT XI OF 1878 (ARMS), 22 A. 323.

Nuisance.

See ACT XV OF 1883 (N.W.P. AND OUDH MUNICIPALITIES), 19 A. 313.

Nullity of Marriage.

See ACT IV OF 1869 (DIVORCE). 22 A 270.

Objections.

See CIVIL PROCEDURE CODE, 1882, 21 A. 297.

Offence.

See ACT IX OF 1890 (RAILWAYS), 20 A. 95.

Order.

See CIVIL PROCEDURE CODE, 1882, 22 A. 430.

Parda-nashin Women.

See SALE, 20 A. 447.

Pardon.

See CRIMINAL PROCEDURE CODE, 20 A. 40, 20 A. 529.

Parties.

(1) *To a suit—Death of plaintiff after hearing but before judgment—Judgment given by Court in ignorance of plaintiff's death—Judgment and decree valid—Doctrine of* nunc pro tunc.—The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour of the deceased plaintiff. *Held*, that nothing remaining to be done by the parties on the day when judgment was reserved, the judgment should read as from that date, and the decree was a valid decree. CHETAN CHARAN DAS v. BALBHADRA DAS, 21 A. 314=19 A.W.N. (1899) 86 ... 909

(2) See CIVIL PROCEDURE CODE, 1882, 20 A. 8, 20 A. 38, 20 A. 46, 22 A. 231, 22 A. 269.

(3) See COMPANY, 21 A. 346.

(4) See HINDU LAW—JOINT FAMILY, 22 A. 408.

(5) See SUIT, 22 A. 143.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 A. 149.

Partition.

(1) See ACT XIX OF 1873 (N. W. P. LAND REVENUE), 20 A. 75, 22 A. 329.

(2) See ACT IV OF 1893 (PARTITION), 21 A. 409.

(3) See CIVIL PROCEDURE CODE, 1882, 19 A. 194, 20 A. 110, 20 A. 311.

(4) See CONTRACT ACT (IX OF 1872), 20 A. 219.

(5) See HINDU LAW—PARTITION, CASES UNDER.

(6) See PRE-EMPTION, 22 A. 1, 22 A. 374.

***Penal Code (Act XLV of 1860)*—(*Concluded*).** PAGE

(16) S. 363, See CRIMINAL PROCEDURE CODE, 1882. 19 A. 109.

(17) S. 408, See CRIMINAL PROCEDURE CODE, 19 A. 111.

(18) S. 412, See CRIMINAL PROCEDURE CODE, 22 A. 445.

(19) *S.* 451—*House trespass with intent to commit adultery— Evidence.*—To sustain a conviction under s. 451 of the Indian Penal Code for the offence of house trespass with intent to commit an offence, the prospective offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman the intent to commit adultery with whom is charged against the accused. BRIJ BASI v. THE QUEEN-EMPRESS, 19 A. 74=16 A.W.N. (1896) 178 ... 49

(20) *S.* 463 et seqq.— *Forgery—Meaning of the term "fraud" discussed.*—A Police head-constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing remarks unfavourable to the head-constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head-constable.

Held, that this interpolation amounted to forgery within the meaning of s. 463 of the Indian Penal Code, but that inasmuch as it was not proved that the head-constable himself prepared and inserted the false page in his character roll, he was rightly convicted of abetment only. QUEEN-EMPRESS v. MUHAMMAD SAEED KHAN, 21 A. 113=18 A. W. N. (1898) 197 ... 781

(21) *S.* 498—*Enticing away a married woman—Evidence of marriage--Mere statement of the complainant and the woman insufficient.*—Where a charge is made under s. 498 of the Indian Penal Code of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. QUEEN-EMPRESS v. DAL SINGH, 20 A. 166=18 A.W.N. (1898) 7 ... 468

(22) *S.* 499—*Defamation—Statement made by an accused person in an application to a Court—Statement made in good faith for the protection of the interests of the person making it.*—In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them. *Held* that this statement did not amount to defamation—not because of the application of any principles of English Law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code—but because the statement fell within the ninth exception to s. 499 of the Indian Penal Code. ISURE PRASAD SINGH v. UMRAO SINGH, 22 A. 234 =20 A.W.N. (1900) 46 ... 1187

Perjury.

See CRIMINAL PROCEDURE CODE, 19 A. 502.

Plaint.

(1) *Amendment of—Suit brought in the name of the idol of a temple—Amendment allowed to name of manager of temple—Practice.*—A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple.

Where such a suit was so brought the Court in second appeal allowed the plaint to be amended, on certain conditions, by substituting the name of the person alleged to be the manager of the temple, but without prejudice to any question which might subsequently be raised as to such person's *locus standi* in the suit. THAKUR RAGHUNATHJI MAHARAJ v. SHAH LAL CHAND, 19 A. 330=17 A.W.N. (1897) 75 ... 216

(2) See CIVIL PROCEDURE CODE, 1882, 19 A. 510, 20 A. 442, 22 A. 55, 121.

(3) See PRACTICE, 21 A. 341.

Pleadings.

(1) See EVIDENCE ACT (I OF 1872), 21 A. 122.

(2) See MORTGAGE—SALE, 21 A. 272.

(3) See PRACTICE, 19 A. 119, 21 A. 341.

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Regulation II of 1803.

S. 37—See EVIDENCE ACT (I OF 1872), 22 A. 294.

Regulation XVII of 1806.

See MORTGAGE—REDEMPTION, 22 A. 149.

Regulation XI of 1825.

S. 4—*Alluvion—Title to land acquired by gradual accretion—Limitation.*—Clause 1 of s. 4 of Regulation XI of 1825 does not depend for its operation on the capability of identification of the accreted lands. Whether the accreted lands are capable of identification or not, the clause applies where the lands have been gained by gradual accession by the recession of a river.

In the case of gradual accretions the ordinary rule of acquisition by prescription does not apply, but each accretion as it occurs comes under the same title as that upon the land to which it is made is held. DEBI BAKHSH SINGH v. TIRBHAWAN SINGH, 19 A. 238=17 A.W.N. (1897) 39. 156

Regulation I of 1877.

Ss. 18, *et seqq.—Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.—Held* that where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under s. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not; but its functions are limited to pronouncing an opinion on any point which may be so referred to it. KALIAN MAL v. RAM KISHEN, 21 A. 163=19 A.W.N. (1899) 4 ... 814

Religious Endowment.

See ACT X OF 1863 (RELIGIOUS ENDOWMENTS), 19 A. 104.

Remand.

(1) See ACT XIV OF 1874 (SCHEDULED DISTRICTS), 22 A. 405.

(2) See CIVIL PROCEDURE CODE, 1882, 21 A. 230, 21 A. 291.

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See LANDHOLDER AND TENANT, 19 A. 352.

Representative.

(1) See CIVIL PROCEDURE CODE, 1882, 19 A. 332, 21 A. 316, 21 A. 323, 22 A. 450, 22 A. 243.

(2) See LAND HOLDER AND TENANT, 19 A. 352.

Res judicata.

(1) *Decree in previous suit defining rights of party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure.*—Where an order adding a defendant under s. 32 of the Code of Civil Procedure, was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed.

Where there is a subsisting decree in a previous suit which as regards the subject matter of a subsequent suit would take effect under s. 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit, the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. BANSI LAL v. RAMJI LAL, 20 A. 370=18 A. W.N. (1898) 75 ... 597

(2) See CIVIL PROCEDURE CODE, 1882, 19 A. 517, 20 A. 516, 21 A. 505, 22 A. 386.

(3) See HINDU LAW—REVERSIONER, 22 A. 382.

(4) See JURISDICTION, 20 A. 520.

(5) See MESNE PROFITS, 21 A. 425.

(6) See MORTGAGE—USUFRUCTUARY, 21 A. 251.

(7) See PRACTICE, 21 A. 446.

(8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 A. 202, 20 A. 386.

(9) See TRUSTS ACT (II OF 1882), 19 A. 277.

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See REGULATION XXXI OF 1803, 21 A. 12.

Review.

(1) See ACT XII OF 1881 (N.W.P. RENT), 19 A. 522.

(2) See CIVIL PROCEDURE CODE, 1882, 21 A. 152.

(3) See SUIT, 20 A. 410.

Revision.

(1) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 21 A. 181.

(2) See ACT VIII OF 1897 (REFORMATORY SCHOOLS) 20 A. 158, 20 A. 159, 20 A. 160, 21 A. 391.

(3) See CIVIL PROCEDURE CODE, 1882, 20 A. 78, 20 A. 474, 21 A. 152.

(4) See CRIMINAL PROCEDURE CODE, 19 A. 200.

(5) See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), 21 A. 89.

Rules of Court.

(1) *Of the 18th January* 1898, *r.* 83—*Finality of judgment or order of the High Court—Judgment or order not completz until sealed.—Held* that a judgment or order of the High Court is not complete until it is sealed in accordance with r. 83 of the rules of Court of the 18th January 1898, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken. QUEEN-EMPRESS v. LALIT TIWARI, 21 A. 177=19 A.W.N. (1899) 15 ... 822

(2) See CIVIL PROCEDURE CODE, 1882, 22 A. 430.

Sale.

(1) *Of villages by a wife to her husband.*—The purchase money had not been paid on what purported to be a deed of sale of villages by a Muhammadan wife to her husband for a price which, however, the deed acknowledged to have been paid. After her death two of her relations, disputing the due execution of the sale deed, sued the husband, who had obtained possession, claiming, in the alternative either that they should obtain their shares in the property of the deceased, or, if the sale of the villages should be maintained, that they should receive their proportion of the price as due to the estate left by her.

The two Courts below concurred in finding that the wife, a *pardanashin*, was capable of managing her own affairs, and that she had not received the price.

The first Court inferred from the state of things that the wife had in a manner made a gift of the villages to the husband. The High Court reversed that judgment, and decided that, with regard to the probability of influence on the part of the husband, the absence of any independent advice for the wife and other circumstances, the transaction was without effect.

The Judicial Committee found that there not being a case of undue influence exercised, either made by the plaint or raised by the issues they found no evidence that the price stated was inadequate, or the sale an improvident one, or that the husband had been released from having to pay the price. From the findings on the evidence the presumption was that the wife intended to pass the property for some purpose, and that the suggestion of a gift being excluded, the deed operated as a sale according to what it purported to be.

They did not throw any doubt on the sound doctrine, laid down in numerous cases, as to the obligations upon persons taking benefits from *pardanashin* ladies.

To the one surviving plaintiff was awarded a moiety of the price payable by the husband, who himself inherited the balance. HAKIM MAHAMMAD IKRAM-UD-DIN v. NAJIBAN, 20 A. 447 (P.C.)=2 C.W.N. 545=25 I.A. 137 =7 Sar. P.C.J. 353 ... 647

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brought his suit against the Board in its corporate capacity, it was *held* that such a suit would not lie against the Board, even if, which was not decided, it might lie against the revising authority, by the irregular action of which, it was alleged, the plaintiff's name had been excluded from the list of candidates. ABDUR RAHIM v. THE MUNICIPAL BOARD OF KOIL, 22 A. 143=20 A.W.N. (1900) 4 .. 1126

(8) For jactitation of marriage. See MARRIAGE, 20 A. 96.

(9) *For malicious prosecution—Reasonable and probable cause—Evidence—Conviction of plaintiff by a Criminal Court.*—The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if unrebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable and probable cause. JADUBAR SINGH v. SHEO SARAN SINGH, 21 A. 26=18 A.W.N. (1898) 161 728

(10) For partition.—See HINDU LAW—PARTITION, 19 A. 428.

(11) For recovery of mortgage money—See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 A. 545.

(12) For sale on a mortgage—See MORTGAGE—SALE, 21 A. 309.

(13) Form of—See CIVIL PROCEDURE CODE, 1882, 20 A. 167.

(14) Form of—See COMPANY, 21 A. 346.

(15) In forma pauperis—*Review of judgment—Court-fee—Act* VII *of* 1870 (*Court Fees Act*), *sch.* I, *cl. v.*—*Civil Procedure Code*, *s.* 410.—*Held* that when an application for review is presented in a suit *in forma pauperis*, that application, like the plaint in the suit, is not liable to any court-fee. UMDA BIBI v. NAIMA BIBI, 20 A. 410=18 A.W.N. (1898) 95 ... 623

(16) *In forma pauperis.* See CIVIL PROCEDURE CODE, 1882, 20 A. 299.

(17) Of the nature cognizable by Courts of Small Causes—See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), 20 A. 480.

(18) On foreign judgment—See CIVIL PROCEDURE CODE, 1882, 21 A. 17.

(19) Parties to a—See PARTNERSHIP, 20 A. 365.

(20) Right of—See BENAMI TRANSACTION, 21 A. 380.

(21) To eject a tenant—See ACT XII OF 1881 (N.W.P. RENT), 20 A. 469.

(22) *To recover compensation in respect of property sold under a decree—Decree not reversed or superseded.*—A zamindar applied to a revenue officer to commute the rent hitherto paid in kind by certain of his tenants to a fixed money rent to be paid in future. The Assistant Collector made the order asked for and fixed the money rent to be paid in future. After that order had been made the zamindar brought a suit for arrears of rent against the tenants in a Court of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. Against this decree the tenants did not appeal, and it became final. The decree was put into execution: property of the tenants was attached and sold, and the decree was partially satisfied out of the sale proceeds. Subsequently to the passing of the decree for rent, the Board of Revenue set aside the order of the Assistant Collector commuting the rent in kind to a fixed money rent. The tenants thereupon sued to recover compensation on account of the sale of their property under the decree for rent.

Held that the suit would not lie, inasmuch as the decree for rent under which the plaintiff's property was sold was unreversed and not superseded by any competent Court KISHEN SAHAI v. BAKHTAWAR SINGH, 20 A. 237=18 A.W.N. (1898) 24 ... 513

(23) To set aside decree obtained by fraud—See CIVIL PROCEDURE CODE, 1882, 21 A. 239.

(24) To set aside order under s. 293 of the Code of Civil Procedure—See EXECUTION OF DECREE, 19 A. 22.

(25) To set aside sale in execution—See ACT XII OF 1881 (N.W.P. RENT), 19 A. 253.

(26) To set aside sale in execution—See CIVIL PROCEDURE CODE, 1882, 21 A. 316.

(27) Valuation of—See COURT FEES ACT (VII OF 1870), 19 A. 210.

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Trust.

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(1) See CIVIL PROCEDURE CODE, 1882, 20 A. 46, 21. 200.
(2) See LIMITATION ACT, XV OF 1877, 20 A. 482.
(3) See PARTITION, 19A . 428.
(4) See TRUSTS ACT (II OF 1882), 19 A. 277.

Trusts Act (II of 1882).

(1) Ss. 55, 60, 66, 74—See APPEAL, 19 A. 131.

(2) *Ss.* 63, 64—*Trust not established—Civil Procedure Code, s.* 13—*Res judicata not made out.*—A claim made for a share of propty by inheritance from a deceased relation who had been in joint possessi of it with the defendant, was met by the defence that the estate ha been jointly held for religious and charitable purposes under a will, te deceased having had no beneficial, or heritable, interest. The defenant alleged that the original owner of the property had bequeathed the roperty in trust for these purposes. The claimant alleged a revocation f the will, and denied that there was such a trust.

The judgment of the High Court, decreeing the claim observed that, even assuming that there had been a trust under the wil, recognised by the deceased and the defendant, the property which had come into their possession had been by them appropriated, from the fist to their own purposes, and had been so long held by them adversely t the trust title, that the defendant could not now allege that there was n beneficial interest transmissible by inheritance. Upon this the Judicial Committee pointed out that no trustee could have actually acquired a title by such an appropriation against the trust, Indian Trusts Act, 1882, ss. 63 and 64. They added that, at the same time, the judgment of the High Court had come to the right conclusion, for the will, and the trust alleged had not been established.

One of the contentions upon this appeal was that the plaintiff was estopped from denying the existence of a trust by there having been a judgment of the High Court, in a prior suit, between the present defendant and the widow of the deceased, that judgment having stated that the trust had been recognised by him who was now defendant.

Held, that this was not within s. 13, Civil Procedure Code, the matter not having been tried and determined in that suit.

Held, also that another prior judgment, in a suit brought by others interested in the trust, which judgment found the will to have been revoked, was admissible, though not conclusive, evidence against him. BITTO KUNWAR v. KESHO PRASAD MISR, 19 A . 277 (P.C.) = 24 I.A. 10 = 7 Sar. P.C. J. 131 = 1 C.W.N. 265 ... 181

(3) Ss. 82, 88—See CIVIL PROCEDURE CODE, 1882, 22 A. 434.

Undue Influence.

See CONTRACT ACT (IX OF 1872), 22 A. 224.

Vakil.

See LETTERS PATENT, 1866, 22 A. 331.

Valuation.

See COURT FEES ACT (VII OF 1870), 19 A. 240.

Vendor's Lien.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 A. 454.

Volunteers.

See ACT XI OF 1878 (ARMS), 22 A. 323.

Wajib-ul-arz.

(1) See ACT XIX OF 1873 (N. W. P. LAND REVENUE), 20 A. 92.
(2) See CONSTRUCTION, 20 A. 103.
(3) See LANDHOLDER AND TENANT, 19 A. 172.
(4) See MORTGAGE—PRE-MORTGAGE, 20 A. 19.
(5) See PRE-EMPTION, 19 A. 148, 311, 324; 20 A. 100, 148, 419; 21 A. 119, 374, 441; 22 A. 1.

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